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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 4, 1987 and MARCH 24, 1988

IN THE

Supreme Court of Nebraska

VOLUME CCXXVII

TRINA SOLLARS

OFFICIAL REPORTER

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By Trina Sollars, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

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D. NICK CAPORALE, Associate Justice
THOMAS M. SHANAHAN, Associate Justice
JOHN T. GRANT, Associate Justice
DALE E. FAHRNBRUCH, Associate Justice[1]

TRINA SOLLARS ..... Reporter
LANET ASMUSSEN ..... Clerk
JOSEPH C. STEELE ..... State Court Administrator

[1]Appointed December 17, 1987

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Robert T. Finn	Tecumseh
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	Robert R. Camp	Lincoln
		William D. Blue	Lincoln
		Earl Witthoff	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	Butler, Hamilton, Polk, Saunders, Seward, and York	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Thomas J. Gist	Falls City
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier	Nebraska City
		Jeffrey L. Campbell	Papillion
		Albert Walsh	Papillion
Third	Lancaster	Neal H. Dusenberry	Lincoln
		James Foster	Lincoln
		Janice L. Gradwohl	Lincoln
		Donald R. Grant	Lincoln
		Jack Lindner	Lincoln
		Gale Pokorny	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		Lyn V. Ferer	Omaha
		Richard M. Jones	Omaha
		John McGrath	Omaha
		Thomas V. McQuade	Omaha
		Jane Prochaska	Omaha
		William F. Ryan	Omaha
		Stephen M. Swartz	Omaha
		Joseph Troia	Omaha
		Robert C. Vondrasek	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Everett Inbody	Wahoo
Sixth	Burt, Dodge, and Washington	Daniel Beckwith	Fremont
		F. A. Gossett, III	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Ray L. Cellar	Geneva
		J. Patrick McArdle	Wilber
Eighth	Cedar, Dakota, Dixon, and Thurston	David W. Curtiss	Hartington
		Neil R. McCluhan	Dakota City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	James J. Duggan Stephen Finn Philip Riley	Norfolk Neligh Creighton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Harry C. Haverly Jack R. Ott	Hastings Hastings
Eleventh	Hall and Howard	David A. Bush Richard E. Weaver	Grand Island Grand Island
Twelfth	Buffalo and Sherman	John Icenogle	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd Kaufman Earl E. Morgan Kristine R. Cecava	Lexington North Platte Ogallala
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Cloyd Clark B. Bert Leffler	McCook Benkelman
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	Alan L. Brodbeck August F. Schuman	O'Neill Ainsworth
Sixteenth	Box Butte, Dawes, Grant, Sheridan, and Sioux	Glen A. Fiebig James T. Hansen	Alliance Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff	G. Glenn Camerer James L. Macken	Gering Gering
Eighteenth	Gage and Jefferson	Steven B. Timm	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, and Kimball	Thomas Dorwart Kenneth C. Fritzler	Sidney Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Keith Kovanda Robert E. Wheeler	Burwell Broken Bow
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	Gary F. Hatfield Gerald E. Rouse Lyle Winkle	Central City Columbus Columbus

ATTORNEYS

Admitted Since the Publication of Volume 226

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TABLE OF CASES REPORTED

A.M.K., In re Interest of 888
Albert; Bamesberger v. 782
Alliance, City of; Ward v. 306
Alphomega, Inc. v. Colfax County Bd. of Equal. 529
Amateur Softball Assn.; Loewenstein v. 454
American Bible Soc.; Youngblood v. 472

Babcock; State v. 649
Bamesberger v. Albert 782
Barker; State v. 842
Beister; State ex rel. Collins v. 829
Bellevue, City of; Kalhorn v. 880
Blair; State v. 742
Blakely; State v. 816
Board of Ed. of Sch. Dist. No. 24; Niedbalski v. 516
Board of Ed. of Sch. Dist. of Arnold; Nuzum v. 387
Boersma v. Karnes 329
Bonczynski; State v. 203
Brandt v. Brandt 325
Brenneis; Lancaster v. 371
Broomhall; State v. 341
Brown v. City of York 183
Buell, Winter, Mousel & Assoc. v. Olmsted & Perry 770
Burke Energy Corp.; Nowak v. 463
Burnett; State v. 351

C.M.H. and M.S.H., In re Interest of 446
Carlson; State v. 503
Chicago Lumber Co. v. School Dist. No. 71 355
Cimino v. W. A. Piel, Inc. 196
City of Alliance; Ward v. 306
City of Bellevue; Kalhorn v. 880
City of Omaha; Hammann v. 285
City of Omaha; Phillips v. 233
City of Omaha; State ex rel. Greyhound Lines v. 676
City of Wahooo; Houska v. 322
City of York; Brown v. 183
Clinton v. Farwell Irr. Dist. 187
Clontz v. Jensen 191
Coffman; State v. 149

Coleman; State v. 755
Colfax County Bd. of Equal.; Alphomega, Inc. v. 529
Collins, State ex rel. v. Beister 829
Columbia West Corp.; Department of Health v. 836
Cornhusker Christian Ch. Home v. Dept. of Soc. Servs. 94
Costanzo; State v. 616
County of Howard; Zeller v. 667
Cronin; State v. 302
Curlile v. Lindner 510

D.S. v. United Catholic Soc. Servs. 654
Daly; State v. 633
Davis; Department of Banking v. 172
Department of Banking v. Davis 172
Department of Health v. Columbia West Corp. 836
Department of Health v. Lutheran Hosp. & Homes Soc. 116
Dept. of Soc. Servs.; Cornhusker Christian Ch. Home v. 94
Detlefs, In re Estate of 531
Douglas; State ex rel. NSBA v. 1
Dugdale of Nebraska v. First State Bank 729

Ege; State v. 824
Eichelberger; State v. 545
Equilease Corp. v. Neff Towing Serv. 523
Estate of Detlefs, In re 531
Estate of Fischer, In re 722
Estate of Ritter, In re 641
Ewing v. Scotts Bluff Cty. Bd. of Equal. 798

Farm Bureau Ins. Co.; Polenz v. 703
Farmland Foods; Hernandez v. 629
Farmland Indus.; Nebraska Mut. Ins. Co. v. 93
Farwell Irr. Dist.; Clinton v. 187
Federal Deposit Ins. Corp. v. Heyne 291
First State Bank; Dugdale of Nebraska v. 729
Fischer, In re Estate of 722
Fitzgerald; State ex rel. NSBA v. 90
Fletcher v. Fletcher 179
Flying Hawk; State v. 878
Frost v. Frost 414

G.B., M.B., and T.B., In re Interest of 512
Gaines; III Lounge, Inc. v. 585
Goreham; State v. 460
Grammer; Kerns v. 165
Greyhound Lines, State ex rel. v. City of Omaha 676
Guy; State v. 610

Hammann v. City of Omaha 285
Hand; Justice v. 856
Hernandez v. Farmland Foods 629
Heuer v. Heuer 182
Heyne; Federal Deposit Ins. Corp. v. 291
Hoffman; State v. 131
Hoffman v. Reinke Mfg. Co. 66
Houlton; State v. 215
Houska v. City of Wahoo 322
Howard, County of; Zeller v. 667

In re Estate of Detlefs 531
In re Estate of Fischer 722
In re Estate of Ritter 641
In re Interest of A.M.K. 888
In re Interest of C.M.H. and M.S.H. 446
In re Interest of G.B., M.B., and T.B. 512
In re Interest of J.S., A.C., and C.S. 251
In re Interest of K.C. and C.C. 84
In re Interest of K.L.C. and K.C. 76
In re Interest of L.H. 857

J.S., A.C., and C.S., In re Interest of 251
Jensen; Clontz v. 191
Jensen Tire Co.; Kingslan v. 294
Joyner v. Steenson 766
Julius; Matthews v. 718
Justice v. Hand 856

K.C. and C.C., In re Interest of 84
K.L.C. and K.C., In re Interest of 76
Kalhorn v. City of Bellevue 880
Karnes; Boersma v. 329
Keithley; State v. 402
Kerns v. Grammer 165
Kingslan v. Jensen Tire Co. 294
Kirk; Shade v. 775
Kirshen v. Kirshen 479
Kleiva v. Paradise Landscapes 80
Knoefler; State v. 410
Kuticka v. University of Nebraska-Lincoln 565

L.H., In re Interest of 857
Lancaster v. Brenneis 371
Landrigan v. Nelson 835
Lane; State v. 687
Lanphier v. OPPD 241
Larson v. Larson 181

Lee; State v. 277
Lenz; State v. 692
Lincolnland Towing; Packett v. 595
Lindner; Curlile v. 510
Loewenstein v. Amateur Softball Assn. 454
Lofquest; State v. 567
Lutheran Hosp. & Homes Soc.; Department of Health v. 116
LynCook; State v. 719

McCoy; State v. 494
McCoy v. Steffen 72
Matthews v. Julius 718
Medina; State v. 736
Meier v. State 376
Minshall; State v. 210
Monzu; State v. 902
Murphy; State ex rel. NSBA v. 171

NSBA, State ex rel. v. Douglas 1
NSBA, State ex rel. v. Fitzgerald 90
NSBA, State ex rel. v. Murphy 171
NSBA, State ex rel. v. Schafer 449
Nance; State v. 581
Nebraska Lutheran Outdoor Ministries; Pluhacek v. 778
Nebraska Mut. Ins. Co. v. Farmland Indus. 93
Neff Towing Serv.; Equilease Corp. v. 523
Nelson; Landrigan v. 835
Niedbalski v. Board of Ed. of Sch. Dist. No. 24 516
Nowak v. Burke Energy Corp. 463
Nuzum v. Board of Ed. of Sch. Dist. of Arnold 387

OPPD; Lanphier v. 241
Olmsted & Perry; Buell, Winter, Mousel & Assoc. v. 770
Omaha, City of; Hammann v. 285
Omaha, City of; Phillips v. 233
Omaha, City of; State ex rel. Greyhound Lines v. 676
III Lounge, Inc. v. Gaines 585
Osmond State Bank v. Uecker Grain 636

Packett v. Lincolnland Towing 595
Paradise Landscapes; Kleiva v. 80
Patman; State v. 206
Patrick; State v. 498
Pence; State v. 201
Pentzien, Inc. v. State 434
Pettit; State v. 218
Phillips v. City of Omaha 233
Pluhacek v. Nebraska Lutheran Outdoor Ministries 778

Polenz v. Farm Bureau Ins. Co. 703
Pribil; State v. 397
Prime Inc. v. Younglove Constr. Co. 423

Ramsier v. Ramsier 746
Reinke Mfg. Co.; Hoffman v. 66
Richardson; State v. 274
Ritter, In re Estate of 641
Robatcek; State v. 159
Roberts; State v. 489

S.I.D. No. 48; West Omaha Inv. v. 785
Schafer; State ex rel. NSBA v. 449
Scholl; State v. 572
Schon; State v. 482
School Dist. No. 71; Chicago Lumber Co. v. 355
Scotts Bluff Cty. Bd. of Equal.; Ewing v. 798
Shade v. Kirk 775
Sock; State v. 646
Sowell; State v. 865
Spotted Elk; State v. 869
Stastny; State v. 748
State ex rel. Collins v. Beister 829
State ex rel. Greyhound Lines v. City of Omaha 676
State ex rel. NSBA v. Douglas 1
State ex rel. NSBA v. Fitzgerald 90
State ex rel. NSBA v. Murphy 171
State ex rel. NSBA v. Schafer 449
State; Meier v. 376
State; Pentzien, Inc. v. 434
State v. Babcock 649
State v. Barker 842
State v. Blair 742
State v. Blakely 816
State v. Bonczynski 203
State v. Broomhall 341
State v. Burnett 351
State v. Carlson 503
State v. Coffman 149
State v. Coleman 755
State v. Costanzo 616
State v. Cronin 302
State v. Daly 633
State v. Ege 824
State v. Eichelberger 545
State v. Flying Hawk 878
State v. Goreham 460

State v. Guy 610
State v. Hoffman 131
State v. Houlton 215
State v. Keithley 402
State v. Knoefler 410
State v. Lane 687
State v. Lee 277
State v. Lenz 692
State v. Lofquest 567
State v. LynCook 719
State v. McCoy 494
State v. Medina 736
State v. Minshall 210
State v. Monzu 902
State v. Nance 581
State v. Patman 206
State v. Patrick 498
State v. Pence 201
State v. Pettit 218
State v. Pribil 397
State v. Richardson 274
State v. Robatcek 159
State v. Roberts 489
State v. Scholl 572
State v. Schon 482
State v. Sock 646
State v. Sowell 865
State v. Spotted Elk 869
State v. Stastny 748
State v. Vaughan 753
State v. Vrtiska 600
State v. Walton 559
State v. Warren 160
State v. Watkins 677
Steenson; Joyner v. 766
Steffen; McCoy v. 72

Uecker Grain; Osmond State Bank v. 636
United Catholic Soc. Servs.; D.S. v. 654
University of Nebraska-Lincoln; Kuticka v. 565

Vaughan; State v. 753
Vrtiska; State v. 600

W. A. Piel, Inc.; Cimino v. 196
Wahoo, City of; Houska v. 322
Walton; State v. 559
Ward v. City of Alliance 306

Warren; State v. 160
Watkins; State v. 677
West Omaha Inv. v. S.I.D. No. 48 785

York, City of; Brown v. 183
Youngblood v. American Bible Soc. 472
Younglove Constr. Co.; Prime Inc. v. 423

Zeller v. County of Howard 667

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 85-956: **Department of Banking & Finance v. Cariotto.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-957: **Department of Banking & Finance v. Copple.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-093: **Cashoili v. State.** Stipulation allowed; appeal dismissed.

No. 86-405: **Greenwood Farmers Co-op v. Karnes.** Stipulation allowed; appeal dismissed.

No. 86-411: **Cornell v. Cornell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-453: **Federal Land Bank of Omaha v. Hanna.** Stipulation allowed; appeal dismissed.

No. 86-721: **Century Lumber v. Baker.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-728: **Jakes v. Douglas County Hospital.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-805: **Federal Land Bank of Omaha v. Wagner.** Motion of appellee to summarily dismiss dated October 23, 1986, overruled. Motion of appellee for summary dismissal dated October 27, 1986, sustained; see Rule 7B(1).

No. 86-1001: **Johnson v. Johnson.** Stipulation allowed; appeal dismissed.

No. 86-1059: **Zander v. Perrone.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-082: **First National Bank & Trust Co. of Kearney v. Kizzier.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-110: **Lease Norwest v. Davis Distributing.** Motion of appellant and appellee to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. 87-199: **Hamar v. Forke Bros.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

Nos. 87-255, 87-788: **Federal Land Bank of Omaha v. Wagner.** Affirmed. See Rule 7A(1).

No. 87-301: **Wright v. Nebraska Liquor Control Commission.** Stipulation allowed; appeal dismissed.

No. 87-322: **State v. Kirk.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-343: **State v. Schumacher.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-354: **Southeast Nebraska PCA v. Hays.** Motion of appellee for summary dismissal overruled. Affirmed. See Rule 7A(1).

No. 87-411: **In re Estate of McAuliffe.** Stipulation allowed; appeal dismissed.

No. 87-442: **Neff v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-458: **State v. Carlson.** Appellant's motion and stipulation for order transferring jurisdiction to district court for further proceedings sustained.

No. 87-466: **State v. Hadaway.** Affirmed. See Rule 7A(1).

No. 87-468: **Bury v. City of Omaha.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-504: **State v. Nist.** Affirmed. See Rule 7A(1).

No. 87-517: **State v. Prothman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-518: **State v. Prothman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-529: **State v. Belmont.** Affirmed. See Rule 7A(1).

Nos. 87-530, 87-531: **State v. Hunt.** Affirmed. See Rule 7A(1).

No. 87-536: **State v. Hart.** Affirmed. See Rule 7A(1).

No. 87-537: **State v. Hart.** Affirmed. See Rule 7A(1).

No. 87-544: **Hongsermeier Farms, Inc. v. Wagoner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-547: **W. S. Care, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-564: **State v. Horr.** Affirmed. See Rule 7A(1).

No. 87-590: **Bank of Steinauer v. Dobrovolny.** Appellants' motion to lift suspension on account of bankruptcy proceedings is granted. Appellee's motion to dismiss appeal for lack of jurisdiction is sustained. Appeal dismissed.

No. 87-592: **Hessler Builders, Inc. v. Monument Mall Assoc.** Stipulation allowed; appeal dismissed.

No. 87-601: **State v. Clayton.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-608: **State v. Gradin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-609: **State v. Wills.** Affirmed. See Rule 7A(1).

No. 87-627: **Nave v. Beatrice Foods.** Stipulation allowed; appeal dismissed.

No. 87-629: **Roscoe Hill Hatchery, Inc. v. Neco, Inc.** Stipulation allowed; appeal dismissed.

No. 87-658: **Pracht v. Pracht.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-664: **Holub v. Kucera.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-669: **State v. Jones.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-670: **State v. Doyle.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-671: **State v. Johnson.** Affirmed. See Rule 7A(1).

No. 87-676: **State v. Majors.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-678: **Nebraska Harvestore Systems v. McCarthy.** Motion of appellee for summary affirmance sustained;

judgment affirmed; see Rule 7B(2).

Nos. 87-697, 87-770: **State Bank v. Sullivan.** Motion of appellee for summary dismissal sustained; see Rule 7B(1). Motion of appellant for extension of brief date and motion to consolidate cases 87-697 and 87-770 moot.

No. 87-699: **Farkas v. Northwestern Bell.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-701: **State v. Loving.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-707: **Colgrove v. Colgrove.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-710: **State v. Laird.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-711: **State v. Harris.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-717: **State v. Ludgwig.** Affirmed. See Rule 7A(1).

No. 87-727: **State v. Chamberlain.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-729: **State v. Bothwell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-734: **State v. Cech.** Affirmed. See Rule 7A(1).

No. 87-736: **State v. Svanda.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-747: **State v. Sweeten.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-749: **State v. Vasquez.** Affirmed. See Rule 7A(1).

No. 87-750: **State v. Billie.** Affirmed. See Rule 7A(1).

No. 87-751: **State v. Prelle.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-752: **State v. Hampton.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-755: **Federal Land Bank of Omaha v. Blankemeyer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-757: **State v. McNeil.** Affirmed. See Rule 7A(1).

No. 87-759: **State v. Latas.** Affirmed. See Rule 7A(1).

No. 87-766: **State v. Mason.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-780: **McSwine v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 87-782: **In re Interest of Lamb.** Motion of appellee to dismiss appeal and motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-790: **State v. Waters.** Affirmed. See Rule 7A(1).

No. 87-791: **State v. Morris.** Affirmed. See Rule 7A(1).

No. 87-797: **Federal Land Bank of Omaha v. Franzen.** By order of the court, judgment affirmed; see Rule 7A(1).

No. 87-798: **State v. Gainforth.** Affirmed. See Rule 7A(1).

No. 87-811: **State v. Jones.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-814: **State v. Swigart.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-817: **Garst v. Garst.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-828: **Eggland v. Eggland.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-829: **State v. Neeman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-831: **State v. Knaff.** Affirmed. See Rule 7A(1).

No. 87-833: **Coin-A-Matic Music Co. v. Northern Bank.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-834: **State v. Thomas.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-838: **State v. Brandenburger.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-841: **Wymodak, Inc. v. City of York.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-842: **Briggs v. Wiley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-843: **Urquhart v. Olympic Investment Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-845: **State v. Martens.** Affirmed. See Rule 7A(1).

No. 87-848: **State v. Hagler.** Affirmed. See Rule 7A(1).

No. 87-849: **State v. Cox.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-850: **State v. Evans.** By order of the court, cause remanded to the trial court for further proceedings to permit appellant to be rearraigned.

No. 87-851: **State v. Molck.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-852: **State v. Seals.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-853: **State v. Winkler.** Affirmed. See Rule 7A(1).

No. 87-860: **State v. Cox.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-864: **State v. Franklin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-866: **Torres v. Department of Social Services.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-869: **State v. Bland.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-876: **State v. Miller.** In accordance with the court's order to show cause, the sentence of the defendant is vacated and set aside and the cause remanded to the district court for Douglas County for resentencing.

No. 87-878: **Francisco v. West Nebraska General Hospital.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-883: **In re Interest of Tyler.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-884: **Woehler v. Archibald.** Appeal dismissed. See Rule 7A(2).

No. 87-889: **State v. Hoffman.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-895: **State v. Woods.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-899: **State v. Hager.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-900: **State v. Portsche.** Affirmed. See Rule 7A(1).

No. 87-902: **Federal Deposit Insurance Corporation v. Middagh.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-905: **Roth v. Roth.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-907: **State v. Obst.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-910: **State v. Fields.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-916: **State v. Clear.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-918: **Allen v. Ridenour.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-921: **Lueck v. Troutman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-923: **State v. Lespreance.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-925: **Sledge v. Nebraska Liquor Control Commission.** Stipulation allowed; appeal dismissed.

No. 87-926: **Federal Land Bank of Omaha v. Martin.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-930: **Amsberry v. Amsberry.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 87-931, 87-932, 87-933: **State v. Graves.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-936: **State v. Harvey.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-938: **Lanzendorf v. Gunter.** Appeal dismissed. See Rule 7A(2).

No. 87-939: **State v. Gamblin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-943: **State v. Spencer.** Affirmed. See Rule 7A(1).

No. 87-944: **State v. Olds.** Affirmed. See Rule 7A(1).

No. 87-947: **Nebraska State Bank v. Scollard.** Motion of appellant to dismiss appeal sustained with prejudice; appeal dismissed at cost of appellant.

No. 87-951: **State v. Hyde.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 87-952: **State v. Hyde.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 87-953: **State v. Stevens.** Court finds appeal wholly

frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-956: **Federal Deposit Insurance Corp. v. Lauritsen.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-957: **State v. Perry.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-958: **State v. Rozic.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-959: **State v. Sellers.** Affirmed. See Rule 7A(1).

No. 87-962: **Reynolds v. Nauman.** Appeal dismissed. See Rule 7A(2).

No. 87-964: **Coker v. Coker.** Stipulation allowed; appeal dismissed.

No. 87-976: **Johnson v. Nebraska Public Power Dist.** Motion of appellee for summary dismissal sustained; see Rule 7B(1); motion of Steinberg for order allowing him to appear pro hac vice moot.

No. 87-982: **Bisby v. Crestview Manor.** Stipulation allowed; appeal dismissed.

No. 87-988: **State v. Gray Grass.** Affirmed. See Rule 7A(1).

No. 87-989: **State v. Richardson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-993: **State v. Hamilton.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-999: **State v. Gagliano.** Affirmed. See Rule 7A(1).

No. 87-1000: **State v. Kersch.** Affirmed. See Rule 7A(1).

No. 87-1001: **Ryan v. Barr.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1003: **Tyler v. Alvarez.** Motion of appellant to

dismiss appeal sustained; appeal dismissed.

No. 87-1004: **State v. Beahm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1006: **Bonta v. Scope Cable Television.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1009: **Arndt v. Nelsen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1010: **Maruska v. Maruska.** Appeal dismissed. See Rule 7A(2).

Nos. 87-1011, 87-1012: **State v. Welty.** Motion of court-appointed counsel for leave to withdraw appearance overruled. Appeal dismissed. See Rule 7A(2).

No. 87-1013: **Hibler v. Oliver.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1014: **Coke v. Bar Mart, Inc.** All pending motions denied; by order of the court, judgment summarily affirmed; see Rule 7A.

No. 87-1018: **Smith v. Marcotte.** Joint motion for dismissal allowed; appeal dismissed.

No. 87-1021: **State v. Cassidy.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1023: **State v. Loux.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1025: **State v. Donner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1029: **Palmersheim v. Palmersheim.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1034: **Green v. Jensen.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-1036: **State v. Bloxton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1038: **State v. Niemann.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; appellant's motion for appointment of new counsel overruled; judgment affirmed; see

Rule 3B.

No. 87-1045: **Pawnee County Bank v. Droge.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1046: **Kuehl v. School District No. 8.** Stipulation allowed; appeal dismissed.

No. 87-1051: **State v. Hill.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1053: **State v. Grimm.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1063: **State v. Younger.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1073: **Davis v. Beasley.** Appeal dismissed. See Rule 7A(2).

No. 87-1082: **State v. Anderson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1085: **Wall v. Renner.** By order of the court, order of confirmation entered in the district court set aside and matter remanded.

No. 87-1086: **Otoe County National Bank v. Coin-A-Matic Music Co., Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-1096: **State v. Alford.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-1103: **State v. Harrington.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-1108: **State v. Dougherty.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-1113: **Hofeldt v. Harrison-Hurtz Enterprises.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-1119: **In re Interest of Walker.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 87-1128: **Widga v. Sandell.** Motion of appellant to

dismiss appeal sustained; appeal dismissed.

No. 87-1141: **Masters v. Salsbury.** Stipulation allowed; appeal dismissed.

No. 87-1149: **State v. Radden.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-1152: **Krause v. Swartz.** Stipulation allowed; appeal dismissed.

No. 88-003: **Jacob v. Rosberg.** Motion of appellee for summary dismissal denied. By order of the court, judgment summarily affirmed; see Rule 7A(1).

No. 88-015: **In re Estate of Dorsey.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-016: **Simonsen v. Petersen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-019: **Jones v. Eliason & Knuth Drywall Co.** Stipulation allowed; appeal dismissed.

No. 88-027: **Sarratt v. Lutheran Medical Center.** Stipulation allowed; appeal dismissed.

No. 88-034: **State v. Petty.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-040: **Krumbach v. Krumbach.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-048: **State ex rel. Tyler v. Nebraska Board of Parole.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-049: **State ex rel. Tyler v. Orr.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-058: **State v. Bybee.** Stipulation allowed; appeal dismissed.

No. 88-068: **Woodruff v. Randazzo Enterprises.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-084: **Majors, Inc. v. Nebraska Department of Revenue.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-121: **State v. Lentz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-146: **State v. Phillips.** Stipulation allowed; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL L. DOUGLAS, RESPONDENT.

416 N.W.2d 515

Filed December 4, 1987. No. 85-535.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** In a disciplinary proceeding against an attorney, the complaint must be established by clear and convincing evidence.
3. _____. In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. **Miranda Rights.** 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 a law enforcement officer has restricted the freedom of the person interrogated, thereby rendering such person in "custody."
5. **Fraud.** When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud.
6. **Public Officers and Employees.** Throughout the United States, public officers have been characterized as fiduciaries and trustees, charged with honesty and fidelity in administration of their office and execution of their duties.
7. _____. The relationship between a state official and the state is that of principal and agent and trustee and cestui que trust. A public office is a public trust. Such offices are created for the benefit of the public, not for the benefit of the incumbent.
8. **Fraud: Intent.** Fraud may consist of the omission or concealment of a material fact, if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak.
9. **Fraud.** Where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation.
10. **Constitutional Law: Public Officers and Employees: Disciplinary Proceedings.**

The constitutionality of the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1984), is generally irrelevant to a disciplinary proceeding. Ordinarily, a respondent has no standing to challenge the act.

11. **Disciplinary Proceedings.** An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had.
12. **Fraud.** One who furnishes false information to the government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself.
13. **Contracts: Intent.** A written contract expressed in unambiguous language is not subject to interpretation or construction, and the parties' intention must be determined from its contents alone.
14. **Disciplinary Proceedings.** Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach upon the courts or the legal profession, constitutes grounds for suspension or disbarment.
15. **Disciplinary Proceedings: Public Officers and Employees.** The conduct of a government attorney is required to be more circumspect than that of a private lawyer. Improper conduct on the part of a government attorney is more likely to harm the entire system of government in terms of public trust.
16. **Disciplinary Proceedings.** The determination of what is appropriate discipline requires consideration of the nature of the offenses, the need for deterrence of similar future misconduct by others, maintenance of the reputation of the bar as a whole, protection of the public and clients, the expression of condemnation by society on moral grounds of the prohibited conduct, and justice to the respondent, considering all the circumstances and his present or future fitness to continue in the practice of law.
17. _____. The purpose of a disciplinary proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether he should be permitted to continue to practice law.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, and Thomas J. Walsh, for relator.

William E. Morrow and Tamra L. Wilson of Erickson & Sederstrom, P.C., for respondent.

Robert M. Spire, Attorney General, and A. Eugene Crump, for State of Nebraska.

BOSLAUGH, C.J., Pro Tem., HASTINGS, SHANAHAN, and GRANT, JJ., and MORAN and HOWARD, D. JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is a disciplinary proceeding against Paul L. Douglas, respondent, who was admitted to the practice of law in Nebraska on June 18, 1953. He was elected county attorney of Lancaster County, Nebraska, in 1961, and Attorney General of Nebraska in 1975. He held the office of Attorney General until his resignation effective January 2, 1985.

Commencing in 1976 and extending through 1981, the respondent had a number of transactions with Marvin E. Copple, who was developing land for residential purposes in and near Lincoln, Nebraska. Copple was also an officer and director of Commonwealth Savings Company. The respondent's activities in these matters are the basis for the charges filed against him in this proceeding. These matters were also the basis for articles of impeachment against the respondent, adopted by the Legislature on March 14, 1984, and an indictment returned on June 14, 1984. See, *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984); *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986).

Although the facts in this case are generally the same as those stated in the impeachment case, there are important differences in the question presented. In the impeachment case the evidence was presented to this court, sitting as an impeachment court, to try the articles of impeachment adopted by the Legislature against Paul Douglas, the Attorney General of Nebraska. By a divided court, respondent was found not guilty of the impeachment charges. The court held that "an impeachment proceeding is to be classed as a criminal prosecution in which the State is required to establish the essential elements of the charge beyond a reasonable doubt." *State v. Douglas, supra*, 217 Neb. at 201, 349 N.W.2d at 874.

In this proceeding, we are reviewing charges that respondent was guilty of misconduct as a lawyer in various described activities set out in the formal disciplinary charges against him. Although some of those charges are similar to the impeachment articles, others are not. As an example, the articles of impeachment made no reference to the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1978 & 1984), the violation of which is the basis

for five of the counts alleged in this proceeding.

The standard of proof in this proceeding is proof by clear and convincing evidence, and the question is not whether the respondent was guilty of an impeachable offense, but whether the *conduct* of the respondent violated the Code of Professional Responsibility. The issues to be decided are different; the burden of proof is different; and the evidence presented is different.

Formal charges against the respondent in this matter were filed in this court on July 8, 1985, by the Disciplinary Review Board of the Nebraska State Bar Association. Additional charges were filed on July 24, 1985, and October 7, 1986, by the Counsel for Discipline of the Nebraska State Bar Association.

The respondent's answer was filed on October 8, 1985, and additional answers were filed on October 21, 1986, and November 10, 1986.

On November 4, 1985, Thomas R. Burke was appointed referee.

The complainant's reply was filed on November 12, 1986.

The hearing before the referee commenced on November 18, 1986, and continued for 6 days. Nine volumes of testimony and over 85 exhibits were offered.

The referee filed his report on January 23, 1987. Exceptions to the report of the referee were filed by the Counsel for Discipline on January 28, 1987. Written briefs were then filed, and the matter was heard in this court on April 24, 1987.

Although the formal charges consisted of 11 counts, the complainant elected to present no evidence in regard to count X. Our opinion, therefore, will discuss only the remaining counts.

The record shows, and the referee found, that in 1976 the respondent and Paul Galter, a friend of the respondent's, agreed with Marvin Copple to assist Copple in the development of a tract of land in Lincoln, Nebraska, that was to be known as Fox Hollow. Copple was a vice president and director of Commonwealth Savings Company, an industrial loan and investment company. Copple was to supply the capital, and the respondent and Galter were to do some of the work, including legal work. The respondent and Galter were to be compensated

through an arrangement that involved conveying some of the lots to the respondent and Galter. When Copple found purchasers for the lots, the respondent and Galter were to convey to the purchasers and retain the difference between the price paid by the purchasers and the amount paid to Copple after the lots had been sold.

The respondent and Galter signed three purchase agreements, dated January 12, 1977; September 8, 1977; and June 1, 1979.

The January 12, 1977, agreement described 26 lots, for which the respondent and Galter agreed to pay $241,774. The agreement acknowledged payment of $100 per lot and contained provisions requiring payment of the balance due, with interest.

On April 20, 1977, the respondent executed a promissory note and a mortgage in the amount of $241,774 to Commonwealth. A check from Commonwealth in the amount of $241,774, payable to the respondent, Galter, and Copple, was endorsed by the respondent and Galter and delivered to Copple.

The September 8, 1977, agreement described 40 lots, with a purchase price of $320,755. The June 1, 1979, agreement described 12 lots, with a purchase price of $105,600.

On December 27, 1977, the respondent and Galter received $371,814 through a transaction arranged by Copple. A Commonwealth check payable to J.A. Driscoll, Copple's secretary, was delivered to the respondent and Galter, who endorsed the check and deposited it in their partnership P.P.S.S.'s account. Copple conveyed 30 of the lots involved in the September 8, 1977, agreement to the respondent, who then conveyed the 30 lots to Driscoll. Copple received $320,755 of the proceeds by check from P.P.S.S.

On July 20, 1979, Driscoll paid the respondent and Galter $120,000 for the 12 lots described in the June 1, 1979, agreement. The respondent and Galter then paid Copple $105,600.

As a result of these transactions, the respondent and Galter each received approximately $44,772. The respondent also received $37,500 directly from Copple for his services to Copple

in connection with Fox Hollow and another development known as Timber Ridge.

The respondent's activities in regard to the Fox Hollow and Timber Ridge developments included services in connection with an easement for sewerlines across property adjacent to Fox Hollow; obtaining an executive order for installation of utilities; and services in connection with problems regarding a flood plain easement, the construction of a powerline near Fox Hollow, and noise problems resulting from aircraft flights over Timber Ridge.

In 1981 and 1982, Paul Amen, director of the Nebraska Department of Banking and Finance, requested additional legal assistance from the respondent, as Attorney General. An assistant attorney general hired for that purpose left, after 1 week, in late September or early October 1982. At about this time, a Federal Bureau of Investigation agent, John Campbell, advised Amen concerning investigation of matters involving the First Security Bank and Trust of Beatrice, Nebraska. Agent Campbell told Amen that the Beatrice investigation might spill over into Commonwealth. Amen then told the respondent there was a serious need for additional legal assistance, and alluded to the Beatrice investigation and the possible spillover to Commonwealth.

On March 10, 1983, a copy of a letter to Amen from Agent Campbell's supervisor was sent to the respondent. The letter specifically mentioned a more than $750,000 loan transaction in which the proceeds of the loan went to S.E. Copple, Marvin's father and president of Commonwealth, and none to the "borrower." The March 10 letter was discussed at a meeting in the respondent's office on March 14, 1983. At that time Amen was attempting to prevent Commonwealth from becoming insolvent.

In early May 1983, Barry Lake, counsel for the Department of Banking, told the respondent that he had information about a transaction in which Marvin Copple had received $500,000 from Commonwealth, a part of which might constitute theft.

At about this time, respondent assigned Ruth Anne Galter, an assistant attorney general, to the banking department. In June 1983, she mentioned the $500,000 transaction involving

Marvin Copple to the respondent.

On November 1, 1983, Amen declared Commonwealth insolvent. On November 18, 1983, the respondent appointed David A. Domina as a special assistant attorney general to handle matters involving Commonwealth. It was at this time that the respondent determined he was disqualified from handling matters relating to Commonwealth.

On November 30, 1983, Domina examined the respondent under oath concerning his transactions with Copple. When asked what arrangement the respondent had with Copple for compensation for his services with respect to Fox Hollow, the respondent described the lot sale arrangement only. In fact, the respondent had received $37,500 from Copple, most of which was for his services in regard to Fox Hollow.

In a letter to Richard G. Kopf, special counsel for the Special Commonwealth Committee of the Legislature, dated February 6, 1984, the respondent admitted that he had received a total of $77,272.11 for his services for more than 1,500 hours of work over a period of 5 years.

At a hearing before the Special Commonwealth Committee on February 24 or 25, 1984, the respondent admitted that he knew the purpose of Domina's questions on November 30, 1983, and that he should have supplied Domina with the information concerning the money he had received from Copple.

Additional facts will be discussed in the analysis relating to particular counts.

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. See, *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980); *State ex rel. Nebraska State Bar Assn. v. Jensen*, 171 Neb. 1, 105 N.W.2d 459 (1960). Cf. *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987).

In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence. *State ex rel. NSBA v. Roubicek*, 225 Neb. 509, 406 N.W.2d 644 (1987); *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d 833 (1985); *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982). We have referred to this standard of proof as " 'a clear preponderance of the evidence . . . .' " See *State ex rel. NSBA v. Kelly, supra* at 12, 374 N.W.2d at 836.

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. Roubicek, supra; State ex rel. NSBA v. Kelly, supra.*

The Code of Professional Responsibility (Code) originally adopted by this court in 1970, as amended, consists of nine basic canons, supplemented by ethical considerations (EC) and disciplinary rules (DR). All of the counts allege a violation of one or more of the following subsections of Canon 1, DR 1-102, of the Code:

> (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.

All of the counts also allege a violation of the respondent's oath as an attorney, as set out in Neb. Rev. Stat. § 7-104 (Reissue 1983).

COUNT I

In its "formal charge" against respondent, the Committee on Inquiry of the Second Disciplinary District alleged:

COUNT I

1. From the year 1977 to and including 1980, Paul L. Douglas, the Respondent, purchased real estate from the said Marvin E. Copple and provided to him consulting and legal services regarding various land developments undertaken by the said Marvin E. Copple.

2. That in the sworn statements of November 30, 1983, and December 12, 1983, hereinabove referred to, which were given and made by the said Paul L. Douglas, Respondent, he was asked numerous questions by the said David A. Domina, Special Assistant Attorney General of the State of Nebraska, concerning compensation and legal fees received by Paul L. Douglas, Respondent, from the said Marvin E. Copple; that in said sworn statements, Paul L. Douglas, Respondent, knowingly and intentionally failed to disclose to said David A. Domina, Special Assistant Attorney General of the State of Nebraska, that he, the Respondent, had actually received compensation and legal fees from the said Marvin E. Copple during the years 1977 to and including 1980, in the aggregate amount of $37,500.00.

3. That the above alleged acts of the Respondent, as set forth in this Count I, constitute a violation of the oath of office of an attorney taken by the said Respondent at the time he was admitted to practice law in the State of Nebraska, as set forth in Section 7-104, Revised Statutes of Nebraska, 1943, and all of which were and are a violation of the following provisions of the Code of Professional Responsibility adopted by the Supreme Court of the State of Nebraska on May 1, 1970, and as subsequently amended, to wit:

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.

(6) Engage in any other conduct that adversely

reflects on his fitness to practice law.

Sometime before his election as Attorney General, respondent and Paul Galter, an attorney and friend of respondent's, had borrowed from four banks to cover a $40,000 loss sustained in their joint venture for trading in the commodities market. The bank loans were still unpaid in 1976, after respondent became Attorney General. As related by Galter:

> I had also had a business venture with Paul [respondent] in the commodity market that had been ongoing for several years which had resulted in losses to both of us, and I thought that — and I know that Paul was looking for some type of outside activity to supplement his own regular income as the Attorney General so that he could repay that loss.

In April 1976, Marvin Copple had purchased undeveloped farmland, later known as Fox Hollow, and had used the services of Galter in acquisition of that farmland. Copple anticipated 230 lots in the proposed residential development of the farmland and 697 lots in a contemplated total development which would include other land. According to Copple, Galter, as Copple's attorney, suggested that "we include General Paul Douglas in on it and that he would — that Paul Douglas would be a good team member to help with the problems that would be coming up." Copple met with Galter and respondent, and, after discussing the prospective real estate development, later reached a "mutual agreement that [Galter and respondent] would be compensated for the work that they did," when lots sold by Copple at a "discount" to Galter and respondent would be resold at a higher price with the "profit" split between Galter and respondent. While Galter did legal research regarding the development, respondent's "role was primarily to counsel with [Copple and Galter]; come up with the ideas and work on whatever matters needed to be developed." According to respondent, at an unspecified time during such relationship, respondent and Copple agreed that respondent "ought to be compensated for work — as work was completed at a — at a price that [we] agreed that I [respondent] should be compensated." Thereafter, as different projects were

completed, Copple paid respondent for work done regarding the real estate developments.

Respondent's work for Copple related to three Fox Hollows (Fox Hollow Addition, Fox Hollow First, and Fox Hollow Second) and another Copple development, Timber Ridge. Although respondent never submitted a bill or statement for services rendered, he told Copple the things he was doing or had done involving Copple's developments, and Copple would then issue a check to pay respondent.

In 1978, Copple paid respondent $5,000 for work pertaining to storm sewers in Fox Hollow. In his federal income tax return for 1978, respondent reported total taxable income of $40,687, including his salary of $32,500 as Attorney General and $5,000 as a "management fee" from an unidentified source. During 1979, respondent assisted Copple by monitoring eminent domain proceedings by the city of Lincoln to acquire a municipal easement which benefited Fox Hollow in the form of sewer and utility service for the development. For services regarding the easement, Copple paid respondent $5,000 on April 12, 1979. Later in 1979, respondent did additional work for Copple which pertained to Timber Ridge and a noise problem caused by military aircraft flying over the development. Respondent communicated with the commander of Offutt Air Force Base and received information about military use of the Lincoln airport near Timber Ridge. On September 5, 1979, Copple paid respondent $7,500 for work on Timber Ridge. Respondent's federal tax return for 1979 showed total taxable income of $64,562, including his salary as Attorney General in the amount of $39,500 and a management fee (source unidentified) of $12,500. In 1980, respondent represented Copple concerning a flood plain easement regarding Fox Hollow. That representation involved contacts with lawyers for the U.S. Corps of Engineers and with the U.S. attorney for Nebraska. As reimbursement for expenses incurred regarding the Timber Ridge development, Copple paid respondent $2,500 on April 25, 1980. On August 29, 1980, Copple issued a check for $5,000 payable to respondent for work relative to the Corps of Engineers and the flood plain pertaining to Fox Hollow. By an additional check, Copple paid

respondent $15,000 on December 23, 1980, for the flood plain matter. In his federal income tax return for 1980, respondent reported total taxable income of $51,681, including his Attorney General's salary of $39,500 and $15,000 as a management fee from an unidentified source. Therefore, for respondent's services rendered on Copple's two real estate developments, Fox Hollow and Timber Ridge, during the period from 1978 to 1980, Copple, by five checks, paid respondent the aggregate sum of $37,500, of which $30,000 related to work on Fox Hollow and $7,500 to work on Timber Ridge.

After Commonwealth Savings Company was declared insolvent in November of 1983, David A. Domina was appointed by respondent as a special assistant attorney general for the State of Nebraska to investigate the circumstances surrounding the financial collapse of Commonwealth. In a transcribed interview conducted on November 30, 1983, at the offices of the Attorney General in the State Capitol, respondent acknowledged that he was Nebraska's Attorney General, and, after the *Miranda* warning was stated to respondent, see *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the following questions were asked by Domina, with answers given by respondent:

> Q. Did you serve as counsel in connection with [Timber Ridge] development and receive compensation?
>
> A. Yes.
>
> Q. Were there other developments in addition to the Fox Hollow and Timber Ridge in which you served as counsel for Marv Copple or any of the Copple family?
>
> A. First of all, I did no other business with anybody else in the Copple family except Marv.
>
> Q. All right. Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel?
>
> A. There was always something coming up, and as it was requiring my time and my counsel — and I would remind him of it and periodically — he would pay me for it....
>
> ....

Q. Did you ever specifically bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge?

A. No.

Q. Did you ever give him orally, you know, a figure or ask for a specific amount of compensation on those other projects?

A. No.

Q. How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he?

A. He never did pay me.

Q. With respect to Fox Hollow, then, what was the arrangement that you had with Mr. Copple for compensation for your services as counsel, then?

To the last question asked by Domina, respondent again stated the plan whereby he and Galter acquired lots from Copple at a reduced price, or "discount," and expected to resell those lots at a price greater than the purchase price, thereby making a profit which would "compensate us for the work that we had done helping Marvin develop those lots."

Domina then continued the questioning:

Q. Okay. I want to be sure that I understand the terms of the compensation on that arrangement and then I can go on to something else here. . . .

. . . .

A. . . . [Marvin Copple] was more than willing to share that profit and to compensate people for — for the money that he was making with the people that helped him put it together. . . .

. . . .

. . . I was confident that he would compensate us well because he was going to have to — if he didn't compensate us well for it, it was all going to go to taxes anyway. But I think it was a way, and I didn't — you know, if he did it by the lot or if he just paid us in cash, he would have had the same tax problem. I don't think he — he saw that solve any of his tax problems by doing it with contracts.

In the course of the November 30 interview, respondent mentioned his dissatisfaction expressed to Marvin Copple

concerning compensation derived from resale of the lots. Respondent then stated that Copple had told him not to worry about the situation, because the profit on resale of the lots would "well compensate us for the services that we had rendered" regarding the Copple real estate developments.

A second interview of respondent was conducted by Domina at the Capitol on December 12, 1983. Domina renewed his inquiry into respondent's involvement in Copple's real estate developments and compensation for services rendered to Copple. When Domina asked a question concerning respondent's interest in Timber Ridge, the following transpired:

Q. You were going to get a fractional interest in the whole tract?

A. That's correct.

Q. What was the fraction?

A. Ten percent —

Q. For you and ten percent for Galter?

A. Correct.

Q. Was that his compensation for your work and its development?

A. And there was a lot more work to be done to develop it, yes.

Q. But it was compensation?

A. Yes.

Q. So, in that connection the arrangements were the same as the Fox Hollow -

A. No, no. No, there wasn't going to be anything the way Fox Hollow was done.

With Fox Hollow what we did was we bought lots at a lower price and then made whatever amount of profit we were going to make from the sale of the lots.

Q. I thought I understood you to say in your first statement that you were allowed to get into the Fox Hollow deal as compensation for consultation services?

A. Yes. But I mean I didn't give a percentage. I didn't get a percentage.

Q. But you were allowed to buy lots without investing any money?

A. Right. But on this one we were going to get a

percentage.

Q. Okay. Instead of specific lots . . . .

A. Yes.

Q. You were to get an undivided 10th interest in exchange for your services?

A. Yes.

Q. But at Fox Hollow you had specific lots?

A. That I had to buy.

On February 6, 1984, respondent wrote a letter to Richard G. Kopf, special counsel for the Special Commonwealth Committee of the Nebraska Legislature. In that letter, which respondent signed as Attorney General, he reiterated the compensation arrangement with Copple, that is, Copple "was willing to compensate us for our services by allowing us to participate in the profits of future lot sales." In his letter to Kopf, respondent also wrote:

> I received compensation in the form of reduced price purchases of Fox Hollow lots, money, and a, to date unconveyed, 10% interest in Timber Ridge. The interest in Timber Ridge will not now be conveyed and is of questionable value in any event. That compensation was paid to me in accordance with the general agreement and understanding between Paul Galter, myself and Marvin Copple. As the course of dealings proceeded, the oral agreement and the method of compensation was changed.

Later, in his letter of February 6 to Kopf, respondent stated:

> Although I advised Mr. Domina that Marvin Copple made payments to me from time to time, no one has ever asked me whether or not the only payments I received for my services in connection with all the real estate developments in which Paul Galter, Marvin Copple and I were involved were received as profits from the lot sales. Because of the extensive additional work which I did and in which Paul Galter had little participation relating to the noise problems, alternative construction methods, the flowage easement and miscellaneous other matters, I was paid a total of $32,500 during 1978, 1979 and 1980. For more than 1,500 hours of work over a period of five years, I received a total of $77,272.11.

At a hearing before the Special Commonwealth Committee on February 24, 1984, respondent referred to the Domina interviews and told the committee:

> I wish I would have told them about the extra 32 five. I didn't, but that hardly puts me in the role that he says that I belong in, but interestingly enough, on his examination of me, he asked me this question: "All right. Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel"? That was the question. "Were there other developments besides Fox Hollow and Timber Ridge for which you were paid for services as counsel", and I responded, "There was always something coming up, and it required my time and counsel. I would remind him of it periodically; he would pay me for it". Now, he didn't pursue that. It is quite obvious that I didn't volunteer it, and I should have.
>
> On the next — Later on on that page, he asks the question slightly different, and I played the part of the lawyer and answered his question. Again, I say, I should have told him. "Did you especially bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge"? And the answer was, "No", and that is a correct answer, but I knew what he wanted. "Did you ever give him orally, you know, a figure or ask for a specific amount for compensation on these other projects"? The answer was, "No". "How did he pay you for your services on the project other than Fox Hollow? How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge, or did he"? I answered the first part of the question by saying, "He never did pay me", meaning he never did pay me for projects other than Fox Hollow and Timber Ridge, and I realize that when I got my statement, and one of the first things we talked about, and one of the things that I did in the two-week period of time was to put it in the report, not only put it in that I had gotten paid, but tell you the exact amount of money that I made.

In the course of the legislative hearing, and in response to

interrogation by special counsel Kopf concerning nondisclosure of fees paid by Copple, respondent remarked:

> Every time this investigation moves along, it seems like there is always another little matter that seems to be the great big focal point. All of a sudden, it seems like the whole purpose of this 16-man committee — 16-person committee — excuse me — is why I didn't disclose the 32 five....

In further questioning by Kopf concerning the Domina interview of November 30, 1983, and respondent's failure to mention the "fees" paid by Copple, respondent responded: "You are saying to me, why didn't you volunteer more than the answer to the question, and I have told you, I'm sorry. I wish I would have, and I should have. I admit that."

In June 1984, a newspaper article listed the checks from Marvin Copple to Douglas. The total of those checks was $37,500, not $32,500 as previously mentioned by respondent in his letter to Kopf and in his statements before the special legislative committee. By reviewing his bank statements, respondent verified the payments by Copple, filed an amended income tax return for 1980, and stated that he honestly believed his total "additional compensation was thirty-two five, where in fact it was thirty-seven five." In his amended tax return for 1980, respondent also explained the previously omitted payment from Copple: "During the taxable year 1980, the taxpayer received a check for $5,000.00 from Marvin Copple. It has subsequently been determined that this amount is earned income."

Respondent resigned as Attorney General on January 2, 1985.

In proceedings before the referee appointed for the disciplinary process now under examination, respondent was questioned about the Domina interview of November 30, 1983:

> Q.... And was it in a statement that Mr. Domina asked you about your compensation, and you didn't him tell [sic] about — about the thirty-seven five?
>
> A. That's not true at all.
>
> Q. Did you tell him about the thirty-seven five?
>
> A. I did not.

Q. Did you later testify that you knew what he wanted, but you decided to play lawyer, and you just didn't tell him about it?

A. That's true.

At the hearing before the referee, respondent also acknowledged that he had been paid $5,000 in 1978, $12,500 in 1979, and $20,000 in 1980, or payments in the total of $37,500, as compensation for services rendered concerning the Copple real estate developments, and that moneys retained from the "lot transactions" as well as the $37,500 paid by Copple were "compensation for services rendered" for Marvin Copple.

In his report, the referee made the following findings:

7. Marvin Copple, Paul Galter, and the Respondent agreed orally that Galter and the Respondent would be compensated for their services with respect to the Fox Hollow development by means of an arrangement by which Copple would convey certain lots in the development to Galter and the Respondent at specified prices, and, once Copple had found third-party purchasers for the lots, Galter and the Respondent would convey the lots to the third parties, pay to Copple the original purchase price, and retain the balance as compensation for services to Copple. . . .

. . . .

14. In addition to profits from lot sales, the Respondent asked Marvin Copple to pay him directly for services related to Copple's real estate developments. Copple write [sic] six checks to the Respondent in the following amounts:

December 19, 1978	$ 5,000.00
April 12, 1979	5,000.00
September 5, 1979	7,500.00
April 25, 1980	2,500.00
August 29, 1980	5,000.00
December 27, 1980	15,000.00

The total of the six checks was $40,000. The April 25, 1980 check for $2,500 apparently was for the purpose of reimbursement for expenses related to the Timber Ridge

development . . . . The Respondent retained the proceeds from the other five checks, in a total amount of $37,500, for compensation for his services on various aspects of the Fox Hollow and Timber Ridge developments.

. . . .

25. On November 30, 1983, David Domina asked if there were developments "besides Fox Hollow and Timber Ridge for which you were paid for services as counsel?" The Respondent answered, "There was always something coming up, and as it was requiring my time and my counsel — and I would remind him of it and periodically — he would pay me for it." . . . Domina then asked, "Did you ever specifically bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge?" . . . Answer: "No." Question: "Did you ever give him orally, you know, a figure or ask for a specific amount of compensation on those other projects?" Answer: "No." Question: "How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he?" Answer: "He never did pay me." . . . Question: "With respect to Fox Hollow, then, what was the arrangement that you had with Mr. Copple for compensation for your services as counsel, then?" . . . The Respondent answered by describing the lot purchase agreements and the manner in which he and Paul Galter were paid by the sale of lots. The Respondent was not asked specifically and did not tell Domina in response to this series of questions . . . that he received compensation for work on Fox Hollow and Timber Ridge by means of checks written to him by Marvin Copple. The only question by Domina to which discussion of the Copple checks would have been a responsive answer was the question ["With respect to Fox Hollow, then, what was the arrangement that you had with Mr. Copple for compensation for your services as counsel, then?"].

26. On December 12, David Domina asked the Respondent what his interest in Timber Ridge was. The Respondent replied that Marvin Copple had agreed that when the property was platted, the Respondent and Paul

> Galter each would receive a 10 percent ownership interest as compensation for their work on its development. . . . Domina did not ask whether the Respondent actually received the 10 percent interest or if he received any other form of compensation for work on Timber Ridge. Instead, Domina asked whether the Timber Ridge compensation plan was the same as for Fox Hollow, to which the Respondent replied that it was not. The Respondent was not asked for, nor did he volunteer, the information that instead of an ownership interest in Timber Ridge, he received direct payments by check from Marvin Copple.
>
> . . . .
>
> 29. There is no direct evidence that the Respondent intended to conceal from David Domina the fact that the Respondent had received direct payments from Marvin Copple for his work on Copple's real estate developments. Although the Respondent bypassed opportunities during the November 30 and December 12, 1983 questioning to reveal details of the direct payments from Copple — he did state that Copple paid him . . . — and although his answer to the question concerning compensation for Fox Hollow work . . . discussed only the lot transactions and did not include the direct payments by check, I conclude that the Respondent did not intentionally withhold that information from Domina. The Respondent reasonably could have perceived that the November 30 and December 12, 1983 statements were being taken in an adversarial context and that his responses could be used against him. . . . It is apparent from the Respondent's willingness to answer other questions put to him by Domina that he would have disclosed his receipt of direct payments from Copple had Domina followed up the several opportunities he had to ask more specific questions about compensation other than the lot arrangements.

In his report, the referee concluded:

> Count I: Nondisclosure of Direct Payments
>
> The Relator, in Count I, charges that the Respondent violated DR 1-102 when he failed to disclose, during his

two sworn statements to David Domina, that he had received a total of $37,500 from Marvin Copple in compensation and legal fees from 1977 to 1980.

The transcripts of the statements to Domina show, and the Respondent admits, that the Respondent did not at that time tell Domina that he had received direct payments by check for his work for Copple in addition to the compensation paid by means of the discounted purchase and resale of 78 lots in the Fox Hollow development. However, Domina asked only one question during two questioning sessions that actually called for disclosure of direct compensation for work on the Fox Hollow or Timber Ridge developments. All other questions going to compensation were specifically addressed to projects other than Fox Hollow and Timber Ridge or were restricted in scope to the plan for compensation by purchase and resale of Fox Hollow lots. Each of these other questions were [sic] answered within the scope of the questions, but not beyond. The one question Domina asked that was broad enough to encompass direct payments: "With respect to Fox Hollow, then, what was the arrangement for your services as counsel, then?" . . . .

. . . .

The difficulty on this count is determining whether the Respondent should be held to the duties of his public role at the time of the questioning by Domina or should be afforded the latitude allowed one whose conduct is under investigation and who may be subject to prosecution. If his duties to aid the investigation were paramount at the time of his statements to Domina, the Respondent should have disclosed what he knew Domina wished to know, even if not specifically asked for the information. But if his public role did not control the situation, the Respondent properly could have "played the lawyer" and answered only the questions actually asked.

. . . [T]he proper characterization of the Respondent's role in answering potentially inculpatory questions was that of a suspect being interviewed by a prosecutor rather than that of the chief prosecutor assisting an investigation

> by another servant of the public interest. In that context, the Respondent cannot appropriately be held to the fiduciary duties he owed the public with respect to matters on which he actively represented the State's interests, and it was legally and ethically permissible for him to answer questions truthfully and completely, within the restraints of the give-and-take of live questioning, without volunteering information not requested.
>
> . . . .
>
> . . . I am unable to find by a clear preponderance of the evidence that the Respondent acted deceptively when he failed to disclose to David Domina in late 1983 the amount of money paid to him directly by Marvin Copple.

In reaching his conclusion that respondent was not obligated to disclose the nature of all compensation derived from Copple, the referee makes veiled reference to a suspect's privilege against self-incrimination during custodial interrogation, see *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and the proscription against postarrest silence, pursuant to the *Miranda* warning, used as evidence. See *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), wherein the U.S. Supreme Court held that "use for impeachment purposes of [an arrestee's] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619.

Therefore, we must dispel any misconception that nondisclosure by respondent was justified pursuant to *Miranda v. Arizona, supra*, where the U.S. Supreme Court reviewed various aspects of a suspect's custodial interrogation by police or law enforcement personnel, namely, "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." 384 U.S. at 444. See, also, *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). The warning specified in *Miranda v. Arizona, supra*, is required only when a law enforcement officer has restricted the freedom of the person interrogated, thereby rendering such person in "custody." See *State v. Brown*, 225 Neb. 418, 405

N.W.2d 600 (1987). If the person to be questioned is not in custody, the *Miranda* warning is not required before interrogation. See *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985). Nothing in the record indicates that respondent, who was being interviewed in his office at the State Capitol, was in any manner deprived of his freedom in any significant way, before or during the interrogation by Special Assistant Attorney General Domina. We do, therefore, disagree with the referee's view of respondent as a "suspect being interviewed by a prosecutor rather than that of the chief prosecutor assisting an investigation by another servant of the public interest," that is, characterization of respondent as a suspect subjected to custodial interrogation by law enforcement personnel, thereby triggering the safeguards in the *Miranda* warning, including the privilege of silence as a means to avoid a suspect's inculpatory statement. Because custodial interrogation is absent in the present case, we need not consider whether silence, existing by virtue of the *Miranda* warning, may be used as evidence in civil proceedings such as respondent's case now before this court.

We now address the question whether respondent had the duty to disclose information concerning all compensation, including payment of fees, which he received from Copple. When he received such payments from Copple, and was later interviewed by Domina, respondent was the elected Attorney General of the State of Nebraska. Count I of the complaint against respondent does not restrict the charge to an affirmative misrepresentation, such as a statement consisting of an actual misrepresentation of fact. The charge in count I embodies, in part, an allegation that respondent engaged in conduct which involved "dishonesty, fraud, deceit, or misrepresentation."

"Although the general rule is that 'one party to a transaction has no duty to disclose material facts to the other,' and [sic] exception to this rule is made when the parties are in a fiduciary relationship with each other." *Midland Nat. Bank, etc. v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980). See, also, *Callahan v Callahan*, 127 A.D.2d 298, 514 N.Y.S.2d 819 (1987). When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud. See 37

C.J.S. *Fraud* § 16d (1943).

Regarding the law of trusts and disclosure by a fiduciary, we have said:

> "It is the duty of a trustee to fully inform the cestui que trust [beneficiary] of *all* facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests."

(Emphasis supplied.) *Johnson v. Richards*, 155 Neb. 552, 566-67, 52 N.W.2d 737, 746 (1952). See, also, *St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp.*, 207 Neb. 153, 296 N.W.2d 479 (1980).

Throughout the United States, public officers have been characterized as fiduciaries and trustees, charged with honesty and fidelity in administration of their office and execution of their duties. See, *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201 (1952); *Marshall Impeachment Case*, 363 Pa. 326, 69 A.2d 619 (1949); *Fuchs v. Bidwill*, 31 Ill. App. 3d 567, 334 N.E.2d 117 (1975); *Jersey City v. Hague*, 18 N.J. 584, 115 A.2d 8 (1955); *Matter of Parsons v. Steingut*, 185 Misc. 323, 57 N.Y.S.2d 663 (1945). See, also, *People v. Savaiano*, 66 Ill. 2d 7, 15, 359 N.E.2d 475, 480 (1976) (member of county board; public officials "owe a fiduciary duty to the people they represent"); *Williams v. State*, 83 Ariz. 34, 36-37, 315 P.2d 981, 983 (1957) (state land commissioner; "The relationship between a state official and the state is that of principal and agent and trustee and cestui que trust"); *In re Removal of Mesenbrink as Sheriff*, 211 Minn. 114, 117, 300 N.W. 398, 400 (1941) (sheriff; "A public office is a public trust. Such offices are created for the benefit of the public, not for the benefit of the incumbent").

"An affirmative statement is not always required, however, and fraud may also consist of the omission or concealment of a material fact if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak." *Tan v. Boyke*, 156 Ill. App. 3d 49, 54, 508 N.E.2d 390, 393 (1987). See, also, *Krueger v. St. Joseph's Hospital*, 305 N.W.2d 18 (N.D. 1981) (fraud may arise not only from misrepresentation but from concealment as well, where there is suppression of facts which one party has a legal or equitable

obligation to communicate to another). "Concealment" means nondisclosure when a party has a duty to disclose. See *Reed v. King*, 145 Cal. App. 3d 261, 193 Cal. Rptr. 130 (1983). "*Conceal* means to hide, secrete, or withhold from knowledge of others . . . ." *State v. Copple*, 224 Neb. 672, 691, 401 N.W.2d 141, 155 (1987). See, also, *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987); *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985). "The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact . . . ." *State v. Copple, supra.*

> It is a general principle in the law of fraud that where there is a duty to speak, the disclosure must be full and complete. It is firmly established that a partial and fragmentary disclosure, accompanied with the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect, it is. Telling half a truth has been declared to be equivalent to concealing the other half. Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all, he must make a full and fair disclosure. Therefore, if one wilfully conceals and suppresses such facts and thereby leads the other party to believe that the matters to which the statements made relate are different from what they actually are, he is guilty of a fraudulent concealment.

37 Am. Jur. 2d *Fraud and Deceit* § 151 at 208-09 (1968).

Moreover, where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation. See, *Security St. Bk. of Howard Lake v. Dieltz*, 408 N.W.2d 186 (Minn. App. 1987); *Callahan v Callahan*, 127 A.D.2d 298, 514 N.Y.S.2d 819 (1987); *Holcomb v. Zinke*, 365 N.W.2d 507 (N.D. 1985); *Anderson v. Anderson*, 620 S.W.2d 815 (Tex. Civ. App. 1981); 37 C.J.S. *Fraud* § 16a (1943).

In passing upon the propriety of action by a commission council, the Supreme Court of Louisiana, in *Plaquemines Par.*

Com'n Council v. Delta Dev., 502 So. 2d 1034, 1039-40 (La. 1987), stated: "Public officials occupy positions of public trust. . . . The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests."

As expressed in *U.S. v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987): "A public official is a fiduciary toward the public . . . and if he deliberately conceals material information from them he is guilty of fraud."

"To reveal some information on a subject triggers the duty to reveal all known material facts." *Hendren v. Allstate Ins. Co.*, 100 N.M. 506, 511, 672 P.2d 1137, 1142 (1983). See, also, *Ingaharro v. Blanchette*, 122 N.H. 54, 440 A.2d 445 (1982); *Wirth v. Commercial Resources, Inc.*, 96 N.M. 340, 630 P.2d 292 (1981); *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983).

As expressed in 37 Am. Jur. 2d, *supra*, § 150 at 207-08:

> A party of whom inquiry is made concerning the facts involved in a transaction must not, according to well-settled principles, conceal or fail to disclose any pertinent or material information in replying thereto, or he will be chargeable with fraud. The reason for the rule is simple and precise. Where one responds to an inquiry, it is his duty to impart correct information. Thus, one who responds to an inquiry is guilty of fraud if he denies all knowledge of a fact which he knows to exist; if he gives equivocal, evasive, or misleading answers calculated to convey a false impression, even though they are literally true as far as they go; or if he fails to disclose the whole truth.

When the Domina interviews of respondent are taken in conjunction with respondent's letter to Kopf (special legislative counsel) and with respondent's statements made during the hearing before the special legislative committee, there is no doubt that respondent fully realized that Domina was seeking information about all respondent's compensation from Copple in connection with the Fox Hollow and Timber Ridge developments. Although respondent mentioned only anticipated profits on resale of lots in Fox Hollow and the

unconveyed fractional interest in Timber Ridge as his compensation for services rendered to Copple, respondent later acknowledged he was "paid a total of $32,500 [actually $37,500] during 1978, 1979, and 1980." In reference to the Domina interviews, respondent expressed: "I wish I would have told them about the extra 32 five. . . . I knew what [Domina] wanted." What Domina was seeking during the respondent's interviews was factual information about all the compensation which respondent had received from Copple for services rendered by respondent, which necessarily included not only compensation in the form of respondent's interests in the two real estate developments but, also, fees paid by Copple. Yet respondent "played the part of the lawyer" and responded to Domina's questions with answers which created the desired and false impression that, in exchange for legal services rendered for Copple, respondent's only compensation was an unconveyed 10-percent interest in one development (Timber Ridge) and prospective resale of the underpriced lots which respondent had acquired in another development (Fox Hollow). In that manner, respondent withheld disclosure of the fees paid directly by Copple and, thus, concealed facts concerning compensation which he had received from Copple. By such half-truths resulting from partial disclosures, respondent's deliberate distortion of the truth was a deceitful suppression of facts known to respondent, and constituted fraud by concealment. As Attorney General of the State of Nebraska, respondent was required to carry out that public office with honesty and fidelity, which included the duty to make full and truthful disclosures regarding his conduct while in such position of public trust. Moreover, as an elected official charged with a public trust, respondent had neither the luxury nor the liberty of selective nondisclosure, when questioned about his conduct and activity occurring while he held the office of Attorney General.

We find that respondent, as Attorney General of the State of Nebraska, was a public official, who was obligated, as part of his duties, to make full and truthful disclosure of all information sought in the course of the interviews concerning his compensation received from Copple. We further find, by

clear and convincing evidence, that respondent, by nondisclosure of information and as the result of equivocal, evasive, or misleading answers given during the interviews by Domina, did fraudulently conceal the fact that respondent had been paid $37,500 by Copple as compensation for respondent's services regarding Copple's real estate developments. Therefore, contrary to the finding and disposition made by the referee, we conclude that count I, namely, that respondent did "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation" in violation of DR 1-102(A)(4), has been established. Under the circumstances it is unnecessary that we further determine whether respondent is guilty of professional misconduct involving moral turpitude, in violation of DR 1-102(A)(3), or is guilty of any other conduct that adversely reflects on his fitness to practice law, as prohibited under DR 1-102(A)(6).

COUNTS II, III, IV, V, AND VI

These counts, in the aggregate, are concerned with certain of respondent's business activities, both as a lawyer and in the business field, between approximately January 1977 and December 1980. Each count charges that respondent committed acts which violated his oath of office as an attorney, set out in § 7-104, and were in violation of DR 1-102, previously set out in detail.

The acts set out in counts II, III, IV, and V were done in connection with various business transactions between Marvin Copple, as seller, and respondent and Paul Galter, as buyers. In this connection the formal charges allege, in pertinent part, as follows:

COUNT II

> 1. That on or about January 12, 1977, the Respondent, Paul L. Douglas, and Paul Galter, an attorney at law . . . and a business associate of the Respondent, jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sume [sic] of $241,744.00.
>
> 2. That at all times mentioned herein, there was in existence, the Nebraska Political Accountability and Disclosure Act, being Sections 49-1401 to 49-14,138,

Revised Statutes of Nebraska, 1943, Reissue of 1978, as amended effective August 30, 1981, 1982 Cummulative [sic] Supplement; that pursuant to the terms, provisions and requirements of said Nebraska Political Accountability and Disclosure Act, the said Paul L. Douglas, Respondent, did file on February 27, 1978, with the Nebraska Accountability and Disclosure Commission, a statement of financial interest as required by said Act for the calendar year 1977.

3. That Section 49-1496 of said Act required the Respondent to disclose the name, address and nature of business of each creditor . . . to whom the Respondent may have owed or guaranteed the sum of $1,000.00 or more.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on February 27, 1978, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum of $241,744.00, and that he was so indebted to Marvin E. Copple, and that Marvin E. Copple was a creditor of the said Paul L. Douglas, Respondent, in the amount of $241,744.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness [sic].

5. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, to-wit: [DR 1-102, as set out above].

COUNT III

1. That on or about September 8, 1977, the Respondent, Paul L. Douglas, and Paul Galter . . . jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sum of $320,755.00.

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on February 27, 1978, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum of $320,755.00, and that he was so indebted to Marvin E. Copple, and that Marvin E. Copple was a creditor of the said Paul L. Douglas, Respondent, in the amount of $320,755.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness [sic].

5. [Same as paragraph 5 in count II.]

COUNT IV

1. That on or about June 1, 1979, the Respondent, Paul L. Douglas, and Paul Galter . . . jointly signed a Purchase Agreement in which they contracted to purchase certain real estate from the said Marvin E. Copple for the sum of $105,600.00.

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in said statement filed by the said Paul L. Douglas, Respondent, on March 27, 1980, he failed to report or to disclose that he had contracted to purchase certain real estate from Marvin E. Copple for the sum of $105,600.00, and that he was so indebted to Marvin E. Copple, and that Marvin E. Copple was a creditor of the said Paul L. Douglas, Respondent, in the amount of $105,600.00; that the failure of the said Paul L. Douglas, Respondent, to so report and disclose the said indebtedness [sic].

5. [Same as paragraph 5 of count II.]

COUNT V

1. That on or about April 20, 1977, the Respondent, Paul L. Douglas, borrowed from the Commonwealth Savings Company of Lincoln, the sum of $241,744.00; that said loan was thereafter extended and renewed until

on or about August 30, 1979, when said loan was paid in full by the Respondent, Paul L. Douglas; that the said loan and the extensions and the renewals thereof were not made in the ordinary course of business.

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That the Respondent, Paul L. Douglas, failed to report or to disclose the above-mentioned loan of April 20, 1977, and its subsequent renewals in the statements filed for the years 1977, 1978 and 1979.

5. [Same as paragraph 5 of count II.]

Count VI concerns certain legal services rendered by respondent to Marvin Copple and alleges, in pertinent part, as follows:

COUNT VI

1. That in the years 1978, 1979 and 1980, the Respondent, Paul L. Douglas, performed legal services for Marvin E. Copple in connection with the Timber Ridge Real Estate Development, and that in consideration of the above services, the said Marvin E. Copple paid to the Respondent, Paul L. Douglas, by his personal check the following:

$ 5,000.00 on or about December 19, 1978
$ 5,000.00 on or about April 13, 1979
$ 7,500.00 on or about September 5, 1979
$15,000.00 on or about December 24, 1980
$ 5,000.00 in the year 1980 (exact date not given)
TOTAL – $37,500.00

2. Paragraph 2 of Count II is made a part hereof by reference, as if fully set out herein.

3. Paragraph 3 of Count II is made a part hereof by reference, as if fully set out herein.

4. That in the statement filed by the said Paul L. Douglas, Respondent, for the calendar years 1978, 1979 and 1980, he failed to report or to disclose therein that he had received income of more than $1,000.00 in each of

said years from the said Marvin E. Copple or from the Timber Ridge Real Estate Development, as herein alleged.

5. [Same as paragraph 5 in count II.]

A summary of these five charges is well set out at pages 51 and 52 of the referee's report, as follows:

Counts II through VI: Accountability and Disclosure Omissions

Counts II and III charge that the Respondent on his 1977 Statement of Financial Interests filed with the Nebraska Accountability and Disclosure Commission pursuant to Neb. Rev. Stat. §49-1493 (Cum. Supp. 1976) failed to identify Marvin Copple as a creditor to whom $1,000 or more was owed, despite the alleged debt arising, respectively, from the January 12, 1977 lot purchase agreement for $241,744 and from the September 8, 1977 lot purchase agreement for $320,755. Count IV charges Douglas omitted from his 1979 Statement of Financial Interests the name of Marvin Copple as a creditor with respect to the June 1, 1979 lot purchase agreement for $105,600. Count V charges the Respondent omitted from his Statements of Financial Interests for 1977, 1978 and 1979 the name of Commonwealth as a creditor, although during each of those years he owed Commonwealth $241,744 plus interest upon a loan extended April 20, 1977 and periodically renewed until repayment on August 30, 1979. Count VI charges that the Respondent on his 1978, 1979 and 1980 Statements of Financial Interests failed to disclose as additional income of $1,000 or more payments totalling $37,500 from Marvin Copple "in connection with the Timber Ridge Real Estate Development for 'legal services' ".

As set out above, in each count the formal charge alleged the applicability of the Nebraska Political Accountability and Disclosure Act, §§ 49-1401 et seq. Section 49-1496 (Reissue 1978) of that act provided, in pertinent part, at the times in question, as follows:

49-1496. Statement of financial interests; form; contents; enumerated. (1) The statement of financial interests filed pursuant to sections 49-1493 to 49-14,104

shall be on a form prescribed by the commission.

(2) Individuals required to file under sections 49-1493 to 49-1495 shall file the following information for themselves:

(a) The name and address of and the nature of association . . .;

(b) The name, address, and nature of business of a person from whom any income or gift in the value of one thousand dollars or more was received during the preceding year and the nature of the services rendered. If income results from employment by, operation of or participation in a proprietorship or partnership or professional corporation or business or nonprofit corporation or other person, the person may list the proprietorship or partnership or professional corporation or business or nonprofit corporation or other person as the source and not the patrons, customers, patients or clients of the proprietorship or partnership or professional corporation or business or nonprofit corporation or other person;

(c) The description, including nature and location of all real property except the residence of the individual, in the state, the fair market value of which exceeds one thousand dollars . . .;

(d) The name and address of each creditor to whom the value of one thousand dollars or more was owed by the filer or a member of the filer's immediate family. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included;

. . . .

(f) Such other information as the person required to file the statement or the commission deems necessary, after notice and hearing, to carry out the purposes of sections 49-1401 to 49-14,138.

The individuals required to file statements under § 49-1496

specifically include the Attorney General of Nebraska, as set out in § 49-1493(1) (Reissue 1978).

In his brief at 21, respondent concedes "that if the Respondent's conduct in filing his reports with the Nebraska Political Accountability and Disclosure Commission constituted dishonesty, fraud, deceit, or misrepresentation, it might constitute grounds for discipline in the present proceedings irrespective of the statute's constitutionality." Respondent goes on to state: "However, in view of the unconstitutionality of the statute, that conduct must be evaluated on its own and such evaluation may not attribute any weight or degree of seriousness to the alleged violation of an unconstitutional statute."

Respondent attacks the constitutionality of the statute on the grounds that § 49-14,105 (Reissue 1984) provides that the Governor of the State appoints four members of the nine-member commission (and two of those appointments must be made from two lists submitted by the Legislature), while the Secretary of State appoints the other four appointed members (and two of those are from lists submitted by the Republican and Democratic state chairpersons). Respondent contends that the Legislature may not constitutionally encroach upon the executive branch, citing *State ex rel. Beck v. Young*, 154 Neb. 588, 48 N.W.2d 677 (1951), and *Wittler v. Baumgartner*, 180 Neb. 446, 144 N.W.2d 62 (1966).

This part of respondent's attack on the constitutionality of §§ 49-1401 et seq. was answered by a brief filed by the current Nebraska Attorney General. The Attorney General contends that the constitutionality of the act is irrelevant to a disciplinary proceeding and that the respondent has no standing to challenge it. We agree.

Respondent does not set out the basis of his standing to challenge the act. The matter before us is not confined to the question as to whether respondent has violated the act, but the matter of respondent's conduct.

We have previously addressed the issue of how the validity of a statute affects disciplinary proceedings against an attorney. In *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982), the court considered the discipline

of an attorney who had entered a plea of nolo contendere to violation of a federal statute. It was noted by the referee that the statute in question was not actually in effect during the period of time charged in the attorney's indictment. Thus, as applied to the disciplined attorney, it could have been argued that the statute was an ex post facto law. The court stated at 383, 322 N.W.2d at 796:

> The fact that the federal statute, which the respondent was charged with having violated, was an ex post facto law is not controlling in this proceeding for several reasons. It is the respondent's conduct or "actions" which is [sic] in issue rather than whether he was technically guilty of the crime charged. An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had. *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978).

The issue of the constitutionality or unconstitutionality of the Nebraska Political Accountability and Disclosure Act is irrelevant to the issues before us.

In *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966), the petitioners were charged with conspiring to defraud the government. Specifically, it was alleged that the petitioners filed false statements or affidavits in order to secure the services of the National Labor Relations Board. The petitioners contended that their convictions could not stand because the statute requiring the filing of the statements or affidavits was unconstitutional as a bill of attainder. To this, the Court in *Dennis* replied at 384 U.S. at 865:

> We need not reach this question, for the petitioners are in no position to attack the constitutionality of § 9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported

> compliance with the statute designed to avoid the courts, not to invoke their jurisdiction.

Quoting *Kay v. United States*, 303 U.S. 1, 58 S. Ct. 468, 82 L. Ed. 607 (1938), the *Dennis* Court stated at 384 U.S. at 866:

> "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

In *Dennis*, the prosecution was for the petitioners' fraud. It was not an action to enforce the statute claimed to be unconstitutional. The same is true with the case at bar. It is a case directed at the respondent's actions, not a case to enforce the statute claimed to be unconstitutional.

"[O]ne who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself." *United States v. Knox*, 396 U.S. 77, 79, 90 S. Ct. 363, 24 L. Ed. 2d 275 (1969).

In the proceeding before us, relator is not trying in any way to charge respondent with any violation of the act, but has merely alleged that certain conduct of respondent has not measured up to the standard that our statutes have set for certain purposes. Respondent, of course, is in a particular situation where he, as the Attorney General of Nebraska, chose to comply with the act by making filings under the act. We hold that respondent has no standing to challenge the act's constitutionality in this proceeding and that we are judging his *conduct* in furnishing information to the public, as required by the act. If respondent has chosen to mislead the public by his filings under the act, we are not concerned with any violation of the act, but with his conduct in improperly informing, or in misleading, the public. In summary, this court, like the U.S. Supreme Court in the *Dennis* case, does not reach the question as to the constitutionality of §§ 49-1401 et seq., but we consider respondent's conduct under the act.

Section 49-1493 requires that the Attorney General shall "file with the commission a statement of financial interests as provided in sections 49-1496 and 49-1497 . . . ." Section

49-1496(2)(d) (Reissue 1978) provides:

> The name and address of each creditor to whom the value of one thousand dollars or more was owed by the filer or a member of the filer's immediate family. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included.

The evidence shows that respondent and Paul Galter entered into three purchase agreements with Marvin Copple: (1) on January 12, 1977, in the amount of $241,744 (count II); (2) on September 8, 1977, in the amount of $320,755 (count III); and (3) on June 1, 1979, in the amount of $105,600 (count IV). The referee, at page 56 of his report, determined:

> On their face, the purchase agreements appear to create a contractual obligation for the Respondent and Paul Galter to pay Marvin Copple the full purchase price upon the sale of the lots, issuance of building permits or expiration of one year from the dates of the agreements. But the actual agreement between the parties to the contract was that no payment was necessary, including the down payment which the contracts recited had been paid but actually had not been, until Marvin Copple would sell a lot and the new purchaser would pay the money. At that point, according to the oral agreement between the parties and their course of conduct, Copple would deed the lot to the Respondent, the Respondent would sign a deed (prepared by Copple) to the new purchaser, the new purchaser would pay the Respondent, the Respondent would pay Copple the originally agreed-upon purchase price, and the Respondent and Paul Galter would split the profit from the sale. At least this was the procedure that was followed for the 40 lots covered by the September 8, 1977 agreement and the 12 lots under the June 1, 1979 agreement. These 52 lots all were sold to Judith Driscoll in two transactions. The original group of 26 lots were handled differently in that Marvin Copple arranged for

> Commonwealth to loan to the Respondent the agreed-upon purchase price for the 26 lots in exchange for a note made by the Respondent and guaranteed by Paul Galter and a mortgage. For these lots, Copple received full payment at the time of the loan and the Respondent repaid principal and interest to Commonwealth as Copple sold the lots to third parties, including eight lots sold to Driscoll. Thus, for the 26 lots, there was a real obligation and debt to Commonwealth. But for the 26 lots before the Commonwealth loan and the later groups of 40 lots and 12 lots, no current or binding obligation existed. Although the Commonwealth loan and the sales to Driscoll intervened before the one-year pay back provisions of the lot purchase agreements might have come into effect, there is no evidence to contradict the testimony of the parties to those agreements that the Respondent and Paul Galter would not have been obligated to pay had the lots not sold and that the parties could have changed the agreements to designate different lots, had they so chosen.
>
> Thus, the agreement between the parties as it actually existed is consistent with the Respondent's position that no reportable debt to Marvin Copple existed with respect to the lots. I do not read the Act to require identification of a seller of property when the obligation to pay for it arises simultaneously with the transfer of title.

Turning first to the allegations of count II, the record shows the following. On January 12, 1977, respondent and Paul Galter signed a purchase agreement agreeing to purchase, from Marvin Copple, 26 described lots in a subdivision in Lancaster County, Nebraska. In the purchase agreement, the parties agreed that "[t]he total purchase price shall be the sum of $241,774.00 which the parties agree has been computed on the basis of one hundred Dollars ($100.00) per frontal foot for the real estate described above." In this provision, and in later provisions discussed, the underlined words were written, while the balance was preprinted.

The agreement acknowledges the seller's receipt of "One hundred Dollars ($100.00) per lot at the time of the execution of this agreement . . . ." This receipted amount was not paid by

buyers at the time the agreement was signed. The agreement further provided that the balance, plus interest at 8 3/4 percent per annum beginning 120 days after the agreement was executed, was due when the lots were sold, or when a building permit was obtained for a lot, "provided, however, that the full purchase price for each lot, plus interest . . . shall be paid not later than Jan. 12, 1978."

The agreement further provided that Marvin Copple had "the right to sell, assign, pledge, encumber or hypothecate this Purchase Agreement." Marvin Copple did assign this agreement to the Commonwealth Savings Company on April 20, 1977. Respondent signed a mortgage and note to Commonwealth and on that date Commonwealth issued a check in the amount of $241,744 to respondent, Marvin E. Copple, and Paul Galter. Respondent and Galter endorsed and gave the Commonwealth check to Marvin Copple.

In exchange, respondent testified, Marvin Copple gave respondent a deed to the 26 lots, and respondent gave the deeds to Commonwealth. These deeds are not in evidence as such, and the only information concerning the deeds exists in other documents—respondent's 1977 income tax return (exhibit 19) and exhibit 58, a partial abstract as to the lots described in the three purchase agreements between Copple, respondent, and Galter. The 1977 tax return shows a sale of an undivided interest in 10 lots acquired on April 20, 1977, and an installment sale of 14 lots also acquired April 20. In each of those installment sales, one payment of $50 is indicated, resulting in a "reportable gain" of approximately $6 per lot. Exhibit 58 also shows that respondent received deeds to 12 lots from Copple and his wife on April 20, 1977, five separate deeds to five different lots later in 1977, and deeds to six other lots in 1978; three lots are unaccounted for. Respondent's 1979 income tax return showed a gain resulting from the sale of 10 lots that were acquired on April 20, 1977. The foregoing shows the confusion generated by the sloppy records of respondent, and results in this court, or any investigator of this whole situation, being unable to determine what actually occurred.

The specific allegations of counts II, III, and IV allege that respondent did not report an indebtedness to Marvin Copple in

his statement of financial interests (hereinafter "disclosure report") forms filed with the State. For the years 1977 and 1978, the reports filed by respondent stated "None" in answer to the question in item 11 on the forms, "Name and Address of Each Creditor to whom the Value of $1,000 or More was Owed by You . . . ." For the year 1979, respondent's report states "None" in answer to the question in item 10, "Creditors to whom $1,000 or More was Owed by You . . . ." The referee determined that respondent's answers were not so incorrect as to be a violation of the disclosure act and that relator had failed to prove the charges against respondent in counts II, III, and IV.

The referee thus determined that respondent was entitled to state in his disclosure report that he was indebted to no one in excess of $1,000 in 1977, because the disclosure act does not require that a filer report the debt rising from a purchase if the "obligation to pay for it arises simultaneously with the transfer of title." We cannot agree with that conclusion.

The facts are undisputed. Respondent signed three purchase agreements, totaling $668,129. In return, Marvin Copple agreed to convey to respondent (and Paul Galter) specific real property. Respondent contends the transaction was only a way to compensate him for services rendered to Marvin Copple and did not create a debt from respondent to Copple.

Respondent's position flies in the face of the way he himself has treated the transaction, and in the face of the realities of the situation. To maintain his position, respondent must contend that the contract between him and Copple means nothing and that their unexpressed intention controls the language and effective meaning of the agreement. That is not the law in this state where third parties, other than the two contracting parties, are induced to rely on such written agreements. Others relied on the written contracts between respondent and Copple. In the case of the first 26-lot purchase agreement, Commonwealth, as assignee of the agreement, relied on the validity of the written agreement. In the other two purchase agreements, the U.S. Government and the State of Nebraska, as taxing authorities, relied on the agreements, and Nebraska is concerned, as a government entity relies on truthful information furnished to it as to the activities of its officials.

We have consistently held that an unambiguous contract is not subject to interpretation or construction and that courts are not free to rewrite a contract for parties or speculate as to terms which the parties have not seen fit to set out. *T.V. Transmission v. City of Lincoln*, 220 Neb. 887, 374 N.W.2d 49 (1985). We have stated that "a written contract expressed in unambiguous language is not subject to interpretation or construction, and the parties' intention must be determined from its contents alone." *Gilbreath v. Ridgeway*, 218 Neb. 822, 826, 360 N.W.2d 474, 477 (1984). In this case, the contract between respondent and Copple is not ambiguous in any way. It was, in fact, written on a form used in the ordinary course of Copple's business to transfer lots. If respondent wanted to express another contractual arrangement, he was free to do so. Respondent was an experienced lawyer. It is difficult to find that respondent signed an assignable agreement that required him to pay substantial sums of money within 1 year unless he was willing to be bound by such promises.

The actual interpretation respondent placed on the agreements shows the same result. Respondent admits the agreements constituted the transfer of an interest in land by Copple to respondent by the fact respondent states in his disclosure reports that he has an interest in the land. At that point the land is a gift to him, or he owes someone for it. Respondent does not contend he paid for the land at the time the agreement was signed, nor does he contend it was a gift.

In his federal income tax returns for 1977 and 1979, respondent indicated a capital gains sale, with an acquisition date of the contract date. To adopt the referee's reasoning would mean that respondent could not use the contract date as a purchase date, but rather the date that Copple arranged for a sale from respondent to others. Respondent's obligation to Copple did not arise when respondent sold the property, but arose under the written agreement with Copple.

This holding that both respondent and Copple had rights and duties under the contract is clearly exemplified in the 26-lot transaction of January 12 and April 20, 1977. The agreement was actually assigned to a third party. There were no further provisions in the two later agreements that the same thing could

not be done again. The possibility of third-party participation in the assignable contracts could not be ruled out by the respondent's oral assertions that he would not permit such assignment.

As set out in count II, respondent was indebted to Copple in 1977 in amounts greater than $1,000. He did not report such debts on his disclosure forms. We find that respondent is guilty of the charges set out against him in count II.

The same reasoning applies to the allegations in counts III and IV. We find respondent guilty of the charges set out against him in counts III and IV.

A different factual situation is set out in count V. It is undisputed that respondent did not list Commonwealth Savings Company as a creditor in his disclosure forms for the years 1977, 1978, or 1979; that he owed Commonwealth money in each of those years; and that there was a Commonwealth loan in 1977, as set out above in connection with the 26-lot purchase agreement in 1977.

Respondent did not report any Commonwealth loans on his disclosure reports. His reason was that in the instructions issued with the 1977 form, there was a proviso that loans of the following types need not be reported: "(b) . . . Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative, and land contracts that have been recorded with the County Clerk or the Register of Deeds." A similar provision was in the 1979 instructions. These instructions reflected generally the provisions of § 49-1496(2)(d). Respondent contends any loans made by Commonwealth to him were made "by financial institutions in the ordinary course of business." The referee agreed with respondent's position and held that since the loans were made in the ordinary course of Commonwealth's business, respondent had no obligation to disclose them. Since we are judging respondent's conduct, the definition of "ordinary course of business" could refer to the lender's business, and we cannot say the respondent did not comply with the requirements of the disclosure act in this respect. We determine that respondent is not guilty of the charges against him in count V.

A still different problem exists with regard to count VI. In that count, respondent is charged with failing to report income received from Marvin Copple in 1978, 1979, and 1980. Again, the facts are not in dispute. Copple, by five personal checks, paid respondent the total sum of $37,500 in those years. On his disclosure forms for those years, respondent did not report any income from Copple in any of those years. In the 1978 report, item 8 requested the following information: "Name, Address and Nature of Business of a Person from whom Any Income or Gift in the Value of $1,000 or More was Received During the Period of This Report and the Nature of the Services Rendered or Circumstances of Gift," and "Nature of Services Rendered . . . ." Respondent answered this question, in part, "Foxhollow Development, 1200 Manchester Dr., Lincoln, NE 68528"; "Real Estate"; and described the services rendered as "Land Development."

In the 1979 and 1980 reports, item 6, entitled "Places of Employment & Business Associations," requested the following information: "Names and Addresses of Places of Employment and Businesses"; "Nature of Association (Specify: employee, owner, partner, director, officer, trustee . . . . See Instructions Item 6)"; and "If you received more than $1,000 from such sources, include nature of payor's business and services you rendered."

In the 1979 report, respondent furnished this requested information, in part, by setting out the name and address of places of employment as "Foxhollow Development, 1200 Manchester Dr., Lincoln, NE 68528"; in describing the nature of the association, replied, "Owner of certain lots"; and set out the nature of the payor's business as "Land development. Made judgement decisions and financial investments."

In the 1980 report, the same questions were answered: "Foxhollow Development, 1200 Manchester Dr., Lincoln, NE 68528"; the nature of association as "Real Estate Development"; and the nature of the payor's business in the same way as in 1979.

The instructions for answering item 8 in the 1978 report included: "(b) 'Person' means a business, individual, proprietorship, firm, partnership, joint venture, syndicate,

business trust, labor organization, company, corporation, association, committee or any other organization or group of persons acting jointly."

The instructions as to how to respond to item 6 in the 1979 and 1980 reports included:

> Business includes a government, political subdivision, body corporate and partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust, activity or entity.
>
> *OWNER*-applies to situations where the filer is the sole proprietor of a business. Under the column entitled "Names and Addresses of Places of Employment and Businesses," the filer's name, trade name or name in which he did business should be used.

The referee describes the charges in count VI as follows:

> Like the other charges, Count VI alleges that the actions set out in the charge constitute a violation of the Respondent's oath of office as an attorney and violate DR1-102 of the Code of Professional Responsibility. That provision of the Code deals with violations of disciplinary rules, illegal conduct involving moral turpitude, dishonesty, fraud, deceit, misrepresentation, and any other conduct adversely reflecting on fitness to practice law. I fail to see how any of these characterizations could properly be placed on the Respondent's disclosure of his business associations and sources of income during 1978 through 1980. All but $7,500 of the $37,500 referred to in Count VI related to the Respondent's services in connection with the Fox Hollow development of Marvin Copple. Instead of listing the name of the developer, the Respondent listed the name of the development and the address which Marvin Copple used for his real estate development activities. I can see nothing dishonest, deceitful, or otherwise malevolent about listing the development rather than the developer.
>
> Only one of the checks from Copple related to his services on the Timber Ridge development rather than the Fox Hollow development. To be consistent, the

> Respondent should have listed on his 1979 Statement of Financial Interests the name of Timber Ridge Development or Marvin Copple's name as the developer to whom he rendered services. The Fox Hollow listing in 1979 is accurate because $5,000 was received during that year for services related to Fox Hollow. The question is whether the omission of the name of Timber Ridge or of Marvin Copple constitutes a violation of the Code. While the omission, strictly speaking, is inaccurate, I believe the purpose of the Act was fulfilled by disclosing involvement with another real estate development of Marvin Copple, listing Copple's business address, and disclosing in a general way his involvement in land development. I conclude that the omission of Timber Ridge or Marvin Copple from the 1979 statement cannot be characterized by reference to any of the language of DR 1-102.

Insofar as it is contended that respondent's conduct in the reporting of his financial activities in his filed disclosure forms cannot be considered as a violation of his oath of office as an attorney or the provisions of DR 1-102, we find that if such conduct constitutes "dishonesty, fraud, deceit, or misrepresentation" or "other conduct that adversely reflects on his fitness to practice law," it is sufficient to violate DR 1-102; or if such conduct results in a failure to "faithfully discharge the duties of an attorney and counselor," it is sufficient to violate respondent's oath as an attorney, as set out in § 7-104.

The referee found that respondent's "disclosure of his business associations and sources of income during 1978 through 1980" did not violate any of respondent's duties as set out above. We cannot agree.

Respondent's disclosure form for 1978 showed he received income greater than $1,000 from a "person" described as "Foxhollow Development." The statutory requirement is set out in § 49-1496(2)(b), and requires the filing of information as follows: "The name, address, and nature of business of a person from whom any income or gift in the value of one thousand dollars or more was received during the preceding year and the nature of the services rendered."

"Person" is defined in § 49-1438 as: "Person shall mean a

business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting jointly." "Foxhollow Development" is not shown in the record before us as any of those. The clear, undisputed fact is that respondent received one check in the amount of $5,000 from Marvin Copple in 1978; received two checks in the total amount of $12,500 from Copple in 1979; and received two checks in the total amount of $20,000 from Copple in 1980. None of respondent's disclosure forms mention Marvin Copple.

The legislative findings and intent in enacting the Nebraska Political Accountability and Disclosure Act, §§ 49-1401 et seq., are set out, in pertinent part, in § 49-1402 (Reissue 1978), as follows:

> (3) That it is essential to the proper operation of democratic government that public officials and employees be independent and impartial, that governmental decisions and policy be made in the proper channels of governmental structure, and that public office or employment not be used for private gain other than the compensation provided by law; and
>
> (4) That the attainment of one or more of these ends is impaired when there exists, or appears to exist, a substantial conflict between the private interests of a public official and his duties as such official; and that although the vast majority of public officials and employees are dedicated and serve with high integrity, the public interest requires that the law provide greater accountability, disclosure, and guidance with respect to the conduct of public officials and employees.

Section 49-1496 requires that the filer under the act set out the name of the person from whom more than $1,000 was received. If a public official receives such sums, that official has the obligation to publicly set out, in an appropriate disclosure form, the name of the person from whom the public official has received the money and, therefore, to whom the public official might be beholden. Respondent chose not to do so, but instead to say he has received money from "Foxhollow Development,"

an entity as to which he described, in his 1979 disclosure report, the nature of his association as "[o]wner of certain lots." In 1979, the instructions in connection with the disclosure form stated: "Item 6: . . . Business Associations-Nature of Association: *OWNER*-applies to situations where the filer is the sole proprietor of a business. Under the column entitled 'Names and Addresses of Places of Employment and Businesses,' the filer's name, trade name or name in which he did business should be used."

We find that respondent has failed to report income from Marvin Copple as he was required to do by § 49-1496(2)(b). Instead, respondent created the impression that he was engaged in a business from which he received income, and in 1979 described himself as an "owner"—that is, giving the impression that he was the proprietor of Fox Hollow Developments. Respondent did not disclose he was an employee of Marvin Copple. Respondent explained his failure to list Marvin Copple as a person from whom he received income, in the hearing before the Committee on Inquiry of the Second Disciplinary District, as follows:

> A I suppose — From the questioning I'm getting, I suppose I should have listed M. E. Copple or Marvin Copple, 1200 Manchester Drive, Lincoln, Nebraska, real estate, and that would have solved all the problems.
>
> I started out — I wrote down Fox Hollow development at that address and I just stayed there. I didn't — It wasn't as a matter to conceal or hide anything. I suppose I just — I listed Fox Hollow development and just stayed with Fox Hollow development.
>
> To this day, I don't find it that significant.
>
> It wasn't a matter of trying to conceal or hide anything.

In our review, we determine that respondent's misrepresentation was significant and that respondent so conducted himself as to not truthfully answer the questions in the disclosure forms in order not to disclose his relationship to Marvin Copple. We find respondent guilty of the charges set out against him in count VI.

COUNTS VII, VIII, AND IX

These counts, which will be considered together, relate to

false statements by the respondent to Richard Kopf, the special counsel to the Special Commonwealth Committee of the Legislature, concerning payments the respondent received from Marvin Copple and whether the respondent had paid income tax on the payments. The formal charges allege in pertinent part as follows:

COUNT VII

. . . .

6. That in a letter to Richard G. Kopf dated February 6, 1984, the Respondent stated that he had been paid a total of $32,500.00 from Marvin E. Copple during the years 1978, 1979 and 1980. That at the time the Respondent made the above-mentioned assertions he knew the same to be false.

7. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, [previously set out].

COUNT VIII

. . . .

5. That on February 25, 1984, the Respondent testified under Oath before the Special Commonwealth Committee of the Legislature of Nebraska.

6. That during his above-mentioned testimony the Respondent stated that he had received payments totaling $32,500.00 from Marvin E. Copple. That at the time the Respondent made said statements he knew the same to be false.

7. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, [previously set out].

COUNT IX

. . . .

5. That on February 25, 1984, the Respondent testified

under Oath before the Special Commonwealth Committee of the Legislature of Nebraska.

6. That during his above-mentioned testimony the Respondent stated that he had paid income tax on all of the payments he received from Marvin E. Copple. That at the time the Respondent made said statements he knew the same to be false.

7. That the actions of the Respondent, as set forth above, constitute a violation of his Oath of Office as an attorney licensed to practice law in the State of Nebraska, as provided by Section 7-104 R.R.S. 1977, and are in violation of the following provisions of the Code of Professional Responsibility, [previously set out].

Count VII charges that in a letter to the special counsel of the Special Commonwealth Committee of the Legislature, respondent stated that he had been paid a total of $32,500 by Copple during 1978, 1979, and 1980, and that he knew the statement was false. Count VIII charges that in testimony before the legislative committee he said he received payments totaling $32,500 from Copple, knowing the statement to be false. Count IX charges that in testimony before the legislative committee respondent said he had paid income tax on all of the payments he received from Copple, knowing the statement to be false. Briefly, it is charged that the false statements violate his oath of office as an attorney and DR 1-102(A)(4), in that they amount to fraud, deceit, misrepresentation, and conduct adversely reflecting on respondent's fitness to practice law.

In his 1980 federal income tax return, respondent showed income of $15,000 as a management fee, but another $5,000 payment from Copple, in the form of one check, was not shown. Respondent testified that in drafting the letter to the special counsel and in preparation for testimony before the legislative committee he relied upon his income tax returns; that the omission of $5,000 from the 1980 return was inadvertent, the result of poor recordkeeping; and that later he learned of the omission from a newspaper article published following the 1984 perjury indictment, listing the payments he had received from Copple. He then looked through his bank records and found a $5,000 deposit corresponding to the payment, and filed

an amended return for 1980, declaring the additional $5,000. The $5,000 check was one of five received from Copple. The others were reported on his tax returns.

The referee properly determined that the counts could not be sustained unless the relator proved by a clear preponderance of the evidence that respondent knew his statements were false at the time he made them. It is reasonable that in writing the letter to the special counsel and preparing for his testimony, respondent would consult his tax returns as the most convenient source and the ultimate distillation of many records. Pointing to the absence of countervailing evidence, the referee accepted respondent's version.

The cause is for trial de novo in this court, but we recognize that the referee heard and saw the witnesses and his findings must necessarily be considered on matters that are in irreconcilable conflict. *State ex rel. Nebraska State Bar Assn. v. Jensen*, 171 Neb. 1, 105 N.W.2d 459 (1960).

Although the omission to declare as much as $5,000 in a tax return is suspect on its face, there was a trail of business records that could easily be picked up by the Internal Revenue Service in the slightest investigation. This seems inconsistent with a studied concealment. We believe that it is unlikely that respondent hoped to frustrate the investigation or diminish his role by intentionally omitting mention of an additional $5,000 payment.

Respondent treated lot sales as capital transactions, and not as compensation. By offsetting capital gains from total lot sales against a capital loss carryover, he was able to save over $8,000 in federal and state income taxes. The referee noted that a liberal reading of count IX might allow consideration of the tax issue. However, he observed that at the hearing the relator drew no connection between the tax treatment of lot sales and count IX, and the referee felt it would be unfair to read count IX as doing so. The relator's brief in this court made no such contention. We decline to interfere with the referee's conclusion.

We find that counts VII, VIII, and IX have not been established by clear and convincing evidence.

COUNT XI

This count relates to the respondent's alleged use of his office for the benefit of a private client, the questionable nature of transactions in which he was involved with Marvin Copple, the conflict of interest that developed as a result of his transactions with Marvin Copple while the respondent was the Attorney General of the State of Nebraska, his failure to disclose the nature and extent of these activities, and his failure while Attorney General to promptly withdraw from all matters relating to the Commonwealth Savings Company.

Count XI of the formal charges alleges in pertinent part as follows:

> 3. That from January, 1975 and at all times material hereto Respondent was the duly elected Attorney General of the State of Nebraska and charged with the duties and responsibilities specified by Reissue Revised Statutes of 1943, Section 84-201 et seq.; that as Attorney General was head of the executive department of state government "known as the Department of Justice"; that as head of the Department of Justice Respondent had "general control and supervision of all actions and legal proceedings in which the State of Nebraska may be a party or may be interested" and had "charge and control of all the legal business of all departments and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel in order to protect the interests of the state" (R.R.S. 1943, Section 84-202); that included in those departments and bureaus was the Department of Banking and Finance (R.R.S. 1943, Sections 8-101 et seq.)
>
> 4. That from and after 1953 and at all times material hereto Respondent was an attorney admitted to practice law in Nebraska; that accordingly Respondent was a part of the judicial system of this State and an officer of the Courts of this State and subject to the Rules of Discipline adopted by the Supreme Court of this State.
>
> 5. That among the Rules of Discipline [Code] adopted by the Supreme Court of this State is DR 1-102 which provides:
>
> (A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

6. That DR 1-102 was in full force and effect at all times material hereto.

7. That during the years 1976 through 1983 inclusive Commonwealth Savings Company was an industrial loan and investment company organized under the laws of the State of Nebraska and subject to "general supervision and control" by the Department of Banking and Finance, State of Nebraska (R.R.S. 1943, Section 8-401, et seq.); that during some or all of these years Marvin Copple was a real estate developer in Lincoln, Nebraska and an officer or director of Commonwealth Savings Company and the son of S. E. Copple, who was president of such institution; and that during some or all of these years Judith Driscoll, a/k/a J. E. Driscoll, was Marvin Copple's personal secretary or employee.

8. That during the years 1976 through 1983 inclusive Respondent engaged in a course of conduct violative of DR 1-102 in that he:

A. Undertook to provide legal or consulting services to Marvin Copple in the development of proposed subdivisions to the City of Lincoln known as Fox Hollow, Fox Hollow First, Fox Hollow Second and Timber Ridge, which included using his personal contacts with government officials or other prominent persons developed through his years of public service to:

1. Expedite the condemnation of an easement across property adjacent to that known as Fox Hollow to provide sewer service to such property.

2. Secure approval of the City of Lincoln for the installation of utilities at Fox Hollow by Executive Order.

3. Negotiate with the Army Corps of Engineers in

regard to problems involving surface flowage easement across portions of Fox Hollow.

4. Protect the interest of Fox Hollow from adverse consequences of condemnation proceedings for construction of a high voltage transmission line.

5. Contact a high ranking officer at SAC Headquarters to secure written confirmation of proposed modification in military aircraft to reduce their noise levels to impeach or challenge the so-called ANCLUC study, which impeded the rezoning and development of Timber Ridge.

B. Engaged in questionable real estate transfers and loan activities with Marvin Copple, Judith Driscoll and Commonwealth Savings Company for the ostensible purpose of obtaining compensation for such services thereby facilitating the flow of Commonwealth Savings Company funds to Marvin Copple in exchange for title to or a security interest in Fox Hollow lots and compromising his ability to perform the duties of his office in regard to providing legal assistance to the Department of Banking in the investigation and prosecution of persons, including his client Marvin Copple, who allegedly had engaged in illegal acts which had impaired or contributed to the impairment of the financial solvency of Commonwealth Savings Company.

C. Failed to provide a full and complete disclosure of the nature and extent of these activities to the Director of the Department of Banking and Finance and the Governor of Nebraska when circumstances developed in regard to the insolvency of Commonwealth Savings Company which made such a disclosure necessary to protect the administration of justice and to secure public confidence in the fairness and adequacy of law enforcement officials and procedures in the State of Nebraska and particularly the office of Attorney General.

D. Failed to promptly disqualify himself from handling the legal business of the Department of Banking and Finance of the State of Nebraska in regard to the Commonwealth Savings Company matter when he knew

or should have known that his failure to so act would impair public confidence in the administration of justice in the State of Nebraska and would be prejudicial to the administration of justice.

E. Failed to make a full and fair disclosure of these matters when requested to do so by Special Assistant Attorney General David Domina in November and December of 1983.

Subsection 8A

Subsection 8A alleges that the conduct of respondent in providing legal and consulting services to Marvin Copple in certain real estate developments violated disciplinary rules, DR 1-102(A)(1), which conduct was prejudicial to the administration of justice, DR 1-102(A)(5). Particularly applicable is the following disciplinary rule: "DR 8-101 Action as a Public Official. (A) A lawyer who holds public office shall not: . . . (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

That rule is explained in EC 8-8: "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."

Although there is some evidence to support the allegations contained in subsections 8A(1), (2), (3), (4), and (5), we find that part of the charge was not proven by clear and convincing evidence.

As part of its case, relator adduced evidence concerning respondent and an Air Force officer. Exhibit 35 is a letter signed by Air Force Col. John R. McKone, commander of Offutt Air Force Base, Omaha, Nebraska, addressed to "The Honorable Paul Douglas, Attorney General, State of Nebraska," listing several questions about military flights into the Lincoln airport that had been posed to the Air Force by the "Honorable Paul Douglas." Respondent explained that the letter was a response to his telephone call to McKone, whom he had met at a reception. In the telephone call, respondent said, he had explained that he was privately employed and that land being developed by a private developer was affected by the noise of night flights of military planes into and over the airport;

respondent asked questions about the flights, and the letter was McKone's response.

Although some of the details of the professional and business relationship between respondent and Marvin Copple raise questions concerning the propriety of respondent's acts, there is no clear and convincing proof that such acts, legal services, and relationships *at the time performed* were in conflict with either his duties as a lawyer under the Code or his duties as Attorney General, to the end that they were prejudicial to the administration of justice. We therefore find that the referee properly found that this part of the charge in subsection 8A had not been proven.

However, that is not to say that the evidence supporting the allegations in subsection 8A does not support the charges in subsection 8D, particularly since the respondent's status of confidentiality with his client Copple continued after the termination of the attorney-client relationship. See, DR 4-101(B), "A lawyer shall not knowingly: (1) reveal a confidence or secret of his client"; EC 4-6, "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of employment." See, also, Neb. Rev. Stat. § 7-105(4) (Reissue 1983).

Subsection 8B

Subsection 8B alleges conduct involving dishonesty, fraud, deceit or misrepresentation that was prejudicial to the administration of justice, and that such conduct was in conflict with respondent's duties as Attorney General in the full investigation of the Commonwealth matter.

The transactions between the respondent and Marvin Copple in which Commonwealth Savings Company was involved were characterized by deception and subterfuge. On their face, the purchase agreements, notes, mortgages, and other documents purported to be binding obligations which created indebtedness on the part of the respondent and his associate, Paul Galter. The respondent, however, contends that these were merely devices by which he would be compensated by sharing in the profit or gain when the property was eventually sold, and that the instruments did not really represent a present indebtedness. Yet the April 20, 1977, promissory note and mortgage in the

amount of $241,774 to Commonwealth was the device by which Copple obtained that amount from Commonwealth for his own benefit. The respondent signed the note and mortgage and endorsed the Commonwealth check to Copple, and when these transactions were reported for tax purposes, they were treated as capital transactions in which the gain or loss was claimed as a capital gain or loss.

By engaging in the various transactions that the respondent had with Copple, the respondent facilitated the flow of funds from Commonwealth to Copple through the use of documents which the respondent claims were not what they appeared and purported to be. Although the respondent himself may not have personally profited greatly from these transactions, they enabled Copple to extract large sums of money from Commonwealth when it in fact was in a precarious financial condition.

We find that the respondent, by these transactions, engaged in conduct involving deceit and misrepresentation, in violation of DR 1-102(4), for which he is subject to discipline.

Subsections 8C and D

Since the issues of disclosure alleged in subsection 8C and disqualification alleged in subsection 8D are closely related conflict-of-interest issues, they are considered together. Both relate to Canon 5 of the Code, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." The alleged conflicts emerged during the investigation by the Department of Banking of insolvent industrial loan companies, including Commonwealth. Briefly, the conflicts directly involved respondent, with his 1976 to 1981 active attorney-client relationship with Marvin Copple, and their personal business associations; and, indirectly, the conflicts involved both Marvin Copple and Commonwealth as a result of Copple's history as a onetime Commonwealth officer and sometime borrower of large sums of money from Commonwealth under irregular circumstances, and the $500,000 payments made to Marvin Copple in 1981.

In 1980 and 1981, Marvin Copple was promoting the purchase of the Stettinger property, which Commonwealth eventually bought and paid Copple a $500,000 fee in two equal

$250,000 checks, on January 15 and April 2, 1981. When this information was given to respondent by Barry Lake in May 1983, Lake described it in terms of "theft." That description should have put respondent on inquiry concerning a conflict. Reasonable inquiry by respondent would have shown that Copple had received the two payments, and would have shown other attendant circumstances. Respondent did nothing. In addition, he did not disclose to the interested State officials his past personal, business, and lawyer-client relationships with Copple. Although the record does not show that respondent performed any legal services for Copple as to the Stettinger tract, he was performing legal services for Copple on other real estate promotions during this 1981 period.

Conflicts have long been the concern of lawyers. When the Nebraska Bar was integrated in 1937, Canon 6 of the Canons of Professional Ethics provided:

> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

The terms "conflict" and "conflict of interest" do not appear as such in a Code rule; rather, they are referred to in the Code as "differing interests," and defined to include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

During this 1976 to 1981 period there were these three general conflict situations presented to respondent, as a lawyer, for his consideration and resolution.

First: At the time when respondent became counsel for Copple in 1976, he had a possible conflict of interest, as

described in DR 5-105(A):

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a 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).

Under those circumstances, and considering applicable statutes and rules, respondent had no clear conflict by accepting employment. See *Adams v. Adams*, 156 Neb. 778, 58 N.W.2d 172 (1953).

Second, after respondent accepted multiple employment, which was the 1976 to the end of the 1981 active employment period, he had a continuing possible conflict of interest, due to the application of DR 5-105(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).

DR 5-105(C), which refers to consent, is not applicable to a public officer. *State ex rel. Nebraska State Bar Assn. v. Richards*, 165 Neb. 80, 84 N.W.2d 136 (1957).

There was a close fact question whether the conflicts from multiple employment (State of Nebraska duties versus Marvin Copple confidences) during this 1976 to 1981 period prevented respondent from exercising independent judgment. We conclude that we cannot say that such a conflict was clearly shown from the evidence.

Third, in 1983, after termination of the multiple employment in 1981, a conflict of interest did arise when the respondent learned that Marvin Copple was suspected of the theft of money from Commonwealth. The exercise of independent professional judgment by the respondent on behalf of the State was adversely affected by his past lawyer-client relationship with Copple. EC 5-1 provides in part: "The professional judgment of a lawyer should be exercised, within the bounds of

the law, solely for the benefit of his client and free of compromising influences and loyalties." See, also, § 7-105(4). To the same effect as previously noted, DR 4-101(B)(1) and EC 4-6 provide that the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of the employment.

In the text C. Wolfram, Modern Legal Ethics § 7.4 at 358 (West 1986), the author states:

> Under the doctrine that has prevailed, any claim that a lawyer is disqualified because of a former-client representation must satisfy the two criteria of the substantial-relationship test. First, the former representation and the present one must be adverse in some material way. Second, the matters must be substantially related.

The Code has one rule that requires withdrawal:

> DR 2-110 Withdrawal from Employment.
>
> . . . .
>
> (B) Mandatory withdrawal.
>
> . . . [a] lawyer representing a client in other matters shall withdraw from employment, if:
>
> . . . .
>
> (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

The following are applicable as guides concerning disclosure and disqualification:

> EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. . . .
>
> EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. . . .
>
> EC 5-16 In those instances in which a lawyer is justified

> in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. . . .
>
> EC 5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

As the details of the banking department investigation of Commonwealth became known to respondent, his prior business and lawyer-client relationships with Marvin Copple came into sharp focus as conflicts of interest highlighted by (1) Copple's receipt of the illegal $500,000 fee from Commonwealth in early 1981, described by Barry Lake as amounting to theft; (2) respondent's own personal knowledge and experience of borrowing large sums of money from Commonwealth in real estate developments with Copple, where the procedures were suspect; (3) the contents of the March 10, 1983, letter from the FBI to Paul Amen that was received by respondent; and (4) confirmation, in June 1983, from Ruth Anne Galter, assistant attorney general, to respondent that there was merit in Lake's report that Marvin Copple may have stolen money from Commonwealth.

Respondent contends that Lake did not tell him all of the facts about the amount of money that Copple was alleged to have stolen, but, rather, "he told me that they were doing some investigation into a matter and that Marv Copple may have stolen or got money by theft from Commonwealth." However, respondent made no inquiries to determine the facts of this allegation.

It was not enough for respondent to tell Lake that he had prosecuted friends before and if Copple was involved in a crime he would be prosecuted.

Respondent also contends that during this 1982 to 1983 investigation period, he had no duty to either disclose or disqualify because (1) there was statutory authority and interoffice policy that the Attorney General would neither conduct an investigation of an institution then under investigation by the banking department nor institute prosecution of a person that was a part of such investigation until requested to do so by the banking department, and he had received no such request; (2) Paul Amen had directed that respondent take no action since it might "blow the lid off" and destroy the whole industry; and (3) respondent had assigned Ms. Galter to assist in the Commonwealth investigation. These facts were true; however, they do not negate his duties to disclose and disqualify under the Code.

During this time there was deep concern by the Director of Banking and Governor Robert Kerrey for the survival of the whole industrial loan industry in Nebraska. Key decisions were being made resulting from conferences between those officials and others, including respondent in his role as Attorney General. It was necessary, and those decisionmakers were interested in the subject matter and expected respondent to contribute his independent judgment (Canon 5). Yet respondent did not disclose to these officials his past relationships with Marvin Copple and business associations with Commonwealth, and he did not disqualify himself as Attorney General until November 18, 1983. Governor Kerrey testified that if he had known about respondent's relationships, he would have requested an investigation by some person other than respondent. In disposing of count I, we said, "where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation." That same rationale is applicable here. Respondent had a duty to make a full and truthful disclosure to the interested State officials concerning the nature of his conflicts. His silence was a clear violation of the Code requiring disclosure, without regard to whether or not the outcome of pending or future official investigations would have been changed, and was tantamount to a false representation that there was no conflict.

From the clear and convincing evidence, we conclude,

contrary to the finding of the referee and his reliance on *Adams v. Adams*, 156 Neb. 778, 58 N.W.2d 172 (1953), that when respondent was first advised by Lake that Marvin Copple may have stolen money from Commonwealth, respondent clearly had a duty to disclose to the Director of Banking and to Governor Kerrey the existence of his prior lawyer, business, and personal relationships with Marvin Copple, and also his real estate loan history with Commonwealth. Further, respondent had conflicts in the whole Commonwealth investigation that were adverse in a material way and substantially related, to the end that he had a duty to disqualify himself as Attorney General no later than July 1, 1983, which was a reasonable time after Ms. Galter had confirmed in June 1983 that there was merit in the allegation that Marvin Copple had taken money illegally from Commonwealth. Having failed to disqualify himself until November 18, 1983, respondent violated the Code, and he is subject to discipline.

Respondent contends that under subsection 8D of count XI, the relator was required to show that his failure to disqualify himself "would impair public confidence in the administration of justice in the State of Nebraska and would be prejudicial to the administration of justice."

" 'Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute [sic] grounds for suspension or disbarment.' " *State ex rel. Nebraska State Bar Assn. v. Strom*, 189 Neb. 146, 151, 201 N.W.2d 391, 393 (1982). The conduct of a government attorney is thus required to be more circumspect than that of a private lawyer. This is the inevitable result of the fact that government attorneys are invested with the public trust and are more visible to the public. As such, improper conduct on the part of a government attorney is more likely to harm the entire system of government in terms of public trust. *Matter of Petition for Review of Opinion No. 569*, 103 N.J. 325, 511 A.2d 119 (1986).

In *Howell v. State*, 559 S.W.2d 432, 436 (Tex. Civ. App. 1977), the court defined "prejudicial" as meaning "tending to injure or impair; detrimental; harmful; hurtful; [or]

injurious," and held that "[c]onduct prejudicial to the administration of justice may consist of any one or more of many acts too numerous to list."

In *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972), the court held that the term "prejudicial" is a word found universally throughout the legal and judicial system and is defined as hurtful, injurious, or disadvantageous.

The failure of respondent to make the required disclosures to the State officials responsible for making major decisions affecting the banking industry and the whole State of Nebraska was compounded by his failure to disqualify himself prior to July 1, 1983. Together, the confidence of the public was impaired, and the effect was an impairment of the administration of justice.

Subsection 8E

This general allegation relates to the November 25, 1983, letter sent by David Domina, special assistant attorney general (appointed by respondent on November 18, 1983, to handle all matters relating to Commonwealth), to respondent, requesting full information concerning respondent's relationships with Marvin Copple and Commonwealth. Instead, respondent's statements under oath were taken November 30 and December 12, 1983.

By the investigative nature of the statements, we see the main issue here as the duty of respondent to tell the truth. That general issue has been discussed in relation to count I. For that reason, subsection 8E does not require further discussion.

DISCIPLINE TO BE IMPOSED

Having determined that the respondent is subject to discipline, the remaining issue is to determine what discipline is appropriate under the facts and circumstances of this case.

As we stated in *State ex rel. Nebraska State Bar Assn. v. Cook*, 194 Neb. 364, 232 N.W.2d 120 (1975):

> The determination of what is appropriate discipline in this case is not without difficulty. Many matters must be considered. These include the nature of the offenses, the need for deterrence of similar future misconduct by others, maintenance of the reputation of the bar as a whole, protection of the public and clients, the expression

> of condemnation by society on moral grounds of the prohibited conduct, and justice to the respondent, considering all the circumstances and his present or future fitness to continue in the practice of law. Drinker, Legal Ethics (1963), pp. 48, 49; State ex rel. Spillman v. Priest, 123 Neb. 241, 242 N.W. 433; In re Dreier, 258 F.2d 68; State ex rel. Nebraska State Bar Assn. v. Butterfield, *supra*; State ex rel. Nebraska State Bar Assn. v. Mathew, 169 Neb. 194, 98 N.W.2d 865; State ex rel. Nebraska State Bar Assn. v. Strom, 189 Neb. 146, 201 N.W.2d 391.

Id. at 384, 232 N.W.2d at 130.

> The purpose of a disbarment proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether he should be permitted to continue to practice law. State ex rel. Nebraska State Bar Assn. v. Wiebush, 153 Neb. 583, 45 N.W.2d 583.

State ex rel. Nebraska State Bar Assn. v. Rhodes, 177 Neb. 650, 660, 131 N.W.2d 118, 125 (1964).

The following matters are of importance in determining the discipline which should be imposed. The record does not show any history of prior violation of respondent's oath as an attorney or of the Code of Professional Responsibility. Insofar as this court is informed, until his involvement with Marvin Copple and the Commonwealth Savings Company, the respondent served honorably as the Attorney General of this state.

It must be recognized that no contention is made that the respondent was responsible for the collapse of Commonwealth Savings Company, and no proceeding has established such responsibility. Although respondent entered into transactions with Copple which resulted in personal gain to the respondent, and those transactions enabled Copple to drain funds from Commonwealth at a time when it was in precarious financial condition, the role of the respondent was relatively minor so far as Commonwealth was concerned.

More serious is the fact that the respondent entered into improper transactions with Copple and Commonwealth, which later necessitated his withdrawal from any matters involving Commonwealth at a time when his services were most urgently

needed by the State and its Department of Banking.

As we stated in the *Cook* case at 387, 232 N.W.2d at 132:

> A judgment of permanent disbarment is a most severe penalty, as anyone who is dependent upon some special skill or knowledge for his own livelihood will quickly recognize if he contemplates for a moment the impact of being deprived by judicial fiat of the use of that skill and knowledge. Disbarment ought not to be imposed for an isolated act unless the act is of such a nature that it is indicative of permanent unfitness to practice law.

Furthermore, we believe there is little likelihood of repetition of unethical conduct by the respondent in the future.

We conclude that the appropriate discipline in this case is suspension from the practice of law for a period of 4 years commencing December 20, 1984.

During the period of suspension the respondent shall not engage in the practice of law in any manner whatsoever in this or any other jurisdiction; shall not engage in any conduct which would subject him to discipline under the disciplinary rules if he were engaged in the practice of law; and shall comply fully with the judgment in this proceeding.

Costs of this proceeding, in the amount of $36,028.94, are taxed to the respondent. All costs except the respondent's docket fee, in the amount of $50, having been paid by the relator, the respondent shall reimburse the relator directly in the amount of $35,978.94.

JUDGMENT OF SUSPENSION.

ELMER J. HOFFMAN, ALSO KNOWN AS PETE HOFFMAN, APPELLANT, V. REINKE MANUFACTURING COMPANY, INC., A NEBRASKA CORPORATION, APPELLEE.

416 N.W.2d 216

Filed December 4, 1987. No. 86-042.

1. **Records: Judgments: Final Orders: Appeal and Error.** To obtain a review by the Nebraska Supreme Court the transcript on appeal must contain the judgment, decree, or final order sought to be reversed, vacated, or modified.
2. _____: _____: _____: _____. A transcript on appeal to the Nebraska Supreme Court which contains only a notice that a judgment was rendered and not the judgment itself does not satisfy the requirement that a transcript on appeal must contain the judgment, decree, or final order sought to be reversed, vacated, or modified.
3. **Judgments.** A judgment finally determines the rights of the parties.
4. _____. The act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, constitutes the rendition of a judgment or decree.
5. _____. Failing a notation on the trial docket, a judgment is rendered when some written notation is made and filed in the records of the court.
6. **Contracts: Equity.** Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value.
7. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving him or her the benefit of all favorable inferences which may reasonably be drawn from the evidence.
8. **Actions.** A cause of action "accrues" when the aggrieved party has the right to institute and maintain suit.
9. **Limitations of Actions: Laches: Equity.** The doctrine of laches may, under appropriate circumstances, shorten the time within which an action in equity could otherwise have been brought.
10. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that the moving party is entitled to judgment as a matter of law.

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

David E. Cording, for appellant.

Rodney P. Cathcart of Erickson & Sederstrom, P.C., for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff-appellant, Elmer J. Hoffman, also known as Pete Hoffman, alleged that defendant-appellee, Reinke Manufacturing Company, Inc., a Nebraska corporation, breached an express agreement to develop Hoffman's unpatented idea for a corner irrigation system and pay him a royalty thereon, or unjustly enriched itself by appropriating the idea. Reinke Manufacturing answered by denying Hoffman's claims and asserting that any cause of action Hoffman may have had is time barred and that the parties abandoned any contractual rights which might have existed. The district court granted Reinke Manufacturing's motion for summary judgment and dismissed Hoffman's petition. Hoffman assigns as error the district court's conclusions that (1) the action is time barred and (2) Reinke Manufacturing is entitled to judgment as a matter of law. Reinke Manufacturing claims this appeal is not properly before us because the transcript does not contain the judgment or decree from which Hoffman purports to appeal. Reinke Manufacturing's claim is without substance, and we reverse and remand for further proceedings.

We concern ourselves first with the claim that this appeal was not perfected in accordance with our rules and the law. The transcript on appeal contains a "Notice of Judgment" which states that "on November 4 1984, judgment was rendered in the above case for [sic] Summary Judgment for defendant is hereby granted," but does not contain the judgment to which the notice purportedly refers. The transcript does contain Hoffman's subsequent timely motion, which asks the district court to "vacate the judgment sustaining Defendant's Motion for Summary Judgment and dismissing this cause, entered on the 4th day of November, 1985 . . ." It also contains an order, dated December 10, 1985, which recites that the matter came on for hearing on December 5, 1985, and that "the plaintiff's Motion to Vacate Judgment is overruled and summary judgment is entered in favor of defendant and against the plaintiff, and plaintiff's Petition is hereby dismissed." A second

"Notice of Judgment" recites that "on December 5 1985, judgment was rendered in the above case for [sic] MOTION TO VACATE SUMMARY JUDGMENT OVERRULED." Hoffman filed a notice of appeal on January 3, 1986, stating that he appeals "from the decision rendered herein on December 5, 1985, overruling my Motion to Vacate Judgment and Dismissing the Petition herein."

Reinke Manufacturing correctly argues that a transcript on appeal to this court which does not contain a final order or judgment presents nothing for review. *Propeck v. Propeck*, 79 Neb. 218, 112 N.W. 302 (1907). Thus, to obtain a review by this court the transcript on appeal must contain the judgment, decree, or final order sought to be reversed, vacated, or modified. *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987); *McCook Equity Exch. v. Cooperative Serv. Co.*, 223 Neb. 197, 388 N.W.2d 811 (1986); Neb. Ct. R. of Prac. 4A(1) (rev. 1986). We have also held that in an error proceeding a recital that a judgment was rendered upon the verdict was insufficient. *Stone v. Neeley*, 34 Neb. 81, 51 N.W. 314 (1892). Therefore, a mere notice that a judgment was rendered will not suffice. However, the record in this case contains more than the notices which advise that some type of action was taken on November 4 and December 5, 1985; it also contains the order dated December 10, 1985.

We have said that a judgment finally determines the rights of the parties and that the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, constitutes the rendition of a judgment or decree. *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986); *Federal Land Bank of Omaha v. Johnson, supra; Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987). We have also said that failing a notation on the trial docket, a judgment is rendered when some written notation is made and filed in the records of the court. *Federal Land Bank v. McElhose, supra; Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984). Thus, because of the language contained in the order dated December 10, 1985, the summary judgment dismissing Hoffman's petition was rendered on December 5, 1985, irrespective of

whatever may have transpired earlier in the case. The transcript therefore contains the judgment from which the subject appeal is taken.

We next observe that although Hoffman originally pled two alternative theories of recovery, express contract or implied contract, during a pretrial conference he relinquished the express contract theory by announcing that "he was basing his theory of recovery upon the general principles of 'quantum meruit.' " We therefore are concerned only with the contract implied in law theory of recovery based on the equitable doctrine that one will not be allowed to profit or enrich oneself unjustly at the expense of another. *Haggard Drilling, Inc. v. Greene*, 195 Neb. 136, 236 N.W.2d 841 (1975). It has been said that where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value. *Haggard Drilling, Inc. v. Greene, supra; Bush v. Kramer*, 185 Neb. 1, 173 N.W.2d 367 (1969).

The facts relevant to the foregoing implied contract theory and the defenses raised by Reinke Manufacturing are that in August of 1968 Hoffman approached Richard Reinke (Reinke), then president of Reinke Manufacturing, about an idea Hoffman had for a corner irrigation system. As a result, Reinke arranged to meet with Hoffman at the latter's home to discuss the matter.

Prior to this meeting, Hoffman and his brother-in-law had roughly sketched a drawing of the system, the concept of which Hoffman then thought to be original with him, and had the sketch notarized. In essence, the idea involved attaching a swinging arm controlled by a steerable wheel to an irrigation system.

According to Hoffman, Reinke looked the drawings over and said he thought the idea was a good one. Hoffman and Reinke discussed developing the idea and obtaining a patent on it, as well as the employment of Hoffman by Reinke Manufacturing.

As a consequence, Hoffman began working for Reinke Manufacturing that month. Hoffman thought his duties

included aiding Reinke in the development of Hoffman's idea. Hoffman worked for Reinke Manufacturing until 1973 or 1974, then worked elsewhere for 9 months and returned to Reinke Manufacturing, where he remained until approximately 1976. However, Reinke never worked with Hoffman to develop the system Hoffman had conceived.

Believing that Reinke Manufacturing was not going to develop his system, Hoffman, unknown to Reinke, took his idea to Valmont Industries sometime during the spring of 1971. Valmont, however, was not interested. Later, Reinke Manufacturing became involved in litigation with Valmont. On March 14, 1981, Reinke asked Hoffman for his cooperation in the Valmont suit and to make copies of Hoffman's original drawings. Hoffman did cooperate with Reinke and gave a deposition in connection with the Valmont suit.

In April 1981 Hoffman became aware through sales literature prepared by Reinke Manufacturing that it was selling a corner irrigation system which utilized a swinging arm and steerable wheels.

This matter comes to us on the sustainment of a motion for summary judgment; thus, we must view the evidence most favorably to Hoffman and give him the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Moseman v. L & P Investment Co.*, 226 Neb. 677, 414 N.W.2d 254 (1987); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

So viewed, the evidence leads to the conclusion that Reinke Manufacturing developed Hoffman's concept for a corner irrigation system, is selling a system based upon that idea, and is profiting therefrom. Under such circumstances, it would be unjust, inequitable, and unconscionable not to require Reinke Manufacturing to pay Hoffman a reasonable portion of the profits Reinke Manufacturing makes from selling systems conceived by Hoffman. Accordingly, the law implies the existence of a contract requiring Reinke Manufacturing to pay Hoffman a reasonable royalty on each such corner irrigation system it sells.

Reinke Manufacturing asserts, however, that any cause of action Hoffman might have had based upon such an implied

contract is time barred. Neb. Rev. Stat. § 25-204 (Reissue 1985) provides that, with an exception not material to this inquiry, civil actions "can only be brought within the following periods, after the cause of action shall have accrued." Neb. Rev. Stat. § 25-206 (Reissue 1985) provides: "An action upon a contract, not in writing, expressed or implied . . . can only be brought within four years." Thus, the cause of action on which Hoffman proceeds must have been instituted within 4 years from the date it accrued. A cause of action "accrues" when the aggrieved party has the right to institute and maintain suit. *Lake v. Piper, Jaffray & Hopwood Inc.*, 219 Neb. 731, 365 N.W.2d 838 (1985). Hoffman acquired the right to institute and maintain this suit when Reinke Manufacturing sold a corner irrigation system, for that is when Reinke Manufacturing began to benefit from Hoffman's idea. So far as the record shows, the sale of the system occurred at the same time Hoffman became aware of the fact, sometime in April of 1981. This suit was first filed on March 9, 1984, and last amended on March 18, 1985. Thus, whether the operative amended petition relates back to March 9, 1984, is immaterial, for the suit was instituted in any event within 4 years from April 1, 1981.

We recognize, of course, that the subject cause of action is one in equity and that for that reason the doctrine of laches might, under certain circumstances, serve to shorten the time within which the action could otherwise be brought. *Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). However, we find nothing in the record presently before us which requires that the period of limitations specified by statute be shortened.

Finally, Reinke Manufacturing's assertion that Hoffman abandoned such contractual rights as he may have had translates into a claim that he waived or is somehow estopped from recovering under the contract implied in law. See, *Simonson v. "U" Dist. Office Bldg. Corp.*, 70 Wash. 2d 35, 422 P.2d 1 (1966); *Bd of Directors v. Western National Bank*, 139 Ill. App. 3d 542, 487 N.E.2d 974 (1985). The only conduct revealed by the record relating to this claim is that Hoffman took his idea to Valmont in 1971. Whether such conduct provides the elements required to establish either a waiver or estoppel need not be decided, for it was conduct which occurred

before the event giving rise to the contract implied in law; that is, the sale by Reinke Manufacturing of a corner irrigation system based on Hoffman's concept.

A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that the moving party is entitled to judgment as a matter of law. *Moseman v. L & P Investment Co.*, 226 Neb. 677, 414 N.W.2d 254 (1987); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

This is not such a case, for, as the foregoing analyses demonstrate, the record thus far developed does not establish that Reinke Manufacturing is entitled to judgment as a matter of law.

The judgment of the district court is reversed and the matter remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HELEN MCCOY, APPELLANT, V. KAREN STEFFEN AND BANK OF HARTINGTON, A CORPORATION, APPELLEES.

416 N.W.2d 16

Filed December 4, 1987. No. 86-167.

1. **Uniform Commercial Code: Security Interests.** There must be compliance with the filing requirements of Neb. U.C.C. art. 9 (Reissue 1980 & Cum. Supp. 1984) in order to perfect a security interest.
2. **Uniform Commercial Code: Security Interests: Time.** Under Neb. U.C.C. § 9-312(5) (Cum. Supp. 1984), conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier.
3. **Uniform Commercial Code: Security Interests: Crops.** Neb. U.C.C. § 9-312(2) (Cum. Supp. 1984) refers to production loans for current crops.

4. _____: _____: _____. The reference in Neb. U.C.C. § 9-312(2) (Cum. Supp. 1984) to "obligations due more than six months before the crops become growing crops" refers to obligations more than 6 months overdue at the time the crops became growing crops.
5. **Uniform Commercial Code: Security Interests.** The renewal of a previous note constitutes new value and is sufficient to support a security agreement.
6. **Appeal and Error.** Consideration of an issue in this court is limited to errors assigned and discussed.

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

Vince Kirby, for appellant.

John Thomas, for appellee Bank of Hartington.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

BOSLAUGH, J.

This action was commenced by the plaintiff, Helen McCoy, to recover $12,071.89 alleged to be due her under a farm lease on land owned by the plaintiff in Knox County, Nebraska. The lease provided for cash rent to be paid by the defendant lessees, Fred Steffen and Karen Steffen, and that unpaid rent should be a lien upon crops raised on the premises. The petition further alleged that the defendant Bank of Hartington claimed an interest in the crops grown and stored on the premises.

Because the defendants Steffen had advertised a farm sale, the plaintiff obtained an order of attachment under which 5,600 bushels of corn stored on the premises were attached.

The Bank of Hartington filed an answer, alleging that it had a perfected security interest in the corn attached by the plaintiff by reason of a prior security agreement executed by the defendant Fred Steffen securing a promissory note on which $150,029.88 was due the bank. The answer prayed for an order directing the sheriff to deliver the attached corn to the bank.

Pursuant to a stipulation between the plaintiff and the bank, the corn was sold and the proceeds paid in to the clerk of the court.

On May 20, 1985, the bank filed an amended answer and counterclaim, alleging loans of new money on four dates in 1984 and claiming damages from the plaintiff for wrongful

attachment.

On December 10, 1985, the trial court found that the lien of the bank on the corn was prior to the plaintiff's lien and that the bank was entitled to recover damages from the plaintiff in the amount of $411.83 and costs in the amount of $1,776.58, including attorney fees in the amount of $880. The plaintiff has appealed.

The controversy in this court is between the plaintiff and the bank. The plaintiff contends that the trial court erred in finding that the lien of the bank was prior to that of the plaintiff and in awarding damages and attorney fees to the bank on its counterclaim.

In *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982), we held that there must be compliance with the filing requirements of Neb. U.C.C. art. 9 (Reissue 1980) in order to perfect a security interest in a contractual landlord's lien. In this case the plaintiff did not file any financing statement.

Under Neb. U.C.C. § 9-312(5) (Cum. Supp. 1984), conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier. Since the bank's financing statement had been filed earlier, its lien was prior to that of the plaintiff.

The plaintiff further contends that the trial court erred in finding that § 9-312(2) did not give the plaintiff priority. Section 9-312(2) provides:

> A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

Section 9-312(2) refers to production loans for current crops. Comment 2 to § 9-312(2) (Reissue 1980). The plaintiff in this

case never perfected a security interest in "growing crops."

The plaintiff did not perfect a security interest in the corn, if at all, until after the corn had been harvested and was no longer a "growing crop."

To meet the requirements of § 9-312(2), the bank's earlier perfected security interest must have secured obligations due more than 6 months before the crops became growing crops, by planting or otherwise. This requirement has been interpreted to give priority "only over obligations more than six months *overdue* at the time the crops become growing crops." (Emphasis supplied.) J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 25-6 at 1053 (2d ed. 1980); *In re Connor*, 733 F.2d 523 (8th Cir. 1984). In the *Connor* case the court held that a loan is not overdue within the meaning of § 9-312(2) if installment payments are due within 6 months before the crops become growing crops. See, also, *United States v. Minster Farmers Coop. Ex., Inc.*, 430 F. Supp. 566 (N.D. Ohio 1977).

The bank, by renewal of the notes signed by Fred Steffen, the last renewal being on December 20, 1984, gave new value and prevented the original loan from being considered "overdue." In *First Nat. Bank in Pierre, S.D. v. Feeney*, 393 N.W.2d 458 (S.D. 1986), in interpreting an identical statute, the court held that the renewal of a previous note constitutes "new value" and was sufficient to support a security agreement. The giving of new value prevented the loan from being considered overdue.

The assignment of error regarding damages and attorney fees was not discussed in the plaintiff's brief. Consideration of an issue in this court is limited to errors assigned and discussed. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986).

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF K.L.C. AND K.C., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. C.R.C., MOTHER, APPELLEE, C.L.C., FATHER, APPELLANT.

416 N.W.2d 18

Filed December 4, 1987. No. 86-246.

1. **Juvenile Courts: Appeal and Error.** An appeal to this court from an order of the separate juvenile court is heard de novo on the record, and, in that review, the findings of fact made by the juvenile court will be accorded great weight by this court because the juvenile court observed the parties and the witnesses and can better judge their credibility.
2. _____: _____. The juvenile court has broad discretion as to the disposition of children neglected as defined in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986).

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

C.L.C., pro se.

Leigh Ann Retelsdorf, Deputy Lancaster County Attorney, for appellee State.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

This is an appeal from the separate juvenile court of Lancaster County, Nebraska. Appellee C.R.C. is the natural mother of the two female children in this case. Appellant, C.L.C., is the adoptive father of K.L.C., born September 23, 1968, and the natural father of K.C., born July 10, 1976. On September 1, 1982, the separate juvenile court adjudicated both children to be children as defined in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982). On October 28, 1985, a supplemental petition was filed in the juvenile court, alleging that the younger child was a child as defined in § 43-247(3)(a) (Cum. Supp. 1986). The older child was not the subject of this supplemental petition.

The older child was placed in foster care after the adjudication of September 1, 1982, has continued in such care, and is not the subject of these proceedings insofar as this appeal

is concerned. On February 20, 1986, the juvenile court ordered in a dispositional order, insofar as the younger child, K.C., and appellant are concerned, that K.C. should continue in the care of her mother, that appellant should have no contact with K.C., that appellant should correct the conditions of neglect adjudicated by the court, and that K.C. should not be removed from Lancaster County without court permission.

After the filing of the initial pleading in juvenile court in 1982, an attorney was appointed to represent appellant. At a hearing on December 11, 1985, the attorney was permitted to withdraw, at appellant's request. The attorney was then appointed to be appellant's legal advisor. After that date appellant represented himself. C.L.C. appeals "from the adjudication of January 20, 1986 and the dispositional order of February 20, 1986, ordering no contact with his natural daughter . . . due to alleged inappropriate sexual contact and alleged neglect of said daughter." In his pro se brief, appellant alleges that the juvenile court erred in finding "by clear and convincing evidence that appellant had inappropriate sexual contact with his daughter, [K.C.]," and that the juvenile court "abused its discretion in ordering there be no contact between the appellant and his daughters." This will be treated by this court as an appeal from the juvenile court's dispositional order of February 20, 1986, as to the younger child only, since the older child has passed the age of 18 and is no longer a juvenile as defined in Neb. Rev. Stat. § 43-245 (Cum. Supp. 1986), and because appellant's notice of appeal is directed to the court orders with regard to the younger child only.

Appellant assigns four other errors allegedly made by the court in the hearing of this case, such as the unsupported allegation that "[t]he Separate Juvenile Court of Lancaster County was prejustice [sic] against the appellant andd [sic] failed to listen to the evidence that was presented . . . ." The frivolousness of this particular alleged error is displayed when it is considered that the record shows that the court conducted at least 16 separate hearings and authorized appellant to present a bill of exceptions exceeding 1,200 pages to this court. Appellant has been given a full and fair hearing on all issues he has sought to present and has been denied no procedural right. The last

four assignments of error set out in appellant's brief are without any merit and will not be considered further in this opinion.

Turning to appellant's first assignment of error, an examination of the entire record shows that there is more than sufficient evidence to support the juvenile court's adjudication that "[K.C.] lacks proper parental care due to the faults and habits of her father, [C.L.C.]. On or between November 1, 1984, and February 28, 1985, [C.L.C.] engaged in inappropriate sexual contact with [K.C.]." The court made further specific findings as to this inappropriate contact. The court concluded its adjudicatory order by finding that "[K.C.] is a child as defined by Neb. Rev. Stat. § 43-247 (3a) by virtue of the faults and habits of [C.L.C.]."

An appeal to this court from the separate juvenile court is heard de novo on the record, and, in that review, the findings of fact made by the juvenile court will be accorded great weight by this court because the juvenile court observed the parties and the witnesses and can better judge their credibility. *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987).

Viewing the record in that light, we find that the evidence fully supports the court's finding that all the allegations in the supplemental petition of October 28, 1985, are true.

Without reciting the details of the evidence, the younger child testified, in detail, to improper sexual contact committed by C.L.C. on her during the times alleged in the supplemental petition. The child was subjected to cross-examination by appellant himself in a fashion which the juvenile court described as "the most grueling examination the court has ever heard." The cross-examination covered 156 pages in the bill of exceptions. The child's testimony throughout supported the allegations of the supplemental petition. Other witnesses testified in corroboration of details of K.C.'s testimony.

Appellant testified to the contrary and presented other evidence that he was a good father. The juvenile court did not believe appellant's testimony, and determined the allegations of the supplemental petition were true. We fully agree. The juvenile court did not err in finding that appellant had inappropriate sexual contact with his daughter, K.C.

In its dispositional order of February 20, 1986, the court

ordered, in part, that "2. [K.C.] shall continue in the care of her mother . . . . 3. [C.L.C.] shall have no contact with [K.C.] until he presents proof to the court that he has changed and that it would be in the best interest of the child for there to be contact." In his second assignment of error, appellant contends that the juvenile court abused its discretion in so ordering. Appellant's assignment of error in this regard is also without merit.

Among the facts known to the juvenile court during the hearings on the supplemental petition was the fact that appellant was in the custody of the Department of Correctional Services following this court's affirmance, set out at 219 Neb. 70, 361 N.W.2d 206 (1985), of the lower court's finding appellant guilty of the crime of first degree sexual assault on a child under 16 years of age, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1985). This was a crime committed by appellant against the older child. Evidence was also presented in the form of letters written by appellant to K.C. Those letters showed that appellant blamed many of his problems on K.C.'s mother. Appellant contends in his brief that K.C. "lied on the stand." Brief for Appellant at 6. If appellant continues to be of the same opinions expressed in his letters and continues to display the same attitudes toward K.C. as set out in his cross-examination of the child, the only possible protection for K.C.'s future is the forbidding of future contact between appellant and K.C. We have held that the juvenile court has broad discretion as to the disposition of children neglected as defined in § 43-247(3)(a) (Cum. Supp. 1986). *In re Interest of R.A. and V.A., supra; In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985).

The juvenile court did not abuse its discretion and did not err in its adjudicatory order or its dispositional order. The court's judgment is affirmed.

AFFIRMED.

KURT T. KLEIVA, APPELLEE, V. PARADISE LANDSCAPES AND AID INSURANCE COMPANY, APPELLANTS.

416 N.W.2d 21

Filed December 4, 1987. No. 86-1095.

1. **Workers' Compensation: Appeal and Error.** The findings of fact of the Workers' Compensation Court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong.
2. **Workers' Compensation.** When a worker has reached maximum recovery, the remaining disability is permanent and such worker is no longer entitled to compensation for temporary disability.
3. _____. Compensation for temporary disability should cease as soon as the extent of permanent disability is ascertainable.
4. _____. Injuries to the body as a whole are compensated under Neb. Rev. Stat. § 48-121(1) and (2) (Cum. Supp. 1986) and refer to loss of employability and earning capacity, and not functional and medical loss alone.
5. **Evidence: Records: Appeal and Error.** Information not contained in the record before the court cannot be considered on appeal.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

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

Ronald J. Palagi and Scot M. Bonnesen, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

The defendants, the employer and insurance carrier, have appealed an award of the Nebraska Workers' Compensation Court, which entered a running award to plaintiff on account of temporary total disability. Assigned as error is the finding that plaintiff remains temporarily totally disabled.

In reviewing this type of case, we are governed by several well-established legal principles. The findings of fact of the Workers' Compensation Court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong. *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987).

When a worker has reached maximum recovery, the remaining disability is permanent and such worker is no longer entitled to compensation for temporary disability. *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985).

Injuries to the body as a whole are compensated under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1984), and refer to loss of employability and earning capacity, and not to functional and medical loss alone. *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987).

The plaintiff-appellee, who was trained as a welder, was hired by the defendant-appellant Paradise Landscapes in September 1984. His duties there included welding, landscaping, and general maintenance.

On September 26, 1984, the plaintiff sustained a back injury while working for the defendant. As a result, the plaintiff was unable to continue working as a welder. The Workers' Compensation Court entered an order on May 7, 1985, finding that the plaintiff was temporarily totally disabled, and awarded temporary total disability payments and vocational rehabilitation benefits to the plaintiff.

The plaintiff attended the Hobart School of Welding Technology in Troy, Ohio, from September 1985 to February 1986, under a vocational training program. During that time, the plaintiff received weekly disability payments from the defendants, and his tuition and travel expenses were paid by the state Vocational Rehabilitation Fund. Upon completion of the training in February 1986, the plaintiff was certified as an associate welding inspector, and the defendants discontinued the temporary total disability payments to him.

Although certified, the plaintiff feels that he would be unable physically to perform the activities of an associate welding inspector, and has not been employed since completing his training.

The plaintiff has remained under the care of his physician, Dr. Patrick W. Bowman, an orthopedic surgeon, since the accident occurred. He is still "having problems" with his lower back and remains on medication prescribed by the doctor. He testified that he has "progressively gotten worse" since the time he first saw the doctor, both in restriction of movement and the

presence of pain. Additionally, the plaintiff notes in his brief that he had back surgery in March 1987 and is currently recuperating. This information was not before the court on rehearing and cannot be considered on appeal. *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985).

The doctor stated in his deposition that the plaintiff has had a temporary total disability since his injury. He also stated that the plaintiff had a 15-percent permanent impairment as a result of his back condition. The doctor is of the opinion that the plaintiff has "reached maximum medical benefit" and does not anticipate "any major changes in his functional capacities in the future."

Based on a hearing held on May 29, 1986, before the Workers' Compensation Court, an award was entered which found that the plaintiff remained temporarily totally disabled and ordered the defendants to resume compensation payments from February 18, 1986 (the time at which the defendants had ceased the payments), and into the future for so long as the plaintiff remains temporarily totally disabled. This award was affirmed on rehearing.

The following depositional testimony of Dr. Bowman is of particular significance in determining whether plaintiff's disability is still of a temporary nature:

> Q. Has there been a change in the therapy program he's undergone in that time?
>
> A. Well, there has. This last six weeks or so after he underwent the functional capacity he did undergo a course of sort of specialized type of therapy, which is sort of emphasized as biomechanics and activities of daily living and is more — rather than being symptomatic care for the spine, that is, ultrasound, heat treatments, that sort of thing, was geared more to conditioning of the spine, sort of a different tac[k]. . . .
>
> Q. The more recent therapy that you mentioned, has he been involved in that long enough to have a resultive effect of that therapy?
>
> A. I do not feel that as far as his symptom levels it's probably going to make much difference one way or the other. I think it would hopefully improve his functional

levels. . . . It may raise his lifting limits 15, 20 pounds, but I suspect that the limits that we saw initially are going to be in the ballpark, no matter how much we have or therapy or anything else we apply to him. And to answer your basic question, I think he has reached maximum medical benefit. And I really don't anticipate any major changes in his functional capacities in the future.

Q. Doctor, did Mr. Kleiva ever give you a history of any vocational rehabilitation program he's been involved in?

A. No. I think he talked to me about —

Q. No specifics were discussed relative to his condition or his back condition?

A. No, sir.

It was quite apparent that based upon the medical evidence there will be no significant improvement in the plaintiff's functional capacities so as to improve his employability and earning capacity. We need not determine at this time the ability of the physician to ascertain or evaluate these latter factors in the absence of the foundational evidence, which was not furnished to him.

The fact remains that the only credible medical evidence demonstrates that the plaintiff will get no better or no worse because of the injury he sustained. He had reached his maximum recovery, his disability was permanent, and he was no longer entitled to temporary disability benefits.

The finding by the compensation court that plaintiff continues to suffer temporary total disability is not supported by credible evidence, and it is therefore clearly wrong. The cause must be remanded to that court for determination of the extent of permanent disability that plaintiff now suffers.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF K.C. AND C.C., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. A.H., APPELLANT.

416 N.W.2d 24

Filed December 4, 1987. No. 87-157.

1. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence and shall be issued only as a last resort when no other alternative exists.
2. **Parental Rights: Appeal and Error.** An order terminating parental rights will be reviewed by the Supreme Court de novo on the record, which requires this court to reach a conclusion independent of the findings of the trial court, but this court may give weight to the findings of the trier of fact, the juvenile court, because that court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Parental Rights.** A parent's failure to take proper measures to protect the children from abuse by another furnishes sufficient cause to terminate parental rights.
4. _____. Children have a right to grow up in a wholesome and healthful atmosphere, free of fear of abuse or injury.

Appeal from the County Court for Hall County: RICHARD E. WEAVER, Judge. Affirmed.

Jerry J. Milner, for appellant.

John R. Brownell, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

This is an appeal from the judgment of the county court for Hall County, sitting as a juvenile court, which had terminated the parental rights of A.H. to her daughter, K.C., born June 21, 1982, and her son, C.C., born February 4, 1981. We affirm.

The custody rights of the natural father are not involved in this appeal. The errors assigned by the mother are: (1) The court erred in finding that there was clear and convincing evidence that parental rights should be terminated; (2) the rehabilitation plan ordered by the court was not reasonable; and (3) the court erred in allowing exhibits 2 and 21 into evidence.

The mother and her boyfriend began living together, along with the two minor children, in September of 1984. The

daughter, K.C., was admitted to the hospital on May 5, 1985, with a fractured femur. Additionally, examination of her revealed several very fresh abrasions on her cheeks and chin and some moderate bruises over bony prominences of the cheeks, a shallow laceration of the upper gingiva over both central incisors, a moderately old bruise on the lower right leg, and nearly healed fracture sites at the left 9th and 10th ribs. The mother reported that she did not see the child fall, in the bathroom, and explained the lacerations and bruises as having occurred when the child fell down some steps and from having been pushed into a fence by her brother. Additionally, there was a "mouse" under one eye and two circular burns, which the mother said occurred when the child ran into the mother's hand which was then holding a cigarette. (The "mouse," she said, was caused when the mother's boyfriend tossed a doll to the child.)

During various interviews while in foster care, where they yet remain, the children have described being hit, punched, and "flushed down the toilet." The minor boy commented as late as September 23, 1986, that "we wanna go back (to mother), but we can't . . . 'cause [the boyfriend is] still there, and we don't want him to beat us." Both children stated that they love their mother and would like to live with her, but consistently stated they will not go home if the boyfriend remains there. Neither child appeared to feel reassured that the mother's friend would not be present and/or that they would be protected from him, according to the reports of the welfare workers.

The evidence is uncontroverted that the boyfriend was charged with a felony count of child abuse involving the minor girl, eventually pleaded guilty to the amended charge of misdemeanor child abuse, and was sentenced to 1 year in the Hall County jail.

The boyfriend described the incident in which the little girl's leg was broken as an accident; that he was in the bathroom when she came in to use the potty chair and that he went out and then heard a thump, went back into the bathroom, and found her on the floor. He claimed not to have known anything about the cigarette burns to the little girl until he heard the testimony during these proceedings, in spite of the fact that the mother

had testified that he was out in the yard with them when the incident occurred. Although the mother had indicated that the boyfriend on occasions had swatted the kids in the rear end, he said that was not for discipline purposes, but was just "little [wrestling] matches on the floor." The boyfriend admitted he pleaded guilty to child abuse. However, he described the incident as one at a particular time when he "was a little tested or hot or something" and the minor girl was lying on the bed and could not move and wanted her doll, so he started tossing stuff, dolls, over his head, behind his head, and one of them struck her right below the eye. "I'll admit to that," he said.

The boyfriend testified that since getting out of jail, he is still living with the mother. He says he is going to continue living at the address where the mother lives, and he feels that "we want to live together, and have the children back home."

The mother agrees that she and the boyfriend are still living together. She is vague as to how long this living arrangement will continue; she has stated that she has plans to marry him, yet at other times she has stated that marriage was only "[w]ishful thinking." She feels that her future with her boyfriend is uncertain at this time, but admits that she is currently financially dependent on him.

For a long time the mother steadfastly denied that there was any abuse of her children by the boyfriend. However, she admitted that on one visitation her son had asked her why she had let the boyfriend beat and punch on him and stood there and watched him. She said that the foster mother had put the boy up to saying that. However, she did finally admit that her children might be telling the truth that the boyfriend had inflicted injuries on them, and that their fear might be justified.

On June 4, 1985, a juvenile petition was filed, alleging that the children were in a situation dangerous to their health through no fault of the custodial parent. At a hearing held on June 27, custody of the children was placed with the Department of Social Services (DSS), they were placed in a temporary foster home at the time, and later, in October, were moved to a second home, where they still remain.

On August 8, 1985, the mother admitted the truth of the allegations in the petition and was ordered to comply with the

terms of an agreement formed by her, her boyfriend, and DSS. Among other things, the agreement called for her to undergo a psychological evaluation, to attend parenting classes, to seek employment, to continue weekly visitations with the children, and to participate in counseling as recommended. Furthermore, the boyfriend was ordered to have no contact with the children.

At a dispositional hearing held on February 19, 1986, the mother was again ordered to comply with the requirements of the August agreement. In particular, she was ordered to participate and cooperate in a psychological evaluation; to participate and cooperate in an alcohol/drug evaluation and comply with the recommendations of the evaluator; to show a consistent record of weekly, punctual visits with the children; to seek full-time employment; to provide DSS with monthly financial records; and to obtain suitable housing for herself and her children. The court further ordered that no other adults, except relatives of the children, were to be permitted to reside in such housing.

Shortly after this hearing, the boyfriend pled guilty to Class I misdemeanor child abuse. On April 21, 1986, the mother and the boyfriend moved to a new address, a one-bedroom residence at 516 North Wheeler. On May 2, the boyfriend went to jail to begin serving his sentence for his child abuse conviction. However, on November 5, 1986, he injured his back and was released from jail to convalesce at the mother's home, where he was still residing at the time of the hearing.

On July 17, 1986, the county attorney moved for an order terminating the parental rights of the mother, alleging that she had failed to correct the conditions leading to the determination that the children were as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984).

The hearing on the motion to terminate parental rights was held on October 14 and November 18, 1986, and was completed on January 8, 1987. Evidence was adduced regarding the extent of the appellant's compliance with the rehabilitation program devised for her.

The record reflects that although the rehabilitation program provided for weekly visitation, the mother was late or absent on

several occasions. Specifically, the appellant failed to show for visitations on August 28, October 10, November 7, December 12, and December 26, 1985, and January 23, October 23, November 6, and November 11, 1986. She was also 40 minutes late on September 26, 1985, 15 minutes late on October 17, 1985, 20 minutes late on October 24, 1985, 45 minutes late on October 31, 1985, and 20 minutes late on September 4, 1986.

The mother was also ordered to undergo a psychological evaluation. Although she attended one session with the psychologist, Dr. England, on September 13, 1985, she failed to show up for additional appointments scheduled for September 23, November 1, and December 17, 1985, and January 24, 1986. She attended a second session with Dr. England on May 27, 1986, more than 8 months after the first session. Because the doctor felt that scheduling additional appointments would not be beneficial in light of the appellant's attendance record, he notified the appellant that further sessions would not be necessary. The mother described these sessions as unnecessary and "silly."

In October and November of 1985, she did attend and complete parenting classes at the YWCA, as required by the court.

In addition, the mother obtained part-time employment at the CJR restaurant in December 1985. In May 1986 she quit the job at CJR because of a conflict with her boss, and in the summer of 1986 she found employment at Village Inn as a waitress. In approximately December 1986, she left Village Inn to begin employment at Wheeler's. She has submitted financial records to DSS as requested.

The court also ordered the mother to comply with the recommendations given by the counselor after a drug/alcohol evaluation. The mother did not schedule an evaluation until July 31, 1986. She failed to show up for this appointment. On September 3, 1986, she did submit to the evaluation, at which time the counselor recommended inpatient treatment for a codependency problem. Briefly, the counselor explained that the mother was "extremely dependent and pre-occupied with another person"—in this case the boyfriend—and that inpatient treatment would be the only effective remedy. The

mother refused inpatient treatment, in part because she did not agree that she had a problem necessitating treatment, and in part because she felt that undergoing inpatient treatment could cause her to lose her job.

The State filed a motion to terminate parental rights on July 17, 1986. The mother was represented by counsel at all stages of the proceedings. The children also had court-appointed counsel. The evidentiary hearings were held on October 14 and November 18, 1986, and January 8, 1987, at which the evidence covering the foregoing facts was set forth.

By order filed on January 26, the court ordered termination of parental rights. The court found that although the mother had minimally complied with certain requirements imposed upon her by the court, her failure to substantially comply constituted substantial neglect of the children. More specifically, the court determined that the mother had elected to maintain her relationship with the boyfriend to the detriment of being able to provide a safe and proper atmosphere for the minor children.

An order terminating parental rights must be supported by clear and convincing evidence, *In re Interest of C. W.*, 226 Neb. 719, 414 N.W.2d 277 (1987), and should be issued only as a last resort when no other alternative exists. Such an order will be reviewed by this court de novo on the record, which requires the court to reach a conclusion independent of the findings of the trial court, but this court may give weight to the findings of the trier of fact, the juvenile court, because that court heard and observed the witnesses and accepted one version of the facts rather than the other. *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987).

Although the mother's attitude and actions showed some ambivalence, it comes across quite clearly that she was not truly devoted to a choice favoring the welfare of her children as opposed to a continuing relationship with her boyfriend. It is quite apparent that the boyfriend's presence in the household poses a real and present risk to the safety of the children.

We have quite consistently held that a parent's failure to take proper measures to protect the children from abuse by another furnishes sufficient cause to terminate parental rights. See, *In*

re Interest of Hollenbeck, 212 Neb. 253, 322 N.W.2d 635 (1982); *In re Interest of Carlson*, 207 Neb. 540, 299 N.W.2d 760 (1980); *In re Interest of Goodon*, 208 Neb. 256, 303 N.W.2d 278 (1981). Children have a right to grow up in a wholesome and healthful atmosphere, free of fear of abuse or injury. *In re Interest of Carlson, supra*. There is insufficient evidence in the record to convince us that the mother's living habits or arrangements are likely to change.

The juvenile court could not place the children with the mother in view of her conduct with and attitude toward her boyfriend and in view of her continuing relationship with him, and indefinite foster care is unacceptable. The court had no alternative but termination, as the mother was unwilling to make a clear choice of her children over her boyfriend. *In re Interest of J. and R.*, 216 Neb. 183, 342 N.W.2d 660 (1984).

The rehabilitation plan as to living arrangements, if nothing else, was reasonable. The evidence found in the record, without regard to exhibits 2 and 21, was sufficient to support a clear and convincing finding that the trial court acted in the children's best interests, and therefore we need not discuss that assignment of error.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN J. FITZGERALD, RESPONDENT.

416 N.W.2d 28

Filed December 4, 1987. No. 87-206.

Original action. Judgment of suspension.

Dennis Carlson, Counsel for Discipline, and Alison Larson, for relator.

John H. Kellogg, Jr., for respondent.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an original disciplinary proceeding against John J. Fitzgerald, an attorney admitted to practice in Nebraska. The referee appointed by this court has filed a report containing findings of fact and recommendations.

The facts in this case are not in dispute. In 1980 Fitzgerald was hired by G. Maxine Hoskins to represent her as the executrix of the estates of Gertrude P. Schrank and Helen A. Schrank. On April 23, 1984, Fitzgerald received the amount of $3,730.32 from Hoskins for the purpose of paying the inheritance tax due on both Schrank estates. Fitzgerald deposited the amount into an account entitled "John J. Fitzgerald, Atty at Law, Escrow Account." Fitzgerald subsequently withdrew a total of $3,630 from the account for personal use. The inheritance tax went unpaid until May 5, 1986, when Fitzgerald voluntarily paid $5,997.36, representing the amount due and owing plus accrued interest and penalties.

Fitzgerald admits that his action constitutes a violation of the Code of Professional Responsibility. See, Canon 1, DR 1-102, and Canon 9, DR 9-102, of the Code of Professional Responsibility. We need only now determine the appropriate discipline.

In *State ex rel. NSBA v. Miller*, 225 Neb. 261, 265, 404 N.W.2d 40, 43 (1987), this court said that "[w]hile we have previously held that conversion of a client's funds requires disbarment [citations omitted], we have also held that 'disbarment is inappropriate in the absence of specifically delineated injuries' to a client as a result of an attorney's misconduct. [Citations omitted.]" In this case no damage, financial or otherwise, has been suffered by the estates or their heirs, or by the client, G. Maxine Hoskins.

We have also held that mitigating circumstances should be considered in determining the appropriate discipline. *Id.*

Fitzgerald was involved in two automobile accidents, one in 1982 and one in 1983, and suffered serious personal injuries in

both accidents. The injuries prevented Fitzgerald from practicing law on a full-time basis in 1983 and 1984, and resulted in a substantial loss of income. While this situation may explain the respondent's conduct, it does not constitute a mitigating factor in the sense that it excuses or justifies the respondent's conduct.

There are, however, a number of mitigating circumstances in this case. In *Miller, supra* at 266, 404 N.W.2d at 43, we said that "[w]hile an attorney's restitution of a client's converted funds *prior* to being faced with accountability may not exonerate such misconduct, restitution . . . is a significant mitigating factor to be considered in determining an appropriate sanction for an attorney's conversion of a client's funds." Fitzgerald's restitution in this case is a significant mitigating factor.

The record also contains evidence of the following mitigating circumstances: (1) absence of complaint from any client; (2) cooperation with the Counsel for Discipline in disposing of the charges, which are neither denied nor minimized by Fitzgerald; (3) a previously unblemished record as an attorney; (4) overwhelming remorse; and (5) a reputation of good moral character.

The respondent filed with this court a "Conditional Admission" which accepts responsibility and punishment upon this court's acceptance of the following terms:

> a. That the Court enter an Order suspending him from the practice of law for a period of one (1) year;
>
> b. That the period of suspension commence on January 1, 1988;
>
> c. That John J. Fitzgerald be permitted to function in a non-lawyer paralegal and/or law clerk capacity during the period of his suspension;
>
> d. That prior to reinstatement John J. Fitzgerald will complete a course on legal ethics at an ABA accredited law school.
>
> e. That all costs of this action be taxes [sic] to John J. Fitzgerald.

The referee in this case recommended substantially the same punishment. Counsel for Discipline has not taken exception to this recommendation or the respondent's conditional

admission.

Fitzgerald's violation of the Code of Professional Responsibility is a serious matter. We agree, however, that under the circumstances suspension is the appropriate sanction.

It is therefore the judgment of this court that the respondent, John J. Fitzgerald, be, and hereby is, suspended from the practice of law in Nebraska for a period of 1 year, effective January 1, 1988. All other terms of respondent's "Conditional Admission" are accepted and ordered.

JUDGMENT OF SUSPENSION.

NEBRASKA MUTUAL INSURANCE CO., APPELLANT, V. FARMLAND INDUSTRIES, INC., ET AL., APPELLEES.

416 N.W.2d 221

Filed December 11, 1987. No. 86-054.

Appeal and Error. Where the appellant's brief does not contain specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), the judgment will be affirmed in the absence of any plain error this court may note.

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

Eugene L. Hillman of McCormack, Cooney, Mooney, Hillman & Pirtle, for appellant.

Ronald H. Stave of Stave, Coffey & Swenson, P.C., for appellees.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

The appellant's brief that was filed May 6, 1986, contained no specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

Having reviewed the record and finding neither compliance with those rules nor plain error, we affirm the judgment.

AFFIRMED.

CORNHUSKER CHRISTIAN CHILDREN'S HOME, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA ET AL., APPELLANTS.

416 N.W.2d 551

Filed December 11, 1987. No. 86-055.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the Supreme Court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Administrative Law: Minors: Public Policy.** Public policy in Nebraska does not prohibit the Department of Social Services of the State of Nebraska from enacting a regulation proscribing the use of physical punishment in licensed child-caring facilities.
3. **Minors: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.
4. **Administrative Law: Minors.** Neb. Rev. Stat. § 43-708 (Reissue 1984) does not provide an agency standing in loco parentis with an affirmative right to inflict corporal punishment upon children residing in licensed child-caring facilities. Section 43-708 simply limits the Department of Social Services' power to forcibly remove a child from the home of his parents or guardian, or one standing in loco parentis prior to State intervention into the parent-child relationship.
5. **Administrative Law: Parental Rights: Minors.** Parents' natural and superior rights to have custody of their children have always been protected and maintained by the courts, but those rights are not absolute or inalienable, as society also has a paramount interest in the protection of the rights of children to be loved, to be cared for properly, and to have proper moral training and education. The State's parens patriae power obligates it to protect the welfare and interests of the child.
6. _____: _____: _____. The parents' natural right to the care and custody of a child is limited by the State's power to protect the health and safety of children. An agency standing in loco parentis to a parent is similarly limited by the State's parens patriae power to protect the best interests and welfare of children within its jurisdiction.
7. _____: _____: _____. A parent has a personal right to determine the appropriate discipline to be inflicted upon the child, but the State has a paramount interest in protecting the health and welfare of a child from parental discipline decisions which may cause the child emotional or physical harm. The State has a compelling interest in the health and safety of children within the State's jurisdiction.
8. **Administrative Law: Statutes: Legislature.** The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the

policy of a statute.

9. _____: _____: _____. An administrative agency's rulemaking authority is limited to the power delegated to the agency by the statute which the agency is to administer.
10. _____: _____: _____. An administrative agency's rulemaking authority is essential to the agency's exercise of its power in efforts to achieve a purpose intended by the Legislature.
11. _____: _____: _____. The validity of an administrative agency's rule or regulation is contingent upon consistency with the statute under which the rule or regulation is promulgated.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed.

Robert M. Spire, Attorney General, and Royce N. Harper, for appellants.

Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an appeal from a judgment entered by the district court for Lancaster County in favor of Cornhusker Christian Children's Home, Inc. (Cornhusker), and against the Department of Social Services (DSS) of the State of Nebraska. In December 1984 Cornhusker brought a declaratory action, asserting that the DSS regulation in Neb. Admin. Code tit. 474, ch. 6, § 6-005.26K (1983) (Regulation 6-005.26K) contravenes state common and statutory law (Neb. Rev. Stat. §§ 28-1413 (Reissue 1985) and 43-708 (Reissue 1984)); exceeds DSS' authority under state law (Neb. Rev. Stat. § 71-1904 (Reissue 1986)); establishes an arbitrary and capricious classification between the regulation of physical punishment imposed in child-caring agencies and that of family day-care homes; and violates the Nebraska and U.S. Constitutions under the due process and equal protection clauses of U.S. Const. amend. XIV. The district court found that the public policy of the State of Nebraska authorizes the use of corporal punishment upon children residing in child-caring facilities. The district court further found that a parent may delegate authority to

administer reasonable corporal punishment and that persons in loco parentis have the authority to use reasonable corporal punishment for discipline and control of children placed in their care. The district court also found that the distinction made by DSS between child-caring facilities and family day-care homes with respect to the use of corporal punishment was arbitrary and capricious. The district court then held that the subject regulation was void and unenforceable, since it exceeded the authority and power granted to DSS under state law. DSS has appealed and requests that this court reverse the judgment of the district court, thereby upholding the regulation and the prohibition against the use of physical punishment as a proper expression of DSS' duty to promulgate rules necessary for the care and protection of children in Nebraska.

Cornhusker is a nonprofit corporation licensed by the State of Nebraska as a child-caring agency to provide 24-hour residential care for children placed in the agency by parents, courts, and DSS. Timothy Loewenstein, a member of Cornhusker's board of directors, described the Cornhusker home as composed of a number of cottages under the control of various houseparents who assume the responsibility of representing the children's parents. Situated on a 160-acre ranch, each cottage consists of a large, seven-bedroom home containing kitchen and dining room facilities, a social area, and a bedroom area. Cornhusker is licensed to provide necessary care for 19 children; the home presently cares for 4 girls and 11 boys, ranging in age from 8 to 16 years. In recent months two of the children were placed in the home by the State, and the remainder of the children were privately placed by their parents or guardians. Since Cornhusker's inception as a child-caring agency, approximately two-thirds of the children have been placed in the home by the courts.

Loewenstein also testified that Cornhusker's primary responsibility is to provide a suitable environment for the care and proper development of the children under its control. Between 1973 and 1983, an established ingredient of Cornhusker's disciplinary policy endorsed the spanking of children on the buttocks for purposes of discipline and control. The precise language of this pre-1983 disciplinary policy

provided for the use of "[c]orporal punishment such as a spanking on the buttocks by the open hand or a suitable instrument for the purpose of inflicting temporary pain."

In September 1983 DSS promulgated a regulation prohibiting the use of physical punishment in child-caring agencies. The regulation is expressed in Regulation 6-005.26K:

> Discipline: Each agency shall develop written policies regarding discipline.
>
> Agency staff shall:
>
> 1. Use discipline only as a learning process in which certain specified consequences are the result of unacceptable behavior; and
>
> 2. Never use the following as discipline:
>
> a. Physical punishment or abuse;
>
> b. Denial of necessities;
>
> c. Chemical or mechanical restraints; or
>
> d. Derogatory remarks, abusive or profane language, yelling or screaming, or threats of physical punishment.

Under Regulation 6-005.26K, physical punishment was prohibited in all child-caring facilities licensed by DSS; however, the limited use of physical punishment was allowed in family day-care homes. Under protest, Cornhusker amended its disciplinary policy to conform to Regulation 6-005.26K, which prohibited the use of physical punishment, in order to ensure that its license would be renewed as a child-caring facility.

Prior to October 1983, DSS approved of Cornhusker's disciplinary policy authorizing a houseparent to spank a child on the buttocks by applying an open hand or a suitable instrument for the purpose of inflicting temporary pain. Loewenstein testified that the former policy approving corporal punishment was applied as a last resort under controlled situations, and only after explaining to the child the reason for such an application of spanking, followed by the administration of the spanking itself. According to Loewenstein, physical punishment had the power of a deterrent, and corporal punishment was necessary to cause a child to change his behavior and conform with the standards that were expected. In the absence of corporal punishment,

Cornhusker has encountered various difficulties with the children's behavior. Cornhusker's former policy of spanking children promoted the welfare of the children entrusted to Cornhusker's care. Every parent who has made a private placement of his or her child with Cornhusker has expressly granted permission or encouraged Cornhusker to apply corporal punishment when the child disobeys the policies or rules of the home. However, Cornhusker has not used corporal punishment to effectuate its disciplinary policies subsequent to DSS' regulation proscribing physical punishment in child-caring agencies.

DSS called witnesses to testify with respect to Regulation 6-005.26K. James B. Maney was involved in the development of the current standard prohibiting the use of physical discipline in child-caring agencies. Maney acted as project manager for a DSS task force which reviewed regulations governing the licenses for group homes and child-caring agencies. Chartered in May 1978, the task force was provided with the authority to review current policy regarding the process for the issuance of licenses for group homes and child-caring agencies, and to do whatever research was necessary to provide recommendations to DSS about the revision of both the license process and the requirements. The task force's research involved the review of current disciplinary policies in child-caring agencies. Maney testified that the adoption of the corporal punishment regulation was based upon model regulations issued by the Department of Health and Human Services and by a "consortium of providers, administrators of licensing programs and various professionals in the field of child care." These regulations were to be used by State agencies as a model for their own formulation of licensing regulations. Maney noted that these model standards uniformly forbid the use of corporal punishment.

Maney testified that DSS permits spanking, with parental consent, in family day-care centers, but does not allow spanking in child-caring agencies. This family day-care regulation admonishes the day-care provider to "obtain prior written permission from the parent(s) before spanking children (only the open hand on the buttocks) to prevent them from

harming themselves, other persons, or property." Neb. Admin. Code tit. 474, ch. 6, § 6-001.15B4(3) (1984). Maney defined a family day-care center as a private home providing care for a part of the day for children under the age of 12.

As an alternative method of discipline, Maney admitted that DSS approves of a child-caring agency's use of a lockup facility. Maney explained that a lockup facility is a room employed by a child-caring agency when the agency is faced with a crisis situation, including situations in which the agency seeks to limit a child's behavior. The DSS task force recommendations listed the lockup facility as an acceptable method of punishment, but recommended that "[t]he following types of punishment shall be clearly excluded: slapping, spanking, paddling, belting, and limiting basic food requirements."

Debra Dawson testified for DSS concerning her role in reviewing, revising, and developing licensing policies, procedures, and regulations. Prior to her current position, Dawson was responsible for the administration of the day-care licensing program before January 1, 1984. Dawson testified that DSS' licensing of day-care facilities includes three types of day-care homes: group day-care homes, day-care centers, and preschool facilities. Residential facilities encompass foster homes, group homes, child-caring agencies, and child-placing agencies.

Explaining the differences between residential care and day care, Dawson testified that the differentiating factor involved in residential care is the 24-hour care provided to the children. Dawson related that residential care often involves children who are placed outside of their parents' custody because of problems within the family. Dawson further testified there were a number of reasons for allowing physical punishment in family day-care homes, while proscribing physical punishment in child-caring facilities. First, children in day-care homes infrequently come from abusing families. Moreover, the children's parents visit the day-care home twice a day. Second, Dawson explained that day-care homes have small numbers of children, and a significant number of the day-care providers and the children's parents believed that day-care homes should permit spanking, with certain restrictions. The primary

consideration, according to Dawson, is that children within the day-care home setting are within their parents' custody; conversely, children in residential care settings are usually placed in the agency by the courts or DSS, and are not in the custody of their natural parents. Finally, child-caring facilities are group-oriented, more institutional and restrictive, and less family-like. As a result, the child-caring facility is, in Dawson's words, "very little like a family situation."

On appeal to this court, DSS asserts numerous assignments of error; however, these can be grouped into four assignments. DSS maintains that the district court erred in holding that the public policy of the State of Nebraska authorizes the use of corporal punishment upon children residing in child-caring facilities; in holding that persons who stand in loco parentis have an affirmative right to use reasonable corporal punishment, thus allowing parents to delegate to third parties the authority to administer corporal punishment; in holding that DSS exceeded its authority under state law in promulgating a regulation prohibiting the use of corporal punishment upon children residing in licensed child-caring agencies; and in holding that DSS' distinction between the use of corporal punishment in child-caring facilities and family day-care homes is arbitrary and capricious. Underlying these assignments of error is DSS' position that the corporal punishment regulation is a proper expression of the State's parens patriae power to set standards for the care and protection of children within its jurisdiction.

In the present case, Cornhusker alleged, and the district court declared, that certain statutory provisions and Nebraska case law express a State public policy precluding DSS from prohibiting corporal punishment in child-caring agencies, parents may delegate to those in loco parentis the authority for corporal punishment of children, DSS exceeded its statutory power to promulgate regulations, and DSS' regulation prohibiting corporal or physical punishment is arbitrary and capricious. These are questions of law. In an appeal from a declaratory judgment, the Supreme Court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Johnston v.*

Panhandle Co-op Assn., 225 Neb. 732, 408 N.W.2d 261 (1987); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986); *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985).

DSS assigns as error the district court's determination that Nebraska public policy authorizes reasonable corporal punishment in licensed child-caring agencies. The district court based its conclusion upon two sources of law that purportedly express a public policy in favor of reasonable corporal punishment. Initially, the district court relied upon §§ 28-1413 and 43-708 as the primary statutory provisions expressing the Nebraska public policy in favor of corporal punishment.

Section 28-1413 provides in pertinent part:

> The use of force upon or toward the person of another is justifiable if:
>
> (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:
>
> (a) Such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
>
> (b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation; or
>
> (2) The actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:
>
> (a) The actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor; and
>
> (b) The degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under subdivision (1)(b) of this section . . . .

Section 43-708, in turn, provides:

> No official, agent or representative of the Department

> of Social Services shall, by virtue of sections 43-701 to 43-709, have any right to enter any home over the objection of the occupants thereof or to take charge of any child over the objection of the parents, or either of them, or of the person standing in loco parentis or having the custody of such child. Nothing in sections 43-701 to 43-709 shall be construed as limiting the power of a parent or guardian to determine what treatment or correction shall be provided for a child or the agency or agencies to be employed for such purposes.

We respectfully disagree with the district court in its conclusion that public policy in Nebraska provides a child-caring agency with an affirmative right to apply reasonable corporal punishment. Section 28-1413 is found in chapter 28, article 14, and is a criminal defense provision of the Nebraska Criminal Code. Section 28-1413 enumerates several classes of persons, including parents, guardians, teachers, and others, who, if prosecuted for an offense involving otherwise criminal force exerted on or toward a minor, may assert a defense of justifiable force regarding that minor. Section 28-1413, however, does not contain any language which, in the area of civil law, precludes the State from regulating the use of force by these same classes of persons mentioned in the criminal statute. Accordingly, § 28-1413 does not create or confer an affirmative right to use physical or corporal punishment, but, rather, the statute only provides a defense against criminal liability. Section 28-1413 extends the defense to a "parent or guardian" when the parent or guardian is caring for or supervising a minor; nevertheless, parents do not derive their authority or affirmative right to discipline their children from this criminal defense statutory provision.

Similarly, § 43-708 cannot be interpreted as preventing DSS from regulating the disciplinary methods imposed upon children in child-caring agencies. Section 43-708 limits DSS' power to enter the home of a parent who retains the custody of a child, or the person standing in loco parentis to the child. This statute restricts DSS from forcibly removing a child from the parent, guardian, or person standing in loco parentis prior to any departmental or court-authorized intervention. Section

43-708 does not supply insulation from DSS' regulatory authority when agencies receive children from the State, parents, or courts. This interpretation is consistent with the other statutory provisions in chapter 43, article 7. For example, Neb. Rev. Stat. § 43-701 (Reissue 1984) authorizes DSS to license child-caring agencies; thus, DSS "may grant or revoke such a license and make all needful rules regarding the issuance or revocation thereof." Neb. Rev. Stat. § 43-705 (Reissue 1984), moreover, provides that DSS may visit any child placed in a child-caring agency in order to ascertain whether a child is being properly cared for and living under moral surroundings. Beyond this statutory power, Neb. Rev. Stat. § 43-706 (Reissue 1984) establishes DSS' statutory authority to file a complaint in the proper juvenile court when DSS has reason to believe that any person having the care or custody of a child is an "improper person for such care or custody, or subjects such child to cruel treatment, or neglect, or immoral surroundings . . . ." Finally, Neb. Rev. Stat. § 43-707 (Reissue 1984) provides in part:

> The Department of Social Services shall have power and it shall be its duty (1) *to promote the enforcement of all laws for the protection and welfare of defective, illegitimate, dependent, neglected, and delinquent children*, except laws whose administration is expressly vested in some other state department or division hereof and to take the initiative in all matters involving such children where adequate provision therefor has not already been made; (2) *to visit and inspect all public and private institutions, agencies, societies, or persons caring for, receiving, placing out, or handling children* . . . .

(Emphasis supplied.)

When §§ 43-707 and 43-708 are read together, the limiting language contained in § 43-708 pertains only to a private, family home where a parent or other person with custody of a child retains custody of the child. Consequently, when the child is placed with an agency, society, institution, or other person, DSS is authorized to oversee and regulate those agencies which place or care for these children. DSS' regulatory authority is triggered when the children are placed with the agencies which care for, receive, place out, or handle children. Section 43-708

merely reaffirms the parent or guardian's right to determine the treatment and correction of the child, or the agency to be employed for treatment and correction, prior to a possible placement by a State agency or the courts. We conclude, therefore, that the language contained in § 43-708 does not preclude DSS from enacting or enforcing a regulation prohibiting the use of physical punishment in child-caring facilities.

In light of our interpretation of §§ 28-1413 and 43-708, we cannot conclude that these statutes codify a public policy prohibiting DSS from promulgating a regulation which prohibits physical punishment in licensed child-caring facilities.

In *United Seeds, Inc. v. Hoyt*, 168 Neb. 527, 96 N.W.2d 404 (1959), this court was confronted with a problem in determining the State's public policy in connection with a statute relating to labeling on containers of agricultural seed sold in Nebraska. United Seeds sought a declaration that Hoyt, as director of the Department of Agriculture and Inspection of the State of Nebraska, did not have the power to prohibit United Seeds' use of labels containing the following language: " 'UNITED SEEDS, INC., warrants to the extent of the purchase price that seeds or bulbs sold are as described on the container within recognized tolerances. Seller gives no other or further warranty, expressed or implied' . . . ." *Id.* at 528, 96 N.W.2d at 405. The agriculture director claimed that his authority to restrict or prohibit seed container labels was founded on Nebraska's public policy expressed in "The Nebraska Seed Law," which provided:

> "The name and address of the person who labeled said seed or who sells, offers or exposes said seed for sale within this state. No tag or label shall be affixed to any package or container of agricultural seed or mixture thereof, unless the same has been approved by the Department of Agriculture and Inspection."

Id. at 529, 96 N.W.2d at 406.

Holding that the agriculture director did not have the authority claimed by public policy, this court, in *United Seeds, Inc. v. Hoyt, supra*, stated:

> Public policy has been defined in varying terms but a

> definition which has been accepted in numerous jurisdictions is as follows: "That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. * * * The principles under which the freedom of contract or private dealings is restricted by law for the good of the community." Black's Law Dictionary (3d Ed.), p. 1374.
>
> It may be said with certainty that the act contains no specific declaration of public policy in this connection. Does it by reasonable inference or implication contain such a declaration? We think not.
>
> . . . There is nothing in the act or its title which specifically gives or purports to give the department any control over or voice in the rights and liabilities between a seller and purchaser of seed. Likewise there is nothing which either by inference or implication gives the department any such control. It is therefore impossible to find a source from which it could be said that there was a declaration of public policy which would permit or require the defendants to reject the declaration of limited warranty which plaintiff intended to place upon its tags or labels.

Id. at 531, 96 N.W.2d at 407.

In the present case, we find that §§ 28-1413 and 43-708 do not provide any expressed legislative indication of any public policy prohibiting DSS from regulating the use of corporal punishment in licensed child-caring facilities.

Citing *Clasen v. Pruhs*, 69 Neb. 278, 95 N.W. 640 (1903), and *Fisher v. State*, 154 Neb. 166, 47 N.W.2d 349 (1951), the district court in this case further determined that this State's public policy is reflected in the common law of Nebraska. Reliance upon those cases, however, is misplaced. *Clasen v. Pruhs, supra*, involved a suit to recover damages for the inhumane and cruel treatment suffered by a minor while in the care and custody of the minor's maternal aunt. The plaintiff alleged that she was subjected to cruel and unnecessary torture, beatings, and whippings, and improperly clothed and fed while under her aunt's care and custody. As a result, the plaintiff maintained

that she suffered permanent injuries to her health and growth. The sole issue focused upon whether or not the plaintiff was subjected to inhumane and brutal treatment in excess of the authority properly reposed in the aunt during the time the plaintiff's aunt stood in loco parentis to the child. In *Clasen* we applied the rule that "[a] parent, teacher or master is not liable either civilly or criminally for moderately correcting a child, pupil or apprentice, but it is otherwise if the correction is immoderate and unreasonable." 69 Neb. at 283, 95 N.W. at 642. Nevertheless, *Clasen* does not stand for the proposition that a teacher, master, or child-caring agency has the affirmative right to administer reasonable corporal punishment. Indeed, the rule found in *Clasen v. Pruhs, supra*, is a restatement of the common-law rule that was later codified in the criminal defense provision of § 28-1413 of the Nebraska Revised Statutes.

Similarly, *Fisher v. State, supra*, was a criminal action in which the defendant had struck and whipped a child with a wooden ruler and stick, causing the child's death. In *Fisher*, this court repeated the rule that a parent, or one standing in the relation of a parent, is not liable either civilly or criminally for moderate and reasonable corporal punishment. *Fisher v. State*, however, does not support the proposition that one standing in the relation of a parent has the affirmative right to use physical punishment upon a child. These cases are limited to factual situations involving criminal and civil liability for the excessive use of physical punishment, abuse, or neglect of a child. Thus, *Clasen v. Pruhs, supra*, and *Fisher v. State, supra*, fail to support the view that the common law of Nebraska supports a clear public policy providing those who stand in the relation of a parent with the affirmative right to inflict physical punishment upon children.

We are unable to conclude that public policy in Nebraska prohibits DSS from enacting a regulation proscribing the use of physical punishment in licensed child-caring facilities. Therefore, we must conclude that the district court erred in determining that the public policy of Nebraska provides an affirmative right to a licensed child-caring facility to inflict corporal punishment.

DSS further maintains that the district court erred in holding

that persons who stand in loco parentis have the right to use reasonable corporal punishment, thus allowing parents to delegate to third parties the authority to administer corporal punishment. The district court determined that those parents who have placed their children in the Cornhusker child-caring agency specifically authorized Cornhusker to administer reasonable corporal punishment. Proceeding from this factual finding, the district court determined that the houseparents and superintendent of Cornhusker stand in loco parentis to a child in the care of the Cornhusker home because the home has placed itself in the situation of a lawful parent in accordance with the principles delineated in *Austin v. Austin*, 147 Neb. 109, 22 N.W.2d 560 (1946). Citing to § 43-708, the district court concluded that Cornhusker's in loco parentis status provided it with the authority to use reasonable corporal punishment for discipline and control.

As we stated previously, § 43-708 does not provide an agency standing in loco parentis with an affirmative right to inflict corporal punishment upon children residing in licensed child-caring facilities. Section 43-708 simply limits DSS' power to forcibly remove a child from the home of his parents or guardian, or one standing in loco parentis, prior to State intervention into the parent-child relationship. Therefore, § 43-708 cannot reasonably be interpreted as providing the child-caring agency with the affirmative right to inflict corporal punishment upon children residing in the agency. In *Austin v. Austin, supra* at 112-13, 22 N.W.2d at 563, we defined the in loco parentis relationship:

> "A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. . . ."

Although Cornhusker may stand in loco parentis to the children at the child-caring facility, the State has a legitimate interest in the proper care and protection of children within its jurisdiction. As we stated in *State v. Duran*, 204 Neb. 546, 554, 283 N.W.2d 382, 387 (1979):

> The parents' natural and superior rights to have custody of their children have always been protected and maintained by the courts, but those rights are not absolute or inalienable, as society also has a paramount interest in the protection of the right of children to be loved, cared for properly, and to have proper moral training and education.

Hence, the State's parens patriae power obligates it to protect the welfare and interests of the child. See, *Gorsuch v. Gorsuch*, 148 Neb. 122, 26 N.W.2d 598 (1947) (quoting 39 Am. Jur. *Parent and Child* § 15 (1942)); *State, ex rel. Bize, v. Young*, 121 Neb. 619, 237 N.W. 677 (1931).

The foregoing propositions of law demonstrate that even the parents' natural right to the care and custody of a child is limited by the state's power to protect the health and safety of children. Consequently, an agency standing in loco parentis to a parent is similarly limited by the State's parens patriae power to protect the best interests and welfare of children within its jurisdiction.

In *State ex rel. O'Sullivan v. Heart Ministries, Inc.*, 227 Kan. 244, 607 P.2d 1102 (1980), operators of a Christian children's home challenged the validity of certain state regulations and licensing requirements, contending that compliance with these regulations violated the home's rights under the "free exercise clause" in the first amendment to the U.S. Constitution. Among these regulations, the nonprofit Christian children's home objected to a regulation prohibiting the use of corporal punishment or other "[d]iscipline which is humiliating, frightening, or physically harmful." *Id.* at 249, 607 P.2d at 1106. However, the Kansas Supreme Court stated:

> The statutes and regulations to which the defendants object are all designed to protect, in one way or another, the children who are cared for in homes other than those provided by their parents. The licensing and inspection, as well as the myriad regulations, are concerned with the care and well being of the children—their shelter, health, diet, safety, education, and general welfare are of prime concern.

Id. at 253, 607 P.2d at 1108-09. Moreover, even though the

children's home in *O'Sullivan, supra*, asserted a fundamental right in the first amendment context, the Kansas Supreme Court held that the balance weighed heavily in favor of the State's power to protect children within its jurisdiction, stating that "[t]he compelling interest of the State, as *parens patriae*, is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements." *Id.* at 257, 607 P.2d at 1112.

Johnson v. Cal. State Dept. of Soc. Services, 123 Cal. App. 3d 878, 177 Cal. Rptr. 49 (1981), involved operators of a private day-care and preschool center who challenged a California Department of Social Services regulation prohibiting corporal punishment and other humiliating or frightening techniques. To obtain a license under California law, the plaintiffs were required by the Department of Social Services to state in writing that they would refrain from corporal punishment, including spanking, and would delete all references to spanking from the advertising and admission agreements.

In *Johnson*, the court stated that the plaintiffs were challenging a policy decision by the department to prohibit corporal punishment in licensed day-care centers. The plaintiffs alleged that the corporal punishment regulation violated the equal protection clause of the 14th amendment to the U.S. Constitution by establishing a suspect classification because parents of children similarly situated were subject to disparate treatment. In addition, the plaintiffs alleged that the regulation affected fundamental rights of parenting and that no compelling state interests were served by the regulation. Rejecting the plaintiffs' constitutional contentions, the court expressed:

> [W]e are here concerned with the delegation by the parents to third parties, and particularly state licensed care facilities, of the rights of discipline by corporal punishment. *We have been cited to no case which holds a State may not by regulation prohibit parents from either allowing or requiring others to administer corporal punishment to their children.* Parenting as a fundamental right is personal in nature. When parents delegate to third

> parties those decisions regarding child rearing, care, discipline and education, such delegation does not carry with it the constitutional protections inherent in the right of the parents. Moreover, *this parental duty and right is tempered by and subject to limitations. When parental decisions may jeopardize the health or safety of a child, the state may assert important interests in safeguarding that health and safety.*

(Emphasis supplied.) 123 Cal. App. 3d at 886, 177 Cal. Rptr. at 53 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)).

The preceding decisions from Kansas and California demonstrate that a parent has a personal right to determine the appropriate discipline to be inflicted upon the child, but the State has a paramount interest in protecting the health and welfare of a child from parental discipline decisions which may cause the child emotional or physical harm. With great emphasis, courts have described the State's interest as a compelling interest in the health and safety of children within the State's jurisdiction. See, *State ex rel. O'Sullivan v. Heart Ministries, Inc.*, 227 Kan. 244, 607 P.2d 1102 (1980); *Johnson v. Cal. State Dept. of Soc. Services, supra; DSS v Emmanuel Baptist*, 150 Mich. App. 254, 388 N.W.2d 326 (1986) (a regulation prohibiting corporal punishment reflected state's compelling interest in protecting young children from physical harm). In the case before us, the district court erred in concluding that child-caring agencies, by standing in loco parentis to a parent, have the right to use reasonable corporal punishment for discipline and control. DSS' regulation prohibiting corporal punishment is a proper expression of the State's parens patriae power to set standards for the care and protection of children within Nebraska. Our determination, however, should not be construed as deprecating the parents' personal right to use reasonable corporal punishment when disciplining their children.

Next, DSS contends that the district court erred in holding that the regulation prohibiting corporal punishment in licensed child-caring facilities exceeds the scope of DSS' rulemaking authority. The district court concluded that DSS' power is

limited to protecting children from unreasonable corporal punishment and does not extend to matters involving corporal punishment which is otherwise reasonable. DSS argues that § 71-1904 provides the legislative authority for Regulation 6-005.26K prohibiting physical punishment in licensed child-caring facilities. Section 71-1904 provides:

> The department shall make such rules and regulations, consistent with sections 71-1901 to 71-1905, as it shall deem necessary for (1) the proper care and protection of children by licensees under said sections, (2) the issuance, suspension and revocation of licenses to carry on the business of child care, and (3) the proper administration of said sections.

Cornhusker does not assert, nor did the district court hold, that § 71-1904 is an unconstitutional delegation of legislative authority to DSS. The sole question, therefore, is whether or not DSS exceeded its rulemaking authority in promulgating the corporal punishment regulation.

The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984). Nevertheless, the administrative agency's rulemaking authority is limited to the powers delegated to the agency by the statute which the agency is to administer. *County of Dodge v. Department of Health, supra; State ex rel. Marsh v. Nebraska St. Bd. of Agr.*, 217 Neb. 622, 350 N.W.2d 535 (1984); *Lincoln Electric System v. Terpsma*, 207 Neb. 289, 298 N.W.2d 366 (1980). An administrative agency's rulemaking authority is essential to the agency's exercise of its power in efforts to achieve a purpose intended by the Legislature. Therefore, the courts are not inclined to interfere with rules established by legislative direction when the rules bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred. *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960); *Board of Regents v. County of Lancaster*, 154 Neb. 398, 48 N.W.2d 221 (1951). Although an administrative agency's rulemaking authority is limited to the powers delegated by the express statutory provisions, "It is almost impossible for a

legislature to prescribe all the rules and regulations necessary for a specialized agency to accomplish the legislative purpose." *School Dist. No. 8 v. State Board of Education*, 176 Neb. 722, 726, 127 N.W.2d 458, 461 (1964). In *Motors Acceptance Corp. v. McLain*, 154 Neb. 354, 358, 47 N.W.2d 919, 921-22 (1951), we stated:

> "It is not always necessary that statutes and ordinances prescribe a specific rule of action. This is particularly true in those situations where it is difficult or impracticable to declare a definite, comprehensive rule, or where the discretion to be exercised by an administrative officer relates to a regulation imposed for the protection of public morals, health, safety, and general welfare. . . ."

The validity of an administrative agency's rule or regulation is contingent upon consistency with the statute under which the rule or regulation is promulgated. *County of Dodge v. Department of Health, supra.* Referring to § 71-1904, we note that the Legislature has authorized DSS to make such rules and regulations "as it shall deem necessary for . . . the proper care and protection of children." The corporal punishment regulation falls under the purview of this general standard providing DSS with the authority to determine the necessary regulations for proper care and protection of children within Nebraska. DSS' disciplinary standard has a direct relationship to the concepts of both child-care and child protection. In each case, DSS has made a determination concerning a specific type of care and protection which, in the present case, relates to corporal punishment. DSS has not used its rulemaking power to modify, alter, or enlarge provisions of the statute which it is charged with administering. *County of Dodge v. Department of Health, supra.* Moreover, as we stated in *Motors Acceptance Corp. v. McLain, supra*, an administrative agency will have considerable discretion when its regulation relates to the protection of public morals, health, safety, and general welfare.

DSS admitted that Regulation 6-005.26K was not promulgated in response to any specific incident of child abuse at a child-caring facility. However, DSS periodically reviews regulations pertaining to child-caring facilities, and the corporal punishment regulation was promulgated in an effort

to protect children from physical or psychological harm. Although Cornhusker asserts that it has the right to inflict "reasonable" physical punishment in licensed child-caring facilities, nevertheless, we agree with DSS that a "reasonableness" determination would be ad hoc in nature and would only come after a child has already been psychologically or physically harmed. In light of these facts, we hold that Regulation 6-005.26K properly comes within DSS' rulemaking authority to promulgate rules for the proper care and protection of children in licensed child-caring facilities.

DSS' final assignment of error asserts that the district court erred in holding that DSS' distinction between the use of corporal punishment in child-caring facilities and family day-care homes is arbitrary and capricious. The district court concluded that the reason for applying reasonable corporal punishment in family day-care homes similarly and equally applied to infliction of corporal punishment in the Cornhusker home, since houseparents at Cornhusker administered the punishment, and if unreasonable force were being used, that fact would more than likely be reported to a higher authority by the other children at Cornhusker home. DSS, however, contends that there is a clear rationale behind DSS' distinction in the disciplinary standards applied in the different facilities.

As pointed out by DSS' witness Debra Dawson, children in licensed child-caring facilities, like children in foster care, often come from abusive families, while children in family day-care centers are visited by their parents at the facility at least twice a day. A major distinction between these two types of facilities is that children in family day-care homes are generally within the custody of their own parents, while children in licensed child-caring facilities are, generally, placed there by courts and DSS. Children in family day-care homes, like children in foster homes, are faced with less severe problems than are children who are placed in the more institutional and restrictive environment of a child-caring agency. Therefore, child-caring agencies are more restrictive and offer a more structured environment than a family day-care home. In summary, unlike parents in child-caring facilities, parents of children in family day-care homes are actively involved in the upbringing of their

children and maintain close contact with the child-care provider.

In *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977), the U.S. Supreme Court analyzed the "openness" of the public school environment in holding that the use of corporal punishment in public schools did not constitute cruel and unusual punishment in violation of the eighth amendment:

> Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. *Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.*
>
> *The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.*

(Emphasis supplied.) 430 U.S. at 670.

DSS contends that, unlike public schools, 24-hour child-caring facilities are not open institutions. Evidence presented in this case concerning the restrictive and more institutionalized environment of the child-caring facility buttresses DSS' contention. Indeed, assuming that the majority of the children have been placed in the child-caring agency by the courts or DSS, as are two-thirds of the children in Cornhusker home, then the children do not have the support of their parents to intervene when the children may be mistreated. Moreover, child-caring agencies are not accountable to the same extent as are public schools. Finally, unlike family day-care home providers, who are often visited by the children's parents as frequently as twice a day, operators of 24-hour-a-day child-caring facilities are not accountable to the children's parents. The record does not support the district court's conclusion that a mistreated child would likely report an incident of mistreatment to a higher authority in Cornhusker

home.

DSS' special concern pertaining to corporal punishment inflicted upon children in licensed child-caring facilities reflects the State's legitimate right and duty to protect and nurture its minor children. See *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). As the Texas Supreme Court expressed in *State v. Corpus Christi People's Baptist*, 683 S.W.2d 692, 696 (Tex. 1984):

> The State must be especially concerned with the welfare of children residing in child-care facilities. The parents of these children are absent. The children who reside in these homes are entirely dependent upon the operators and employees for their food, shelter and care. Communication with those outside the facility is wholly controlled by the institution. The staff at the homes exercise total supervision over the children's health, safety and well-being. They direct even the smallest details of the children's daily lives.

In *State v. Corpus Christi People's Baptist, supra*, the court held that the State has a compelling interest of the highest order in protecting children in child-care facilities from physical and mental harm and that this compelling interest outweighed the burden imposed by the church's duty to comply with licensing requirements.

Realizing that the State of Nebraska has a compelling interest in the care and protection of children in licensed child-caring facilities, we cannot conclude that DSS' proscription of physical punishment upon children in these child-caring agencies is arbitrary and capricious. DSS has demonstrated that a justifiable reason exists for the difference in treatment between children residing in licensed child-caring facilities and children in the care of providers in family day-care homes. See, also, *Johnson v. Cal. State Dept. of Soc. Services*, 123 Cal. App. 3d 878, 177 Cal. Rptr. 49 (1981) (upholding a Department of Social Services regulation prohibiting corporal punishment in licensed day-care centers, and emphasizing the differences between licensed day-care centers and public schools); *Kate' School v. Department of Health*, 94 Cal. App. 3d 606, 156 Cal. Rptr. 529 (1979) (prohibiting corporal punishment in

community care facilities for mentally disabled children).

We conclude that DSS' regulation, codified in Neb. Admin. Code tit. 474, ch. 6, § 6-005.26K (1983), and prohibiting corporal or physical punishment, is a proper expression of the State's parens patriae power to set standards for the care and protection of children within the State of Nebraska. Therefore, we reverse the judgment entered by the district court in these proceedings.

REVERSED.

DEPARTMENT OF HEALTH OF THE STATE OF NEBRASKA, APPELLANT, V. LUTHERAN HOSPITALS AND HOMES SOCIETY OF AMERICA, A NONPROFIT CORPORATION, DOING BUSINESS AS GRAND ISLAND MEMORIAL HOSPITAL, GRAND ISLAND, NEBRASKA, APPELLEE.

416 N.W.2d 222

Filed December 11, 1987. No. 86-129.

1. **Administrative Law: Appeal and Error.** The Supreme Court's review of an administrative agency's decision is de novo on the record.
2. **Administrative Law: Public Health and Welfare.** The consideration of an application for a certificate of need is governed by three authorities: the Nebraska Health Care Certificate of Need Act, regulations promulgated under that act, and the Nebraska state health plan.
3. **Administrative Law: Public Health and Welfare: Proof: Appeal and Error.** In an appeal from the decision of an appeal board granting a certificate of need, the party appealing bears the burden of proof.
4. **Administrative Law: Appeal and Error.** A state agency's interpretation of its own regulation should be given significant weight.

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

Robert M. Spire, Attorney General, and Marilyn B. Hutchinson, for appellant.

William H. Lewis, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The applicant, Lutheran Hospitals and Homes Society of America, doing business as Grand Island Memorial Hospital, filed an application for a certificate of need for the acquisition and installation of a linear accelerator and for development of radiation therapy services. The Nebraska Department of Health recommended denial of the application. The Certificate of Need Review Committee found that the applicant had failed to demonstrate that the proposed project met the review criteria specified in Neb. Admin. Code tit. 182, ch. 2, § 005 (1983), and denied the application. The applicant then appealed to an appeal board of the Nebraska Certificate of Need Appeal Panel, which reversed the decision of the review committee and approved the application. The appeal board's decision was affirmed by the district court. The Department of Health has appealed to this court.

This court's review of an administrative agency's decision is de novo on the record. Neb. Rev. Stat. § 84-918 (Reissue 1981); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985); *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986). This does not mean that we ignore the findings of fact made by the board and the fact that it saw and heard the witnesses who appeared before the board at its hearing.

At the time of the hearing there were two hospitals in health planning subarea III which were equipped to furnish radiation therapy. Good Samaritan Hospital in Kearney, Nebraska, had a Linac 6 unit and The Mary Lanning Memorial Hospital in Hastings, Nebraska, had a Cobalt-60 unit. The Mary Lanning hospital had obtained a certificate of need for a 12-MeV (megaelectron volt) unit, which was expected to be operational in 1985.

The project proposed by the applicant was the acquisition of a 6-MeV medical linear accelerator, with the intent to expand the hospital's present abilities to treat oncology patients. Locally, the linear accelerator would be shared with St. Francis Medical Center and the Veterans Administration Medical Center, in addition to providing service for patients who travel to Grand Island from outlying communities.

In addition to purchasing the linear accelerator, a 3,700- to 4,000-square-foot building was to be constructed to accommodate the radiation equipment and to provide three examination rooms, office space, and a waiting room. The estimated cost of the entire project was $885,191; the equipment and furnishings to total $413,075, while construction of the therapy center (including architectural and engineering fees) was estimated at $472,116. Financing for the equipment was to be through Nebraska financing authority at .08875 percent interest. Construction costs were to be financed with $300,000 of donated funds; the remaining balance of $172,116 was to be commercially financed at an estimated 13.5-percent interest.

The useful life of the linear accelerator would be about 7 to 10 years. The annual anticipated total cost of operation was estimated to be $217,000. From this data, it was calculated that the break-even point for operating costs would be 163 patients or 4,075 treatments per year. The approximate cost per treatment to the patient for the first year of operation was estimated to be $65, which was comparable to existing services.

The administrator of the applicant, Ken Klaasmeyer, testified that during 1983 the applicant operated at a loss but that in 1984 the applicant realized a net growth or profit of $330,000. In terms of actual occupancy rates, Klaasmeyer stated that of the 128 beds within the hospital, approximately 60 percent of the 108 medical-surgical beds were occupied in 1983.

Neb. Rev. Stat. § 71-5830(6) (Reissue 1986) requires that a certificate of need be obtained prior to "[a]ny capital expenditure or obligation incurred by or on behalf of a health care facility in excess of the capital expenditure minimum made . . . [f]or the purchase . . . of clinical equipment . . . ." Minimum capital expenditure is defined in Neb. Rev. Stat. § 71-5805.01 (Reissue 1986) as a "base amount of five hundred thousand dollars . . . ." Because the cost of the proposed project was anticipated to exceed $500,000, a certificate of need was required.

The Nebraska Legislature has declared the purpose of the certificate of need act:

> [T]o conserve the limited health care resources of

> personnel and facilities in order to provide quality health care to all citizens of the state, to minimize unnecessary duplication of facilities and services, to encourage development of appropriate alternative methods of delivering health care, to promote wherever appropriate a more competitive health care delivery system, to encourage the provision of high-quality health care which is available and accessible to all citizens of the state, and to maximize the effectiveness of expenditures made for health care.

Neb. Rev. Stat. § 71-5802 (Reissue 1986).

Whether the applicant should receive a certificate of need is to be determined from the provisions of the Nebraska Health Care Certificate of Need Act encompassed in Neb. Rev. Stat. §§ 71-5852 to 71-5855 (Reissue 1986); the Department of Health regulations (promulgated under the certificate of need act), Neb. Admin. Code tit. 182, ch. 2, §§ 005-006 (1983); and the Nebraska State Health Plan 1982-1987 (Neb. Dept. of Health 1982). *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986).

The statutes require the Nebraska Department of Health to promulgate criteria by which to assess applications for certificates of need. According to the rules adopted by the Department of Health, the applicant "bears the burden of demonstrating in its application that the proposal satisfies all of the review criteria" applicable to the proposal at hand. Neb. Admin. Code, *supra*, § 003.02C. However, in an appeal from a decision granting a certificate of need, the party appealing bears the burden of proof that the application does not meet the applicable criteria. Neb. Rev. Stat. § 71-5865 (Reissue 1986).

The decision of an appeal board of the Nebraska Certificate of Need Appeal Panel is the final determination of the health department. Neb. Rev. Stat. § 71-5866 (Reissue 1986). There is no presumption of error, and, as in any usual appellate situation, the party alleging error has the burden of proof to establish error.

The controversy in this case centers around the following provisions of the certificate of need regulations (Neb. Admin. Code tit. 182, ch. 2 (1983)) adopted by the state Department of

Health:

006.07 Therapeutic Radiology.

006.07A A megavoltage radiation therapy unit shall treat at least 300 new cancer cases annually within three years after initiation.

006.07B There shall be no additional megavoltage units opened unless all existing megavoltage units in the health planning subarea are performing at least 6,000 treatments per year, and such new units will decrease access time to care. Adjustments downward may be justified when travel time to available services exceeds one hour for 50 percent of the population in health planning subareas I through IV (as shown on Attachment 1 [map of Nebraska subareas]), or one hour for 10 percent of the population in the Southeast and Midlands subareas (as shown on Attachment 1).

In addition to the regulations of the Department of Health, the Nebraska state health plan sets forth goals and objectives in reference to therapeutic radiology. Those relevant in this case are:

5.3.7.3 Goals and Objectives

GOAL 1 Access to megavolt radiation therapy units should be increased.

GOAL 2 There should be no additional megavoltage units opened unless (1) access to care is increased, and (2) all existing megavoltage units in the health service area(s) are performing an average of at least 6,000 treatments per year.

OBJECTIVE 2(A) By 1985, hospitals with single units failing to meet established goal levels in the Midlands should consider phasing out this service.

GOAL 3 Adjustments downward in economic utilization rates (6,000 per year) may be justified when travel time to an alternate unit exceeds: (a) one hour for 50 percent of the population in Greater Nebraska, (b) one hour for 90 percent of the population in Southeast Nebraska and the Midlands.

Nebraska State Health Plan 1982-1987, *supra* at V-242.

The appeal board found there is a need for radiation therapy

services in the service area; that the area to be served by the proposed project has been defined; that a linear accelerator to be located in Grand Island Memorial Hospital in Grand Island, Nebraska, for a cost of $885,000, is the least costly alternative for providing such service or, if not the least costly, is the most effective alternative; that the increase in costs or charges resulting from the project is justified by the need and that the project is financially feasible for the life of the linear accelerator; that the proposed project coordinates with the existing health care system and that the need established is consistent with the need projections in Neb. Admin. Code, *supra*, § 006, and with the state health plan; that even if the need established is inconsistent with the need projections in Neb. Admin. Code, *supra*, § 006, and with the state health plan, exceptions to the state health plan and Neb. Admin. Code, *supra*, § 006, shall be made when justification is shown by a preponderance of the evidence and the preponderance of the evidence herein justifies such exception; and that the applicant has carried its burden of proving that the project meets all the applicable criteria.

The primary contention of the Department of Health is that the evidence is insufficient to support the appeal board's determination that all applicable review criteria have been met. In support of its position, the department asserts that the proposed unit would not treat 300 new cancer cases annually within 3 years of its initiation unless it drew patients from existing units.

Charles Myers, the assistant administrator of the applicant, testified as a witness for the applicant. Myers introduced a map which represented the combined service area of Grand Island, Hastings, and Kearney. The map reflected the number of patients from each Nebraska county who were treated in Hastings, Kearney, or either St. Francis or the applicant in 1983. According to Myers, this information was obtained by an analysis of patient origin information reported to the state.

Myers then testified as to the 1985 population for each county in the combined service area based on estimates by the bureau of business research of the University of Nebraska. The total population of the combined service area was stated to be

393,409. Myers then referred to the state health plan published in 1982, which he testified states that for every 1,000 people, 3.7 new cancers are expected to develop annually. By multiplying the population of the service area by the risk factor, Myers concluded that there would be 1,456 new cancer cases per year in the combined service area.

According to the state health plan about 60 percent of all new cancer cases will be treated with radiation therapy, and the average number of treatments per patient is 25. Thus, Myers concluded there would be approximately 21,850 total treatments each year in the combined service area.

Similarly, Myers conducted a statistical analysis of the Grand Island service area (not the combined service area) and concluded that the number of treatments per year in the Grand Island service area would be 7,550.

Based on the above data, Myers concluded there would be 504 new cancer cases in the Grand Island service area annually, thus meeting the 300-case requirement of the Nebraska Administrative Code. Additionally, Myers concluded that the projected 7,550 treatments per year exceeded the 6,000-per-year requirements of both the Nebraska Administrative Code and the state health plan.

In its brief, the Department of Health criticizes the statistics relied on by the applicant. The department asserts that despite the applicant's showing of 504 new cancer cases annually for the Grand Island service area, and thus approximately 302 cases requiring radiation, Grand Island cannot assume that all 302 patients would choose to undergo the treatment and, even if they did, that they would choose the Grand Island hospital. There is evidence tending to show that, traveltime aside, many patients opt not to undergo radiation therapy because less than one-half obtain curative results, because of the associated physical discomforts, and finally, because of the trend toward dying at home and refusal of life-prolonging treatment.

In regard to the impact of the proposed Grand Island unit on already existing units in the subarea, Myers stated:

> Well, I think that just looking at the figures, there's going to be an impact. At the same time, I don't think the impact is . . . nearly as severe as one would have you believe.

> These three communities serve, for the most part, distinct populations. They are the three largest cities in central Nebraska. They're going to have their people in their counties and their service area that are going to continue to use these services. I think the impact is not that great.
>
> I guess another point that needs to be brought up is that the Hastings unit that has been proposed or that is anticipated to come on line in November of '85 is an MEV 12. An MEV 12 is capable of treating a percentage, and the percentage that I've been told from the American College of Radiology is between 5 to 10 percent of those patients that can't be treated with a 6. I hesitate to get too much in detail, but I think it has to do with very deep-seated tumors. It also has to do with perhaps breast — some breast malignancies.
>
> So while we are going to have an impact, we are also going to be providing referrals back down there, or at least Hastings would be the nearest available unit that could take care of those particular cases.

Dr. Hrnicek, an internist in Grand Island whose practice relates extensively to cancer, stated that the impact on existing radiation units in Hastings and Kearney would be "minimal." As a basis for his opinion, Dr. Hrnicek stated that the distance from the Grand Island service area to Kearney is so great that he has only referred one patient to Kearney in 4 years. Dr. Hrnicek did state that of the patients he refers for radiation therapy, approximately one-half go to Hastings and one-half to Omaha, with a few going to Lincoln.

Dr. VanWie, a general surgeon in Grand Island, maintains a practice, 30 to 40 percent of which is devoted to cancer-related surgery. Like Dr. Hrnicek, Dr. VanWie stated that a radiation unit in Grand Island would not have a substantial impact on the unit in Kearney because he has not sent any patients to the Kearney unit. Dr. VanWie also sees the impact on Hastings as declining because he has begun referring more patients to Lincoln.

Based on this testimony, it appears that significant numbers of patients would not be drawn from Hastings or Kearney.

Instead, patients may be drawn from the Lincoln and Omaha areas, where the impact would be less severe because two-thirds of all units in those cities operate at a level over 6,000 treatments and could thus sustain a loss in number of treatments without a significant impact.

Despite the fact that the applicant has shown that the proposed equipment and facility at Grand Island would realistically treat the required number of patients, the Department of Health asserts that the applicant must also show that "all existing megavoltage units in the health planning subarea are performing at least 6,000 *treatments* per year" before a new unit may be "*opened*." (Emphasis supplied.) Neb. Admin. Code tit. 182, ch. 2, § 006.07B (1983).

The applicant argues that there are two discrepancies in the above regulation, both of which support a decision in its favor. First, because the term "treatment" as used in the regulations, the statutes, and the state health plan is not a defined term, it is vague and ambiguous. The applicant then asserts that because the regulation contains an ambiguous term it is arbitrary and capricious and imposes an impossible requirement on applicants attempting to satisfy that particular criterion. Because of the regulation's use of an undefined term, the applicant asks that an exception to the regulation be granted.

The record does contain evidence which establishes the fact that the term "treatment" as used in Neb. Admin. Code, *supra*, § 006.07B, has been interpreted to have different meanings by Good Samaritan Hospital and The Mary Lanning Memorial Hospital. Defendant's exhibit 13 (contained in exhibit 1 of the district court's proceedings) is a letter from the president of Good Samaritan sent to the Department of Health in response to the department's request for information. An attachment to the letter indicates that at Good Samaritan "a patient is counted each time they receive a treatment whether they receive one field or ten fields." Similarly, in response to the department's request for information from Mary Lanning, the administrator for Mary Lanning hospital stated, "Our practice is to classify as a treatment in radiation therapy each area that radiation is exposed to during the visit of a patient."

The statutes and the regulations in the Nebraska

Administrative Code do not define the word "treatment." However, the state health plan uses the word "treatments," directly followed by the word "visits" in parentheses. Nebraska State Health Plan 1982-1987, V-236 (Neb. Dept. of Health 1982). Because an application for a certificate of need is governed in part by the state health plan, *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986), the definition provided by the plan is applicable. Since the state health plan was promulgated by the Nebraska Department of Health, the rule that a state agency's interpretation of its own regulation should be given significant weight and that the interpretation should be given great deference is applicable. *Smith v. Sorensen*, 748 F.2d 427 (8th Cir. 1984); *Columbus Community Hospital, Inc. v. Califano*, 614 F.2d 181 (8th Cir. 1980).

Since "visit" is equivalent to "treatment," the statistics reported by Mary Lanning create doubt as to whether Mary Lanning is exceeding 6,000 treatments per year. The number is unknown, because there is no evidence as to the average number of "fields" irradiated per patient visit.

The evidence indicates that up to 1985, the linear accelerator in Kearney, operational since September 1982, had not performed 6,000 treatments in any year. In 1983, the first full year of operation, 3,505 treatments were performed; 4,858 in 1984; and 1,255 for the first quarter of 1985. However, it is significant that the number of treatments has increased steadily and probably exceeded 5,000 in 1985. Section 006.07B of the regulation states that no new radiation therapy unit shall be *opened* unless all others in the subarea are performing at least 6,000 treatments per year. Neb. Admin. Code tit. 182, ch. 2, § 006.07B (1983). The applicant contends that the use of the term "opened" allows it to consider the projected number of treatments that Kearney will be performing at the time the Grand Island unit is ready to be placed in service. In other words, the use being made of other units is to be determined as of the time of completion of the project.

The regulation permits adjustments downward when traveltime to available services exceeds 1 hour for 50 percent of the population in the subarea. Plaintiff's exhibit 8 is a chart

showing the travel distance for patients living in the Grand Island service area. Plaintiff's exhibit 7 is a chart showing a comparison of the miles traveled to the closest existing unit and the miles that would be traveled if a unit were available in Grand Island. The exhibits show that at this time approximately 42 percent of patients living in the Grand Island service area must travel for more than 1 hour to obtain radiation therapy. Neither chart satisfies the requirement stated in the regulation, but they tend to support the board's finding that exceptions are justified in this case.

The applicant asserts an additional ground for an exception under §§ 005.01A and 005.01B of the regulations:

> 005.01A. The applicant must establish that there is an unmet need for health care services for a specific population.
>
> 005.01A1 A need exists when additional services for health care are essential to make high-quality health care available and accessible to all citizens of the state.
>
> 005.01A2 Under this part 005.01A, the population in need and the health care services which are needed must be identified, and the need of that population for the identified services must be established. The need which must be established under this part 005.01A is the need for diagnostic, treatment, rehabilitation, or maintenance services, not facilities or equipment. Facilities or equipment for providing the needed services must be identified under subsection 005.02 below. . . .
>
> . . . .
>
> 005.01B The need established under part 005.01A above must be consistent with the need projections in section 006 of these regulations (182 NAC 2), and with those in the state health plan most recently adopted under section 1524(c)(2)(A) of P.L. 93-641, 42 U.S.C. 300m-3(c)(A), and on file with the Secretary of State, each of which is hereinafter referred to as a document. Projections in section 006 of these regulations shall take priority over those in the state health plan in the case of conflicts between those documents. *Exceptions to the requirement of consistency with the projections in the*

> *document having priority shall be made when justification is shown by a preponderance of the evidence.*

(Emphasis in § 005.01B supplied.) Neb. Admin. Code, *supra*, §§ 005.01A and 005.01B.

Apparently, the provision for exceptions when justification is shown by a preponderance of the evidence has its origin in § 71-5852, as amended in 1982, which provides in part:

> The department shall, by rules and regulations, provide criteria for:
>
> (1) The relationship of the health services being reviewed to the state health plan adopted under section 1524(c)(2)(A) of P.L. 93-641, 42 U.S.C., section 300m-3(c)(2)(A) and to the state medical facilities plan, adopted under section 1603 of P.L. 93-641, 42 U.S.C., section 300o-2, as amended by P.L. 96-79, *but exceptions to the state health plan shall be made when justification is shown by a preponderance of the evidence.*

(Emphasis supplied.)

The provisions for exceptions contained in both the regulations and the statute permit the board to grant a certificate of need when there is an unmet need for health care services for a specific population, even though there is not full compliance with the requirements of Neb. Admin. Code, *supra*, § 006.

The issue of an unmet need for health care services for a specific population was addressed in the testimony of medical personnel from Grand Island. Dr. Rusthoven, a diagnostic radiologist, testified that there was no linear accelerator in the Grand Island service area and that if one were installed, patients from the Grand Island area would use the facility. Dr. Rusthoven stated that Grand Island hospitals can currently treat cancer patients with surgery and chemotherapy, but then "lose them because we have to let them go somewhere else for radiation therapy." Dr. Rusthoven stated that not only is the situation frustrating to physicians, but it also presents a serious problem to the patients involved. Such a situation, according to Dr. Rusthoven, results in a fragmentation of care, where the patient experiences a loss in continuity as the patient travels from doctor to doctor and hospital to hospital. Additionally,

the patient may encounter increased medical expenses because of duplicative testing as well as a decrease in the effectiveness of treatment when travel is impossible due to weather conditions or the physical status of a patient.

Dr. VanWie specified economic reasons as the basis of need for a linear accelerator in Grand Island, as well as his belief that a linear accelerator in Grand Island would improve the quality of care. Dr. VanWie recounted instances where patients have refused radiation treatments because of the traveltime involved.

Dr. Hrnicek stated that about one-half of his practice deals with cancer, and it is his opinion that a linear accelerator is necessary in Grand Island because of the difficulty involved in traveling. He, too, related incidents where patients refused radiation therapy because of the expense and the physical discomforts associated with travel for treatments. He testified that if a unit were in Grand Island, the majority would accept treatment.

Joan Muhvic, hospice coordinator and oncology nurse at the applicant, supported the hospital's application for a linear accelerator. Muhvic stated that "we have a large drawing range for the patients who come to Grand Island, and presently for those patients to continue, it's impossible for them to continue with their present physician because they're being shipped out of the treatment area for their radiation therapy." She went on to state: "Radiation therapy is a very standard form of treatment for cancer, and I think that the patient has the right to be able to expect that with their private physician in their own locality."

Muhvic stated that communications between doctor and patient break down when the patient travels to a new facility for treatment. She also stated that during the course of therapy, patients become weak and tired and may experience nausea and vomiting. She, too, has experienced patients who have looked at various locations for treatments in an attempt to minimize traveltime.

Finally, Myers, the assistant administrator of the applicant, stated that Grand Island needed its own unit rather than relying on Hastings and Kearney because: "We are attempting to

become a comprehensive cancer center to be able to provide those three modalities of care. We have the two modalities. We have the support services set up. This is the last modality which we need to take care of those cancer patients."

There is additional evidence which supports a finding that exceptions are justified in this case.

The record shows that cancer is the second leading cause of death. It is primarily a disease of the elderly, and the Grand Island area has a higher percentage of elderly persons as residents than other areas. Not only is the number of elderly persons increasing as a proportion of the population, but the rate of cancer has increased from 3.7 new cases per 1,000 population per year (which was the basis for the calculations made in the application) to 4 new cases per 1,000 population per year.

From our review of the record, we find that the appellant has not carried its burden of proof and that the judgment of the district court should be affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

In my view the majority has reached a result which is legally incorrect, and I therefore respectfully dissent.

Grand Island is in Nebraska Department of Health planning subarea III, which consists of 21 counties in the south-central part of the state. The area includes Adams County, in which the city of Hastings is situated; Buffalo County, in which the city of Kearney is placed; and Hall County, in which the city of Grand Island is located.

At the time of the hearing before the Nebraska Certificate of Need Appeal Panel, radiation therapy was available within subarea III at two places: Kearney, at a site 43 miles from the proposed location of the linear accelerator for which applicant seeks approval, and Hastings, at a point only 26 miles from the applicant's proposed facility.

Although the linear accelerator at Kearney has been in place since September of 1982, it was not delivering 6,000 treatments per year at the time of the appeal panel hearing. Moreover, the evidence fails to establish that the cobalt unit in Hastings was then delivering 6,000 treatments per year. While the evidence

suggests that the applications of cobalt and linear acceleration therapies differ, the evidence is that an application for the installation of a linear accelerator at Hastings had already been approved. There is no evidence that such approval has been withdrawn or that installation of the approved unit has been abandoned.

Pitted against that history is the applicant's prophecy, through its assistant administrator, that its additional accelerator will deliver 7,550 cancer treatments per year. That prediction is based on the assistant administrator's assumption that the applicant will entice cancer patients in varying percentages from 17 counties, only 9 of which are in subarea III. This witness himself concedes that his assumption concerning the applicant's market shares from those 17 counties is but a "gut reaction," that is to say, a guess without any statistical foundation whatsoever—speculation, pure and simple. Not only does the evidence reveal no basis for the number of patients the applicant assumes it will capture, the assumption completely ignores the fact that a linear accelerator has been approved for positioning at Hastings. For those two reasons alone, there is no more relationship between the applicant's presaging of 7,550 treatments per year and reality than there is between reality and a tale by the Brothers Grimm.

The true basis for the applicant's effort is best revealed, perhaps unconsciously, by the local medical practitioner's lament that the Grand Island hospitals lose patients "because we have to let them go somewhere else for radiation therapy." While such a parochial concern is understandable, it has no legal significance. See *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985), which holds that merely demonstrating a local demand for a nursing home does not establish a need for one. In so holding, we observed that while demand connotes an immediate preference to live in a particular nursing facility, need focuses on long-range plans to provide required services to an entire population.

The Legislature in its wisdom has enacted legislation designed to eliminate unnecessary duplication of certain medical facilities in an effort to reduce the overall cost of health care for the citizens of the state. This court is obligated to

adhere to that legislatively declared policy.

For the foregoing reasons, I would reverse the decision of the district court affirming the appeal panel and reinstate the decision of the Certificate of Need Review Committee denying the application.

SHANAHAN and GRANT, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DENNIS L. HOFFMAN, APPELLANT.

416 N.W.2d 231

Filed December 11, 1987. No. 86-944.

1. **Assault: Words and Phrases.** *Recklessly*, as used in Neb. Rev. Stat. § 28-309(1)(b) (Reissue 1985), means conduct in which an actor disregards a substantial and unjustifiable risk of serious bodily injury to another, which risk, in view of the nature and purpose of the actor's conduct and circumstances known to the actor, involves a gross deviation from a standard of conduct which a law-abiding person would have observed in the actor's situation.
2. **Assault: Intent.** Under Neb. Rev. Stat. § 28-309(1)(b) (Reissue 1985), concerning a second degree assault based on a reckless act or conduct, an intent to inflict or cause bodily injury is not an element; rather, the reckless act or conduct, causing serious bodily injury, is the gravamen.
3. **Assault: Words and Phrases.** A reckless act involves a conscious choice in a course of action, made with knowledge of a serious danger or risk to another as a result of such choice of action or with knowledge of the attendant circumstances which, to a reasonable person, would indicate or disclose a serious danger or risk to another as a result of the course of action selected.
4. **Criminal Law: Intent.** When one deliberately does an act which proximately causes and directly produces a result which the criminal law is designed to prevent, the actor is legally and criminally responsible for all the natural or necessary consequences of the unlawful act, although a particular result of the act was not intended or desired.
5. **Assault: Intent: Words and Phrases.** For the purpose of a second degree assault contrary to Neb. Rev. Stat. § 28-309(1)(b) (Reissue 1985), the requisite reckless act or conduct involves the actor's conscious choice in a course of action involving a dangerous instrument, which constitutes disregard of a substantial and unjustifiable risk to another, and does not require the actor's intent to cause serious bodily injury to another.
6. **Criminal Law: Intent: Intoxication.** The fact that an accused, at the time of the criminal act charged, was drunk or intoxicated does not constitute, as a matter

of law, a defense regarding an offense which requires a general or specific intent.

7. _____: _____: _____. Ordinarily, voluntary intoxication does not justify or excuse a crime, unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged.
8. **Criminal Law: Intent: Circumstantial Evidence.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
9. **Constitutional Law: Double Jeopardy.** Both the Nebraska and U.S. Constitutions provide that no person shall be twice put in jeopardy for the same offense. Neb. Const. art. I, § 12; U.S. Const. amend. V.
10. _____: _____. The double jeopardy clauses of the Nebraska and U.S. Constitutions protect against a second prosecution for the same offense, after an acquittal or conviction on that same offense, and protect against multiple punishments for the same offense.
11. **Constitutional Law: Double Jeopardy: Indictments and Informations: Lesser-Included Offenses.** In a prosecution on a multiple-count information, based on a single event or the same transaction, constitutional protection against double jeopardy prevents convictions for different degrees of the same offense arising out of the same event or transaction and prohibits a conviction for the lesser offense included in a greater offense.
12. **Homicide: Drunk Driving: Lesser-Included Offenses.** When the predicate offense for motor vehicle homicide is drunk driving in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984), drunk driving is a lesser-included offense in motor vehicle homicide.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Judgment on counts I and II affirmed. Judgment on count III reversed and remanded with direction to dismiss.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Lancaster County Public Defender, for appellant.

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

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

As the result of a bench trial in the district court for Lancaster County, Dennis L. Hoffman was convicted of, and sentenced for, three crimes, namely, assault in the second

degree, Neb. Rev. Stat. § 28-309(1)(b) (Reissue 1985), a Class IV felony; motor vehicle homicide, Neb. Rev. Stat. § 28-306(1) and (3) (Reissue 1985), a Class IV felony; and drunk driving, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) and a misdemeanor. The district court sentenced Hoffman to consecutive terms of imprisonment: 1 year on the assault conviction, not less than 20 months nor more than 5 years on the motor vehicle homicide conviction, and 6 months plus a $500 fine on the drunk driving conviction. We affirm the judgment concerning the assault and motor vehicle homicide charges, but vacate the judgment of conviction and sentence for drunk driving.

MULTIPLE-COUNT INFORMATION

In its three-count information concerning an automobile collision on February 18, 1986, the State charged (count I) that Hoffman, by use of a dangerous instrument, did recklessly cause serious bodily injury to Lana G. Wagner (assault in the second degree, § 28-309(1)(b)); (count II) that Hoffman caused the death of Lana Wagner unintentionally while he was operating a motor vehicle in violation of state law, namely, that Hoffman

> did operate or be in actual physical control of a motor vehicle while under the influence of alcoholic liquor or of any drug or when the said Dennis L. Hoffman had ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath or urine, or did operate a motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property,

(motor vehicle homicide, § 28-306(1) and (3)); and (count III) that Hoffman operated a motor vehicle while he was "under the influence of alcoholic liquor or of any drug or when he had ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath or urine," contrary to the provisions of § 39-669.07. Therefore, count II (motor vehicle homicide) was based on the alternative allegations of Hoffman's drunk driving (§ 39-669.07) or reckless driving (Neb. Rev. Stat. § 39-669.01 (Reissue 1984)). In count III, the State also alleged Hoffman's

previous convictions for drunk driving.

THE FATAL COLLISION

According to a witness who was with Hoffman on February 18, 1986, while the two were working together on a car, Hoffman drank at least 2 pints of root beer schnapps between 11 a.m. and 1 p.m. on that date. At approximately 4:30 p.m. on February 18, Hoffman was involved in an automobile accident on Sun Valley Boulevard, a north-south thoroughfare with a speed limit of 45 miles per hour, in Lincoln, Nebraska.

Another witness saw the Hoffman car as it came around a curve from O Street and proceeded north on Sun Valley Boulevard. As that witness watched, Hoffman drove onto a concrete median or lane-divider on Sun Valley, where Hoffman's car struck a metal sign embedded in the median and knocked the sign into the southbound lane of Sun Valley. Hoffman's car continued north at an estimated speed of 65 miles per hour and began its ascent of an inclined viaduct or overpass for Sun Valley. A southbound motorist had to drive at the extreme right to avoid colliding with the accelerating Hoffman car, still headed north.

As it neared the crest of the viaduct, Hoffman's car struck the left rear of a northbound pickup truck driven by Joseph P. Engler. After striking the Engler pickup, Hoffman's car skidded into the southbound lane on Sun Valley and collided head on with a car driven by Lana Wagner. The impact crushed the front end of both vehicles and compressed the driver's area of the Wagner car. As the result of severe injuries received in the collision, Lana Wagner died at the scene. After the collision, root beer schnapps bottles were found in Hoffman's car.

At 5:15 p.m. on February 18, Officer Bassett of the Lincoln Police Department arrived at the hospital to which Hoffman had been taken on account of injuries sustained in the collision, where the officer found Hoffman conscious, alert, and responding to questions from medical personnel. Officer Bassett detected the odor of alcohol on Hoffman's breath and, while reading the "Implied Consent Advisement Form" to Hoffman, noted that Hoffman had difficulty in focusing his watery, reddened eyes. Hoffman was abusive and uncooperative toward the officer, but, nevertheless, Officer

Bassett obtained a sample of Hoffman's blood for testing at the Nebraska State Patrol laboratory. Test results on Hoffman's blood sample showed that Hoffman had thirty-nine hundredths of 1 percent by weight of alcohol in his blood at the time Hoffman's car collided with the Wagner vehicle. Officer Bassett expressed his opinion that Hoffman was intoxicated when the officer contacted Hoffman at the hospital.

The parties stipulated that, if Hoffman were a witness at his trial, he would testify that he did not intend to cause Lana Wagner's death. A National Safety Council publication indicated that a person with a blood-alcohol content of ".40" would "have passed out." As exhibits, appropriate copies of court records showed Hoffman's four previous convictions for drunk driving in violation of § 39-669.07.

APPLICABLE STATUTES

For an assault in the second degree, § 28-309 provides: "(1) A person commits the offense of assault in the second degree if he or she: . . . (b) Recklessly causes serious bodily injury to another person with a dangerous instrument . . . ."

As a definitional section of the Nebraska Criminal Code, Neb. Rev. Stat. § 28-109(19) (Reissue 1985) contains:

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Regarding motor vehicle homicide, § 28-306 states:

> (1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.
>
> . . . .
>
> (3) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section

> 39-669.01 [reckless driving], 39-669.03, or 39-669.07 [drunk driving], motor vehicle homicide is a Class IV felony.

Section 39-669.01 defines reckless driving: "Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving."

As a crime, drunk driving is prohibited by § 39-669.07, which, in pertinent part, provides:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine.

CONVICTIONS

The court found Hoffman guilty on each of the information's three counts. Concerning the motor vehicle homicide charge (count II), the court found that Hoffman

> caused the death of Lana G. Wagner unintentionally while engaged in the operation of a motor vehicle in violation of the laws of the State of Nebraska in that he (1) was operating his motor vehicle while under the influence of alcoholic liquor and (2) was operating said vehicle when he had more than ten-hundredths of one percent by weight of alcohol in his body fluid, namely .39 of one percent by chemical analysis of his blood.

On count III (drunk driving), the court found that Hoffman operated and was in actual physical control of a motor vehicle while Hoffman was "under the influence of alcoholic liquor or when he had ten-hundredths of one percent or more by weight of alcohol in his body fluid, namely .39 of one percent, as shown by chemical analysis of his blood." After a presentence report, the court imposed sentence on Hoffman for each of the convictions, which sentences ran consecutively.

ASSIGNMENTS OF ERROR

Hoffman claims that (1) he was intoxicated to such an extent that he lacked mental capacity to form the general intent

required for a second degree assault; (2) the trial court erred in finding Hoffman guilty of both second degree assault and motor vehicle homicide, because the assault, charged in count I, was a lesser offense included in motor vehicle homicide, charged in count II, constituting double jeopardy contrary to the provisions of Neb. Const. art. I, § 12 ("No person shall be . . . twice put in jeopardy for the same offense"), as well as the provisions of U.S. Const. amend. V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."); (3) the trial court erred in finding Hoffman guilty of motor vehicle homicide and drunk driving, because drunk driving, charged in count III, was a lesser offense included in motor vehicle homicide, charged in count II, constituting double jeopardy contrary to the provisions of the Constitutions, state and federal; and (4) the trial court abused its discretion in imposing consecutive sentences.

The State proposes that Hoffman waived any objection to the multiple-count information regarding greater and lesser-included offenses charged by its several counts because Hoffman did not move to require the State's election on the stated charges. In *State v. Aby*, 205 Neb. 267, 270, 287 N.W.2d 68, 70 (1980), which involved a two-count information charging first degree sexual assault and felonious debauchery, this court stated: "The State was not required to elect between the counts because a crime and a lesser-included offense may be charged in separate counts of the same information." As a result of *Aby*, in Hoffman's case the State was not required to make an election regarding the charges filed, and any motion by Hoffman in that respect, therefore, would have been unavailing. The State then shifts to *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980), in which this court held that the defense of double jeopardy, as the result of a prior conviction, must be asserted and proved, and, in the absence of such issue raised by the pleadings, the defense of double jeopardy is waived. The State fails to grasp the precise question involving the claim of double jeopardy in this appeal and misunderstands Hoffman's argument. Hoffman is not asserting that it was error to *charge* him with an offense containing a lesser-included offense; rather, Hoffman maintains the trial court erred in

twice convicting him of the same offense, that is, convictions of the greater and lesser-included offenses, arising out of the same transaction—the fatal collision. Hoffman argues that prejudicial error occurred when the district court found Hoffman guilty on the information's various counts, as detailed in the foregoing assignments of error. Consequently, we must address Hoffman's contentions that he was convicted of both greater and lesser-included offenses charged separately in the multiple-count information.

INTOXICATION AND SECOND DEGREE ASSAULT

Hoffman directs our attention to *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981), a prosecution for second degree assault prohibited by § 28-309(1)(a) (Reissue 1979), which provided: "A person commits the offense of assault in the second degree if he . . . [i]ntentionally or knowingly causes bodily injury to another person with a dangerous instrument . . . ." In *Duis* this court expressed: "Assault with a dangerous instrument, like simple assault, is a 'general intent' crime." 207 Neb. at 854, 301 N.W.2d at 589. Hoffman asserts that the blood-alcohol content of his body caused oxygen depletion in his brain so that his "thoughts were dominated with a relaxed, 'so-what' attitude making defendant feel invincible and inducing him to climb behind the wheel." Brief for Appellant at 18. That condition, Hoffman argues, was the result of intoxication to such an extent that, as a matter of law, Hoffman could not "intentionally" cause the death of Lana Wagner.

Whereas *State v. Duis, supra*, involved intentional infliction of bodily injury to another, the State has prosecuted Hoffman for "recklessly" causing bodily injury to another by means of a dangerous instrument contrary to § 28-309(1)(b) (Reissue 1985). According to the definition contained in § 28-109(19), *recklessly*, as used in § 28-309(1)(b), means conduct in which an actor disregards a substantial and unjustifiable risk of serious bodily injury to another, which risk, in view of the nature and purpose of the actor's conduct and circumstances known to the actor, involves a gross deviation from a standard of conduct which a law-abiding person would have observed in the actor's situation. Regarding the preceding characterization of a reckless act or conduct, Hoffman questions only the nature of a

defendant's state of mind relative to the reckless act or conduct necessary for commission of second degree assault, § 28-309(1)(b).

However, under § 28-309(1)(b) concerning a second degree assault based on a reckless act or conduct, an intent to inflict or cause bodily injury is not an element; rather, the reckless act or conduct, causing serious bodily injury, is the gravamen. A reckless act involves a conscious choice in a course of action, made with knowledge of a serious danger or risk to another as a result of such choice of action or with knowledge of the attendant circumstances which, to a reasonable person, would indicate or disclose a serious danger or risk to another as a result of the course of action selected. See, *People v. Mason*, 198 Misc. 452, 97 N.Y.S.2d 462 (1950); *State v. Bischert*, 131 Mont. 152, 308 P.2d 969 (1957); 22 C.J.S. *Criminal Law* § 31(5) (1961).

When one deliberately does an act which proximately causes and directly produces a result which the criminal law is designed to prevent, the actor is legally and criminally responsible for all the natural or necessary consequences of the unlawful act, although a particular result of the act was not intended or desired. *Hankins v. State*, 206 Ark. 881, 178 S.W.2d 56 (1944); *People v. Hickman*, 9 Ill. App. 3d 39, 291 N.E.2d 523 (1973); 22 C.J.S., *supra*, § 36.

Thus, for the purpose of a second degree assault contrary to § 28-309(1)(b), the requisite reckless act or conduct involves the actor's conscious choice in a course of action involving a dangerous instrument, which constitutes disregard of a substantial and unjustifiable risk to another, and does not require the actor's intent to cause serious bodily injury to another.

The fact that an accused, at the time of the criminal act charged, was drunk or intoxicated does not constitute, as a matter of law, a defense regarding an offense which requires a general or specific intent. *People v. Crosser*, 117 Ill. App. 3d 24, 452 N.E.2d 857 (1983). Ordinarily, voluntary intoxication does not justify or excuse a crime, unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime

charged. *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986).

When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence. See *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983) (location, nature, and number of wounds were circumstantial evidence of deliberate and premeditated malice necessary for first degree murder). Evidence established that Hoffman drank a considerable quantity of alcoholic beverage (root beer schnapps); drove his automobile on the city streets of Lincoln after consuming that alcohol; was conscious, alert, and conversing with hospital personnel after the fatal collision; and discussed the "Implied Consent Advisement Form" with Officer Bassett. Those facts provided the trial court with sufficient circumstantial evidence from which to draw the conclusion that Hoffman was able to make a conscious choice to drive his automobile, rather than refrain from operating his vehicle, and thereby disregarded the substantial risk of bodily injury to the public as the result of Hoffman's drinking alcohol combined with his driving an automobile. Even Hoffman does not claim that he was incapable of making a decision whether to drive his car. Hoffman's instilled euphoria from the alcohol, "inducing him to climb behind the wheel," is not a legal excuse for the reckless act which resulted in the unintended and tragic death of Lana Wagner. Hoffman's first assignment of error has no merit whatsoever.

DOUBLE JEOPARDY

Both the Nebraska and U.S. Constitutions provide that no person shall be twice put in jeopardy for the same offense. See, Neb. Const. art. I, § 12; U.S. Const. amend. V.

As a prelude to cases involving a claim of double jeopardy, the U.S. Supreme Court, in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), adopted a "test of identity" to determine whether crimes separately charged were actually but one offense. In a multicount indictment, the government charged Blockburger with the sale of morphine hydrochloride to the same purchaser on successive days. As expressed by the Court in *Blockburger*:

> It appears from the evidence that shortly after delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day. But the first sale had been consummated, and the payment for the additional drug, however closely following, was the initiation of a separate and distinct sale completed by its delivery.
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> The contention on behalf of petitioner is that these two sales, having been made to the same purchaser and following each other with no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold, constitute a single continuing offense. The contention is unsound. The distinction between the transactions here involved and an offense continuous in its character, is well settled . . . .
>
> . . . .
>
> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 301-02, 304.

Specifically addressing the issue of a lesser-included offense, this court, in *State v. Lovelace*, 212 Neb. 356, 359, 322 N.W.2d 673, 675 (1982), recognized a test similar to that enunciated in *Blockburger v. United States, supra*, namely: " 'To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. . . .' "

Although the question arose in the context of a prior conviction as a bar to a subsequent prosecution for the same convicted offense, the U.S. Supreme Court, in *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), made the following observations regarding the double jeopardy clause of the fifth amendment to the U.S. Constitution:

> Because it was designed originally to embody the protection of the common-law pleas of former jeopardy,

see *United States v. Wilson*, 420 U.S. 332, 339-340 [95 S. Ct. 1013, 43 L. Ed. 2d 232] (1975), the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 [89 S. Ct. 2072, 23 L. Ed. 2d 656] (1969).

In *Brown v. Ohio, supra*, the U.S. Supreme Court concluded: "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser-included offense." 432 U.S. at 169.

Subsequently, in *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), the Supreme Court applied the double jeopardy clause of the fifth amendment to the U.S. Constitution in a case involving two criminal charges arising out of the same occurrence, robbery of a store. In an Oklahoma state court, Harris was convicted under the felony-murder rule on account of a homicide during Harris' use of a firearm to rob the store. Later, after denial of his motion to dismiss on the ground of double jeopardy, Harris was tried and convicted of "robbery with firearms." Harris contended that he was convicted of robbery with firearms when he was previously convicted on the felony-murder charge, that is, the homicide was proximately caused in perpetration of the robbery by use of a firearm. The state conceded that, in the murder-felony case, it was necessary to prove all the ingredients of the underlying felony of robbery with firearms. In reversing Harris' conviction for robbery with firearms, the Court stated:

When, as here, conviction of a greater crime, murder,

> cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. [Citations omitted.] "[A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." [Citations omitted.]

433 U.S. at 682-83.

Considering a double jeopardy contention by implication, this court, in *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980), reviewed convictions obtained on a two-count information against Aby, namely, first degree sexual assault (count I) and felony debauchery of a minor (count II). The offenses arose out of a single occurrence involving the same victim. Aby successfully argued that his conviction on count I (sexual assault) barred his conviction on count II (debauchery). In reversing Aby's conviction on count II and ordering dismissal of that count, we stated:

> First degree sexual assault in this case consisted of sexual penetration of a person less than 16 years of age by a person more than 18 years of age. § 28-408.03(1)(c), R.R.S. 1943. Felony debauching of a minor as charged in count II consisted of fondling or massaging in an indecent manner the sexual organs of a person under 16 years of age. § 28-929(2), R.R.S. 1943.
>
> . . . The evidence of the State which proved the first degree sexual assault in this case also proved felony debauching of a minor although the element of penetration was not an element of the debauching offense. Thus, under the evidence in this case, debauching of a minor was a lesser-included offense of the sexual assault charge.
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> . . . .
>
> . . . [A] defendant cannot be convicted of two degrees of the same offense or a crime and a lesser-included offense based upon the same act or transaction. In re Resler, 115 Neb. 335, 212 N.W. 765. A conviction or acquittal of the principal offense bars any prosecution or punishment for

> a lesser-included offense.
>
> For that reason the judgment on count II must be reversed and that count dismissed.

205 Neb. at 269-70, 287 N.W.2d at 70.

> The common law doctrine of merger no longer exists. *See* 1 Burdick, Law of Crime § 85 (1946). That term, however, is now commonly used to refer to the constitutional prohibition, arising out of the double jeopardy clause, against punishing a person twice for the same act or offense.

United States v. Belt, 516 F.2d 873, 875 n.7 (8th Cir. 1975).

In *United States v. Belt, supra*, the question was whether convictions for robbery and larceny, obtained as the result of a multiple-count indictment based on a single incident, should be permitted to stand. In ordering that the larceny conviction must be vacated, the court stated in *Belt*:

> The convictions for robbery and larceny, however, cannot both stand. "It is beyond dispute that larceny is a [sic] necessarily a lesser included offense of the crime of robbery." Walker v. United States, 135 U.S.App.D.C. 280, 418 F.2d 1116, 1120 (1969). [Citations omitted.] . . .
>
> When, as here, a defendant is convicted of both a greater and lesser included offense, the conviction and sentence on the lesser charge must be vacated. [Citations omitted.]

516 F.2d at 875.

Courts in other states have reached the same conclusion as that expressed by this court in *State v. Aby, supra*, that is, in a prosecution on a multiple-count information, based on a single event or the same transaction, constitutional protection against double jeopardy prevents convictions for different degrees of the same offense arising out of the same event or transaction and prohibits a conviction for the lesser offense included in a greater offense; for example, see, *Tuckfield v. State*, 621 P.2d 1350 (Alaska 1981) (by a multiple-count information, convictions were obtained for rape and assault with intent to commit rape; held, double jeopardy prevented conviction of both the rape offense and its lesser-included offense of assault with intent to rape); *Bell v. State*, 437 So. 2d 1057 (Fla. 1983)

(multiple-count information charging defendant with trafficking in illegal drugs and sale of a controlled substance; held, where it is established that an offense is a lesser-included offense of a greater offense, the double jeopardy clause proscribes multiple convictions and sentences for both the greater and lesser-included offense); and *People v Jankowski*, 408 Mich. 79, 289 N.W.2d 674 (1980) (multiple-count information charging robbery and larceny; held, larceny is a lesser-included offense of robbery; double jeopardy clause prohibits multiple punishment for the same offense, which would result from convictions of both greater and lesser-included offenses).

SECOND DEGREE ASSAULT AND MOTOR VEHICLE HOMICIDE

In examining Hoffman's contention concerning double jeopardy and the convictions in this case, we are not confronted with a prospective finding of a defendant's guilt or a theoretical verdict, as may be involved in a permissibly possible conviction by proper jury instruction on a greater offense and its lesser-included offense. See *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987). What is involved in Hoffman's appeal are actual convictions for crimes arising out of the same act or transaction. Thus, in the present appeal, we are concerned with the reality of convictions obtained in the trial court, not with prospective activity in the course of a criminal trial, which at some point might be possible or could occur as a future disposition during trial.

Hoffman's conviction on count I is based on § 28-309(1)(b), a second degree assault for reckless causation of serious bodily injury to Lana Wagner, namely, her death. While the State did charge the crime of second degree assault (reckless causation of serious bodily injury) in count I, and by count II charged that Lana Wagner's death was caused by Hoffman's reckless driving, the district court actually found that the cause of Lana Wagner's death was Hoffman's drunk driving, which was an alternative allegation to reckless driving as the cause of Lana Wagner's death.

The district court found Hoffman guilty of motor vehicle homicide (count II) based on drunk driving, a violation of

§ 39-669.07, because Hoffman caused Lana Wagner's death by his operating a motor vehicle while he was "under the influence of alcoholic liquor" and while Hoffman had "more than ten-hundredths of one percent by weight of alcohol in his body fluid, namely, .39 of one percent . . . ." To obtain the motor vehicle homicide conviction, the State proved that Hoffman was guilty of drunk driving—operating a motor vehicle while he was intoxicated. Intoxication, whether a motorist's physical and mental condition characterized as "under the influence of alcoholic liquor" or a motorist's having "ten-hundredths of one percent by weight of alcohol in [the motorist's] body fluid," see § 39-669.07, is not an element which must be proved to obtain a conviction for reckless causation of serious bodily injury by means of a dangerous instrument, the second degree assault condemned by § 28-309(1)(b). Conversely, the reckless act or conduct involved in a second degree assault may occur without the actor's ingestion of alcohol, but, as an alcohol-related offense, ingested alcohol is necessary for a violation of the drunk driving statute, § 39-669.07. It is clear that the elements of a second degree assault, based on a reckless act or conduct, do not necessarily include the presence of alcohol in the actor. It is equally clear that drunk driving, as a predicate offense in a motor vehicle homicide charge, does not necessarily involve a reckless act or conduct, as defined in § 28-109(19) of the Nebraska Criminal Code. Therefore, the findings of Hoffman's guilt on count I and count II constituted two convictions for two different and elementally unrelated criminal offenses arising out of the same event or transaction. Under the circumstances, determination of whether second degree assault, prohibited by § 28-309(1)(b), is a lesser offense included in motor vehicle homicide predicated on reckless driving, or vice versa, is not required for disposition of Hoffman's appeal. Nonetheless, constitutional protection against double jeopardy has not been denied to Hoffman by his convictions for second degree assault and motor vehicle homicide.

MOTOR VEHICLE HOMICIDE AND DRUNK DRIVING

In finding Hoffman guilty of motor vehicle homicide (count

II), the district court found Hoffman guilty of drunk driving in violation of § 39-669.07, and also found Hoffman guilty of the separate charge of drunk driving alleged in count III. There is no question that the drunk driving, as a violation of a Nebraska statute necessary for the crime of motor vehicle homicide charged in count II, was the identical prohibited act and the exact offense charged in count III. Consequently, count II and count III involved the same act—drunk driving. If the predicate offense is drunk driving in violation of § 39-669.07, a charge and conviction of motor vehicle homicide, analytically compared with the offense of drunk driving, requires the additional element of homicide caused by such drunk driving. Thus, when the predicate offense for motor vehicle homicide is drunk driving in violation of § 39-669.07, drunk driving is a lesser-included offense in motor vehicle homicide. See, *State v. Best*, 42 Ohio St. 2d 530, 330 N.E.2d 421 (1975); *People v Dickens*, 144 Mich. App. 49, 373 N.W.2d 241 (1985). Consequently, commission of motor vehicle homicide, as a result of a violation of § 39-669.07, necessarily includes the offense of drunk driving. The constitutional protection against double jeopardy, therefore, applies to Hoffman's convictions on counts II and III. In Hoffman's case, the district court imposed consecutive sentences for all the convictions. The consecutive sentences imposed on Hoffman for motor vehicle homicide and drunk driving are cumulative sentences for the same offense and constitute separate and multiple punishments for the same offense, a denial of the protection against double jeopardy afforded by the Constitutions, both state and federal. See *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). We must, therefore, reverse the district court's judgment for Hoffman's conviction and sentence for drunk driving in violation of § 39-669.07 (count III) and remand this matter to the district court for dismissal of count III contained in the information against Hoffman.

MULTIPLE-COUNT INFORMATIONS

Nothing we have stated in this opinion should be construed as disapproval of a multiple-count information; preclusion of a multiple-count information charging more than one offense arising from the same transaction; or prohibition against a trial

under a multiple-count information. As aptly expressed by the Supreme Court of Washington in *State v. Johnson*, 92 Wash. 2d 671, 680-81, 600 P.2d 1249, 1254 (1979):

> [T]he prosecutor should not be denied the right to charge the separate offenses, for he may fail to persuade the jury that the greater offense was committed, while succeeding in proving the ancillary crimes. There is no reason to deprive him of this opportunity. . . . A complicated criminal transaction necessarily gives rise to multiple charges and instructions, and this is a result which it is difficult to avoid if justice is to be accorded both the defendant and society.

CLAIM OF EXCESSIVE SENTENCE

As his final assignment of error, Hoffman contends that his sentences are excessive, especially since the court imposed consecutive sentences.

"[I]n the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal." *State v. Dillon*, 222 Neb. 131, 136, 382 N.W.2d 353, 357 (1986). " 'It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively, as opposed to concurrently.' " *State v. Irish*, 223 Neb. 814, 817, 394 N.W.2d 879, 881 (1986).

Hoffman asserts that he has "no prior criminal record." Brief for Appellant at 22. The presentence report on Hoffman contains five pages of his undenied and deplorable history of convictions. Rather than a misrepresentation that Hoffman does not have a criminal history, we will view Hoffman's assertion of "no prior criminal record" as a partially correct statement that Hoffman has no record of a previous felony conviction. At the time of sentencing, Hoffman was an unmarried 29-year-old home-maintenance repairman. Hoffman has been twice convicted of petit larceny and has had one conviction for public intoxication. Additionally, Hoffman was convicted of leaving the scene of an accident (1983) and theft (1984). Hoffman has five convictions for driving under a suspended operator's license or the amended charge of driving with no operator's license, resulting in jail sentences imposed on two of those convictions. Even more conspicuously, Hoffman

has been convicted for drunk driving in the years designated and with his bodily blood-alcohol content as indicated: 1975, .13 percent; 1979, .28 percent; 1981, .17 percent; and 1984, .129 percent. Hoffman's record of convictions and Lana Wagner's death as mute testimony were undoubtedly considered by the district court in determining and weighing the sentences to be imposed. We find no abuse of discretion, either in the separate sentences imposed on Hoffman for his convictions of second degree assault (count I) and motor vehicle homicide (count II) or in the imposition of consecutive sentences for the convictions on those counts.

Because there is no error in Hoffman's convictions and sentences on count I and count II, the judgment of the district court regarding each of those counts is affirmed. For the reason previously given, the district court's judgment of conviction and sentence on count III is reversed, and, concerning count III only, this matter is remanded to the district court with direction to dismiss count III of the information against Hoffman.

JUDGMENT ON COUNTS I AND II AFFIRMED.
JUDGMENT ON COUNT III REVERSED AND
REMANDED WITH DIRECTION TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. LARRY SCOTT COFFMAN, APPELLANT.
416 N.W.2d 243

Filed December 11, 1987. No. 87-059.

1. **Appeal and Error.** Error which is assigned but not discussed will not be considered by this court.
2. **Directed Verdict: Convictions.** In a criminal trial, the 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.
3. **Verdicts: Appeal and Error.** A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be

said as a matter of law that the evidence is insufficient to support the verdict.

4. **Trial: Evidence.** The admission of improper evidence on one side provides no justification for the other party to introduce its own incompetent or improper evidence.
5. _____: _____. Admission of evidence, pursuant to Neb. Rev. Stat. § 27-106 (Reissue 1985), rests with the sound discretion of the court.
6. **Trial: Jurors: Presumptions.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.
7. **Trial: Jurors.** A juror is not incompetent merely because he is an acquaintance of one of the witnesses.
8. _____: _____. Retention or rejection of a juror is a matter of discretion with the trial court.
9. **Jury Instructions: Evidence.** Before a jury instruction can be said to unduly emphasize a part of the evidence, it must be found to misrepresent either the totality or the existence of the evidence, or it must infringe upon the province of the jury.
10. **Habitual Criminals: Prior Convictions: Proof.** Neb. Rev. Stat. § 29-2222 (Reissue 1985) does not confine proof on the issue of the defendant's prior convictions to the documents therein mentioned.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

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

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

WHITE, J.

The defendant, Larry Scott Coffman, was convicted by a jury of first degree sexual assault under Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1985), a Class II felony. The court found the defendant to be a habitual criminal and sentenced him to an indeterminate term of incarceration of from 10 to 12 years.

Thirteen errors are assigned which can be summarized as follows: (1) The court abused its discretion in overruling the defendant's motion for a protective order and appointment of a special prosecutor; (2) the court erred in finding the evidence sufficient to submit the question of guilt to the jury and to

support a finding of guilt by the jury; (3) the court erred in sustaining the State's hearsay objection to a question asked of Shannon Mills; (4) the court erred in overruling defendant's request that Bradley Carper be dismissed as a juror and that a mistrial be declared; (5) the court erred by giving two separate instructions which stated that they could consider the defendant's prior felony convictions in weighing his credibility; and (6) the court erred in finding the defendant to be a habitual criminal, resulting in an excessive sentence. We affirm.

The first assignment of error was not addressed in the appellant's brief and was later abandoned at oral argument. Error which is assigned but not discussed will not be considered by this court. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Meis v. Grammer*, 226 Neb. 360, 411 N.W.2d 355 (1987).

The second assignment of error goes to the sufficiency of the evidence. In *State v. Dwyer*, 226 Neb. 340, 344, 411 N.W.2d 341, 344 (1987), we set forth the applicable rules of law in this area:

> In Nebraska, it has been 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. Meints*, 225 Neb. 335, 405 N.W.2d 15 (1987); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. Those determinations are within the province of the jury. *State v. Meints, supra; State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict. *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v.*

Thomte, 226 Neb. 659, 413 N.W.2d 916 (1987). After a jury has considered the evidence and returned a verdict of guilty, that verdict on appeal may not, as a matter of law, be set aside for insufficiency of evidence if the evidence sustained some rational theory of guilt. *State v. Wilkening*, 222 Neb. 107, 382 N.W.2d 340 (1986).

The defendant does not deny that he had sexual intercourse with the victim, but claims that the act was consensual. The defendant argues that the testimony of the victim with respect to the issue of consent is of so weak and doubtful a character that no reasonable juror could find beyond a reasonable doubt that the defendant had forcible sexual intercourse with the victim. With this we cannot agree.

The State produced overwhelming evidence that the act was in fact forceful. The victim supplied the jury with a detailed account of the event. She met the defendant in April of 1986 while they were participating in a study at Harris Laboratories. On June 12, 1986, she had a chance meeting with the defendant at a liquor store. She invited the defendant and three of his friends to her residence for a beer. The defendant agreed and proceeded with his friends to the victim's trailer house, where they all sat around the kitchen table for several hours. The victim went to the bathroom, and when she came out, she realized she was alone in the trailer with the defendant. The defendant grabbed her and shoved her into the bedroom. She struggled and screamed, and the defendant responded by punching her in the face, approximately 15 times in all. The defendant ripped off the two shirts the victim was wearing and took off her shorts. The victim testified that she screamed, from time to time, for him to quit hitting her and for assistance. In response to this the defendant would cover her mouth and nose with his hand. The entire assault lasted about 45 minutes.

The victim's testimony was corroborated by three neighbors. Sonja Buchanan testified that she heard the victim shouting, "Don't hit me any more," and also heard the name Larry. She stated that the screaming lasted on and off for about 45 minutes.

After the assault the victim went to Tina Milburn's house. Milburn testified that the victim was very upset and reported to

her that she had been raped. Milburn observed that the victim's face was red and swollen and that she had been beaten up. Another neighbor, Ron Lasher, testified that he heard the victim call for help approximately seven times.

Dr. Kent Eakins, who examined the victim after the assault, testified that there were fresh bruises on her face. Margaret Bunn testified that she observed the victim earlier in the day and did not notice any redness or bruises on her face. The two shirts which were ripped off the victim were also in evidence.

Absent an eyewitness, it is hard to imagine how the victim's testimony with regard to consent could have been more thoroughly corroborated. It can hardly be said that such testimony is weak or doubtful. There was competent proof to submit the issue of nonconsent to the jury, and there was sufficient evidence to support the jury's guilty verdict. The defendant's second assignment of error is therefore without merit.

In his third assignment of error defendant contends that the court abused its discretion by sustaining the State's hearsay objection to a question posed by defense counsel of his witness, Shannon Mills. Shannon Mills was among those present at the victim's trailer on the night in question. Mills was called by the defense in an apparent effort to corroborate the defendant's version of the events which transpired that night. On cross-examination, the State asked Mills whether Gloria Pulhamus, a friend of the defendant's, had told him what to tell the police in regard to their investigation of this case. On redirect, counsel for defense attempted to show that Mills had not discussed that matter with Pulhamus. He asked the witness: "[D]id you see her [Gloria Pulhamus] again before you talked to Officer Martin?" Mills' response was, "No, because that was the night she was trying to kill herself with some drugs." On recross, the State followed up on the witness' comment as follows:

> Q. Mr. Mills, you indicated that Gloria Pulhamus was really upset and was trying to kill herself with some drugs?
>
> A. Yeah, because I had to call the cops and they had to break her door in.
>
> Q. Was that because she was so upset about what was

going on with Larry?

A. Yeah.

. . . .

Q. You care about Gloria a lot; don't you?

A. As a friend, yes. As far as any physical contact or anything like that or anything else, I have nothing in common.

Q. But you don't want her to commit suicide; do you?

A. No.

Q. Do you think that that's a real possibility for Gloria?

A. Well, she would have. . . .

Q. Have you ever known her to try to commit suicide before?

A. No.

Q. So did you think that this was a serious threat?

A. Yes, I did.

The State's line of questioning on cross-examination and again on recross was clearly designed to show the jury that this witness had fabricated his story. The implication on recross was that Shannon Mills testified as he did because he was afraid Pulhamus would commit suicide if the defendant were convicted.

On further redirect, counsel for defendant attempted to show that Gloria Pulhamus was upset because she was jealous of the defendant and the victim, and not because she feared that the defendant would be convicted. He asked Mills, "What was it she [Gloria Pulhamus] told you she was upset about?" The State objected on the grounds that the question called for hearsay. The objection was sustained both before and after an offer of proof on the matter.

The defendant, in his brief, admits that the question called for hearsay, but argues that it was offered in rebuttal of the State's own incompetent evidence. Assuming, for the sake of the defendant's argument, that the State did elicit a response based upon hearsay from Shannon Mills, it nevertheless cannot be said that the court erred in sustaining the State's objection. It has long been the rule in Nebraska that the admission of improper evidence on one side provides no justification for the other party to introduce its own incompetent or improper

evidence in rebuttal. *Damme v. Nebraska P. P. Dist.*, 208 Neb. 478, 304 N.W.2d 45 (1981); *Conley v. Hays*, 153 Neb. 733, 45 N.W.2d 900 (1951); *Dodge v. Kiene*, 28 Neb. 216, 44 N.W. 191 (1889); *McCartny, plaintiff in error, v. The Territory of Nebraska*, 1 Neb. 121 (1871).

We recognize that other jurisdictions have held that the party who first introduces improper evidence cannot object to the admission of evidence from the other party relating to the same matter. (See 31A C.J.S. *Evidence* § 190 (1964) for a compilation of the cases.) In addition, Neb. Rev. Stat. § 27-106 (Reissue 1985), formerly Neb. Rev. Stat. § 25-1215 (1943), provides in part:

> When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

Under this rule the admission of such evidence is not a matter of right, but rests with the sound discretion of the court. *Spani v. Whitney*, 172 Neb. 550, 110 N.W.2d 103 (1961). Given the circumstances of this case, it could not reasonably be said that the trial judge abused his discretion or that the defendant was prejudiced in absence of the proffered testimony. For these reasons the defendant's third assignment of error is without merit.

In his fourth assignment of error, defendant submits that juror Bradley Carper should have been dismissed and a mistrial declared. After Tina Milburn had testified for the State, Carper, during recess, informed the court that, contrary to what he said on voir dire, he knew Milburn but did not recognize her married name. Carper indicated off the record that it would not influence his ability to be an impartial juror. Counsel for the defendant discussed the matter with his client and informed the court in chambers that they were prepared to waive any objection as to Carper's remaining on the jury. The

court later summarized these events for the record, after which the defendant asked that Carper be excused and motioned for a mistrial, notwithstanding the previous waiver of objection. This motion was submitted without argument, and no attempt was made to produce evidence that the juror was prejudiced. The court overruled the motion and in so doing observed that there was no showing that this juror could not be fair and impartial in his judgment.

The defendant now claims that the court erred in refusing to strike Carper from the jury without first establishing on the record whether the juror's acquaintance with Tina Milburn caused him to form an opinion in the case. The defendant admits that the record does not demonstrate how he was prejudiced, but contends that the court was obligated to voir dire the juror on the record before determining that there was no prejudice.

The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. *State v. Beasley*, 183 Neb. 681, 163 N.W.2d 783 (1969); *Medley v. State*, 156 Neb. 25, 54 N.W.2d 233 (1952). A juror is not incompetent merely because he is an acquaintance of one of the witnesses. *State v. Dodson*, 551 S.W.2d 932 (Mo. App. 1977). The record contains no evidence and the defendant made no allegation of any misconduct on the part of the juror which would have warranted an evidentiary hearing on the matter. *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). The defendant produced no evidence that this juror was other than competent. Retention or rejection of a juror is a matter of discretion with the trial court, and there is nothing in the record to show that such discretion was abused. *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984). The juror gave the court assurance off the record that his acquaintance with the witness would not affect his impartiality. The fact that the judge chose simply to recite the juror's assurance for the record rather than voir dire the juror on the record is of no consequence.

Defendant's fifth assignment of error is that the court erred in giving two separate jury instructions which unduly emphasized the defendant's prior felony convictions. The court's instruction No. 14, taken from NJI 14.81, states:

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider:

1. Their interest in the result of the suit, if any;

2. Their conduct and demeanor while testifying;

3. Their apparent fairness or bias or relationship to the parties, if any such appears;

4. Their opportunity for seeing or knowing the things about which they have testified;

5. Their ability to remember and relate accurately the occurrences referred to in their evidence;

6. The extent to which they are corroborated, if at all, by circumstances or the testimony of credible witnesses;

7. The reasonableness or unreasonableness of their statements;

8. Evidence of previous conviction of a felony;

9. Evidence of previous statements or conduct inconsistent with their testimony at this trial;

10. All other evidence, facts, and circumstances proved tending to corroborate or contradict such witnesses.

The court's instruction No. 15, taken from NJI 14.62, states: "Evidence has been received showing that defendant has been convicted of committing felonies. This evidence can be considered by you only as affecting his credibility, and may not be considered by you as establishing the truth or falsity of the charges against defendant in this case."

The defendant relies on *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985), for the proposition that a jury instruction which unduly emphasizes a part of the evidence should be refused. In *Harrison*, counsel for defense requested an instruction which attempted to convey to the jury that "excited utterances" are more credible and should be accorded greater weight than other types of evidence. The court said that the requested instruction was properly refused because it would have infringed upon the jury's duty to make its own determination as to the weight and credibility to be accorded the evidence. A survey of the Nebraska cases tells us that before an instruction can be said to unduly emphasize a part of the

evidence, it must misrepresent either the totality or the existence of the evidence, or, as in *Harrison*, it must infringe upon the province of the jury. See, e.g., *Bell v. State*, 159 Neb. 474, 67 N.W.2d 762 (1954); *City of South Omaha v. Wrzesinski*, 66 Neb. 790, 92 N.W. 1045 (1902); *Markel v. Moudy*, 11 Neb. 213, 7 N.W. 853 (1881).

There is nothing in either instruction in question which misrepresented the evidence or misguided the jury as to its duty. Both instructions were necessary and served different purposes. Instruction No. 14 was given to show how prior convictions relate to the overall judgment of credibility of any witness, and instruction No. 15 was given to prevent the jury from considering the prior felonies as establishing the truth of the present charge against the defendant.

In the final assignment of error the defendant contends that certain exhibits offered by the State in support of the habitual criminal allegation were not competent evidence of the defendant's prior convictions. Neb. Rev. Stat. § 29-2222 (Reissue 1985) provides:

> At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

In *State v. Bundy*, 181 Neb. 160, 147 N.W.2d 500 (1966), we concluded that § 29-2222 does not confine the proof on the issue of the defendant's prior convictions to the documents therein mentioned. In proof of the defendant's prior convictions, the State offered authenticated copies of two prior judgments. Instead of the actual commitment papers, the State offered certified copies of the sheriff's return and the warden's receipt, which evidenced the defendant's actual commitments to the Nebraska Penal and Correctional Complex. The State was in substantial compliance with the requirement of proof of commitment. The defendant's contention that the trial court erred in finding him a habitual criminal is therefore without merit.

We cannot sustain any of the assignments of error urged by the defendant. It therefore follows that the judgment and sentence of the district court must be and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DIANE L. ROBATCEK, APPELLANT.

416 N.W.2d 565

Filed December 11, 1987. No. 87-079.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Edward F. Fogarty of Fogarty, Lund & Gross, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

This appeal involves defendant's claimed error that in a DWI enhancement hearing, Neb. Rev. Stat. § 39-669.07(2) (Reissue 1984), the State has not met its burden of proving a prior DWI guilty plea conviction where the transcript of judgment evidence contains only checklist findings that defendant's rights to counsel were explained and she waived counsel, which was not an affirmative showing on the record of such advice and waiver required by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

We have reviewed the record and find that the evidence on enhancement complies with our prior decisions in *State v. Foster*, 224 Neb. 267, 398 N.W.2d 101 (1986), *State v. Schaf*, 218 Neb. 437, 355 N.W.2d 793 (1984), and *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIS L. WARREN, APPELLANT.

416 N.W.2d 249

Filed December 11, 1987. No. 87-096.

Motions to Suppress: Waiver. Neb. Rev. Stat. § 29-115 (Reissue 1985) requires that any objection as to the voluntariness of a statement of a defendant in a criminal case be made as a pretrial motion to suppress the statement, and failure to object at this stage results in a waiver of the objection.

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 Linda L. Willard, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

This is an appeal from the district court for Douglas County, where Willis L. Warren was convicted in a jury trial of burglary and sentenced to 3 years' imprisonment. At issue is the testimony of the arresting officer regarding incriminating statements made to him by the defendant. Defendant assigns as error that the district court allowed the arresting officer to testify concerning defendant's statement made to him following defendant's arrest. We hold that defendant's statement was admissible, and affirm.

The record shows that Rev. Roy McLemore, who lived in a duplex in Omaha, Nebraska, was hospitalized on August 15, 1986. On August 19, 1986, he was called at the hospital and told a light was on in the upstairs of his house. He then called the police.

Omaha Police Officers Morford and Higgins responded to a burglary in progress call at the McLemore address. Officer Morford testified that he arrived first and checked around the side of the duplex. At this time he heard footsteps in the duplex going toward the front of the duplex. Officer Morford testified

that he then went around to the front and saw defendant running out the front door. At about the same time, Officer Higgins arrived in his cruiser. Both Higgins and Morford chased defendant, caught him about a block away, and arrested him. He was placed in the cruiser with Officer Morford.

While testifying during the jury trial, Officer Morford stated that while he and defendant were in the police cruiser, he asked defendant for identification. Defendant produced identification. Officer Morford testified that he did not initiate the conversation, but that he "did ask [defendant] two questions after he made a statement to me." After the county attorney then asked the officer what the defendant had told him, defense counsel objected because there had been "no foundation laid whether or not these statements are voluntary or under the advisement of rights." This objection apparently went to the alleged "statement" and to the two questions.

The court then required foundation for defendant's remarks. Foundation was laid as to the "statement" made by defendant, in that the officer testified he had asked no questions after defendant identified himself, but that defendant volunteered a statement.

After the officer was asked, "What did he tell you," defendant again objected generally, stating, "At this point it appears that the defendant was in custody."

Before the court ruled on this objection, Officer Morford testified:

> At the time that I — after I had run a record check to verify that he — he was who he said he was, the party made a statement that I was just in the house, I had heard that the people that had lived there moved, and I was checking to see if there was anything of any value that I could use later.

Defendant then again objected and asked for a mistrial. The objection was overruled and the motion for mistrial denied. State's counsel then asked Officer Morford about the two questions which the officer had later addressed to the defendant. The objection to that question was sustained. Since the criminal offense of burglary, pursuant to Neb. Rev. Stat. § 28-507 (Reissue 1985), requires both a forcible breaking and entering and an intent to commit a felony or steal property, a

statement tending to establish intent to steal would be helpful to the prosecutor producing evidence of the alleged crime.

Counsel for defendant conceded that defendant might be guilty of trespass, but asserted that defendant lacked the requisite "intent to steal." Defendant testified that he entered the duplex, which he thought was vacant, because he needed a place to stay. He also denied having made the disputed statement to Officer Morford.

With regard to the admissibility of defendant's statement, this court holds that Neb. Rev. Stat. § 29-115 (Reissue 1985), although it was not raised at trial, is dispositive. The statute states in relevant part:

> Any person aggrieved by a statement taken from him or her which is not a voluntary statement, or any statement which he or she believes was taken from him or her in violation of the fifth or sixth amendments of the Constitution of the United States, may move for suppression of such statement for use as evidence against him or her. The suppression motion shall be filed in the district court where a felony is charged and may be made at any time after the information or indictment is filed, and must be filed at least ten days before trial, unless otherwise permitted by the court for good cause shown. Unless claims of a statement being involuntary or taken in violation of the fifth or sixth amendments of the Constitution of the United States are raised by motion before trial as provided in this section, all objections to the use of such statements as evidence on these grounds shall be deemed waived, except that the court may entertain such motions to suppress after the commencement of trial when the defendant is surprised by the introduction of such statements by the state, and also the court in its discretion may entertain motions to suppress such statements when the defendant was not aware of the grounds for any such motion before the commencement of trial, or in such situations as the court deems that justice may require.

This statute generally reflects the holdings of this court that "[t]he defendant may request a hearing on and a determination

of voluntariness, but in the absence of such request, defendant cannot complain of the failure of the court to hold such a hearing and make such determination." *State v. Oliva*, 183 Neb. 620, 625, 163 N.W.2d 112, 115 (1968), citing *United States v. Frazier*, 385 F.2d 901 (6th Cir. 1967), and *Woody v. United States*, 379 F.2d 130 (D.C. Cir. 1967). See, also, *State v. Escamilla*, 195 Neb. 558, 239 N.W.2d 270 (1976).

Section 29-115 requires that any objection as to the voluntariness of a statement of a defendant in a criminal trial be made as a pretrial motion to suppress the statement. Failure to object at this stage results in a waiver of the objection. Defendant did not raise the issue in a pretrial motion to suppress. In addition, with regard to other provisions in § 29-115 providing for exceptions to the requirement that motions to suppress statements be filed before trial, there is no evidence in the record that defendant made a contention that he was surprised by the introduction of the statement, nor is there evidence that defendant was not aware of the grounds for the motion before the commencement of the trial.

The objection should have been overruled pursuant to § 29-115, since the right to object had been waived by operation of the statute. Defendant does not challenge the statute, nor does he attempt to bring himself within the exceptions to the statute's requirements. The judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

In my view, Neb. Rev. Stat. § 29-115 (Reissue 1985) served to deny the defendant in this case his due process rights as announced in *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The *Jackson* Court held that "[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Id.* at 380. The Court announced its decision as follows:

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the

> confession, *Rogers v. Richmond*, 365 U. S. 534, and even though there is ample evidence aside from the confession to support the conviction. *Malinski v. New York*, 324 U. S. 401; *Stroble v. California*, 343 U. S. 181; *Payne v. Arkansas*, 356 U. S. 560. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *Rogers v. Richmond, supra.*

Id. at 376-77.

The defendant's objection at trial to the voluntariness of his statement warranted a separate *Jackson v. Denno* hearing outside the presence of the jury. This would afford the trial judge the opportunity to make a reliable determination of voluntariness based upon all the evidence. The evidence of voluntariness should not be limited, as it was in this case, to the State's own witness' testimony.

This view finds support in the federal case law. Rule 12 of the Federal Rules of Criminal Procedure is very similar to § 29-115. Rule 12 provides in relevant part:

> (b) . . . The following must be raised prior to trial:
>
> . . . .
>
> (3) Motions to suppress evidence . . . .
>
> . . . .
>
> (f) . . . Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

In *United States v. Powe*, 591 F.2d 833, 839 (D.C. Cir. 1978), the court recognized that "[o]rdinarily, the issue of voluntariness will be raised by the defense, either by a pretrial motion to suppress [citing Fed. R. Crim. P. 12(b)(3)] or by objection at trial [citing Fed. R. Crim. P. 12(f)]." Despite the waiver language in rule 12, the court said, "When an objection is lodged [at trial], the hearing requirements mandated by *Jackson v. Denno* are triggered, and a hearing must be held out

of the presence of the jury to determine whether the confession is admissible." 591 F.2d at 839. See, also, *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965).

For this reason, I respectfully dissent.

SHANAHAN, J., joins in this dissent.

SANDY PATRICK KERNS, SR., APPELLANT, V. GARY GRAMMER, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

416 N.W.2d 253

Filed December 11, 1987. No. 87-191.

1. **Criminal Law: Constitutional Law: Habitual Criminals.** The rule announced in *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983) (that in order to warrant the enhancement of the penalty under Neb. Rev. Stat § 29-2221 (Reissue 1985), the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense) is not to be applied retroactively.
2. **Criminal Law: Constitutional Law.** Retroactive application of a new rule of law is appropriate when it is aimed at enhancing the accuracy of criminal trials, when there has not been justifiable reliance on a prior rule of law, and when retroactive application will not have a disruptive effect on the administration of justice.
3. **Constitutional Law: Habitual Criminals.** Neb. Rev. Stat. § 29-2221 (Reissue 1985) does not deprive one of fundamental fairness, equal protection, or federal due process of law.
4. **Habeas Corpus: Prisoners.** Habeas corpus is available as a remedy to a person held pursuant to a judgment of conviction only upon a showing that the judgment, sentence, and commitment are void; persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ.
5. **Postconviction.** Postconviction relief is available only when a constitutional right has been infringed or violated.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Lancaster County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

The court below sustained the demurrer of appellee, Gary Grammer, warden at the Nebraska Penal and Correctional Complex, denied the motion of appellant, Sandy Patrick Kerns, Sr., to amend his petition "to present action as both habeas corpus and post conviction," and dismissed Kerns' petition, which sought a writ of habeas corpus. Kerns' 10 assignments of error merge to question the (1) denial of his motion to amend, (2) determination that the rule enunciated in *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983), was not applicable to him, and (3) failure to hold the Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1985), unconstitutional as applied to him. We affirm.

According to the petition Kerns was sentenced in 1975 to concurrent prison terms of 10 years on a rape conviction and 5 to 10 years on a robbery conviction. The convictions resulted from one continuing criminal episode taking place during a single day and were the subject of a single arrest and information. Later, in 1978, and while serving the aforesaid sentences, Kerns was treated as a habitual criminal under the provisions of § 29-2221 and sentenced to imprisonment for a period of 12 to 15 years for a first degree sexual assault on his cellmate.

The relevant portion of § 29-2221 then provided, as it does now:

> (1) Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the Department of Correctional Services adult correctional facility for a term of not less than ten

> nor more than sixty years; *Provided*, that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern.

We determine first whether the *Ellis* rule, discussed later in this opinion, applies to Kerns, and if not, whether § 29-2221 is unconstitutional as applied to him, for if the *Ellis* rule does not apply and § 29-2221 is constitutional as applied to Kerns, it matters not whether the trial court erred in failing to permit Kerns to amend his petition.

In considering the applicability of the *Ellis* rule to the situation presented in this case, it is useful to bear in mind the chronology of related opinions of this court and of the U.S. Eighth Circuit Court of Appeals. The first of these is *State v. Kerns*, 201 Neb. 617, 271 N.W.2d 48 (1978) (*Kerns I*), in which Kerns appealed his 1978 sentence and unsuccessfully argued that the loss of "good time" in an administrative proceeding and the subsequent criminal conviction constituted double jeopardy in violation of provisions of the U.S. Constitution and that his sentence of 12 to 15 years under § 29-2221 was excessive. This court next considered *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979) (*Pierce I*), and held that two prior offenses which were committed on the same date, prosecuted in the same information, and resulted in concurrent sentences could be treated as two separate convictions for the purpose of enhancing a sentence under § 29-2221.

Some years later, the eighth circuit court considered *Kerns v. Parratt*, 672 F.2d 690 (8th Cir. 1982) (*Kerns II*), which challenged § 29-2221 on constitutional separation of powers, due process, and eighth amendment grounds. The federal court rejected all of Kerns' constitutional challenges.

The following year we, in *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983), rejected the rule announced in *Pierce I* and reinterpreted § 29-2221(1) by holding that "in order to warrant the enhancement of the penalty under . . . § 29-2221, the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense." 214 Neb. at 176, 333 N.W.2d at 394. We explained that

> the purpose of enacting the habitual criminal statute is to

> serve as a warning to previous offenders that if they do not reform their ways they may be imprisoned for a considerable period of time, regardless of the penalty for the specific crime charged. . . . " 'Recidivist statutes are enacted in an effort to deter and punish incorrigible offenders. * * * They are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment.'. . ."

Id. at 175, 333 N.W.2d at 394. We did not at that time consider whether the *Ellis* rule and rationale would be applied retroactively to persons whose sentences had been enhanced under the rule applied in *Pierce I*.

Pierce himself invited us to consider that question in *State v. Pierce*, 216 Neb. 792, 345 N.W.2d 835 (1984) (*Pierce II*). Contrary to Kerns' apparent misunderstanding of *Pierce II*, we declined that invitation. Although we noted that "it has been stated in federal law that there is no constitutional objection to overruling a case purely prospectively as we did in *Ellis*," 216 Neb. at 795, 345 N.W.2d at 836-37, we said, "While many courts, including the U.S. Supreme Court, have struggled with the question of retroactivity, this court does not have to tackle such a matter of judicial policy and past precedents, because the statutory requirements for relief under the Post Conviction Act have not been met." *Id.* at 795, 345 N.W.2d at 837. Under the apparent erroneous assumption that *Pierce II* specifically refused to grant retroactive application to the *Ellis* rule, Kerns devotes a considerable portion of his brief in an attempt to distinguish the situation presented by this appeal from that presented by *Pierce II*. Kerns argues that

> applying the Ellis ruling to the facts of his case would not be a retroactive application of Ellis. Plaintiff is still serving the time imposed upon him under the terms of the habitual criminal law. If the Court were to grant him relief at this time, that would not be a "retroactive" application of the rule in Ellis. Quite clearly, it would be a prospective application. All the Court need do is reverse this case and return it to the trial court for a determination of whether or not defendant qualified under the statute, as interpreted in Ellis, to be classified as an habitual criminal.

> And if he should not have been found to be an habitual criminal, relieving him from serving his penal term or the balance thereof in the future is very simply a prospective application of Ellis.

(Emphasis in original.) Brief for Appellant at 9-10. This is an interesting use of words, but an utterly meaningless argument. In asking this court to apply the 1983 *Ellis* decision to declare his 1978 sentence void, Kerns is obviously asking this court to give *Ellis* retroactive effect.

Kerns also argues that

> [w]hen the Court interpreted the statute in Ellis, the ruling of the Court and that interpretation became a part of the statute just the same as if the legislature had put the ruling into the statute in the first place. The Court was simply saying what the intent of the legislature was when it passed the habitual criminal statute.
>
> . . . .
>
> Plaintiff submits that his case is one in which the trial court lacked the authority to punish him in the manner of an habitual criminal . . . .

Brief for Appellant at 10-11. That argument seems to suggest that § 29-2221 sets out punishment for the status of habitual criminal; this, however, is not the case. Consistent with principles long recognized in this state, Kerns was punished in 1978 for the crime of sexually assaulting his cellmate, and his sentence for that crime was determined through application of § 29-2221 to the facts of his criminal history. *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982); *State v. Losieau*, 184 Neb. 178, 166 N.W.2d 406 (1969). Later, in *Ellis*, this court laid down a rule for application of § 29-2221 which, had it existed when Kerns was sentenced, would have precluded application of the statute to his case. However, under the rule which existed at the time, Kerns was properly sentenced.

As this court noted in *Pierce II*, "retroactive operation of an overruling decision is neither required nor prohibited by constitutional provisions." *Pierce II, supra* at 795, 345 N.W.2d at 836. Retroactive application of a new rule of law is appropriate when it is aimed at enhancing the accuracy of criminal trials, when there has not been justifiable reliance on a

prior rule of law, and when retroactive application will not have a disruptive effect on the administration of justice. *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984). In *Clark*, this court reasoned that the rule requiring that a defendant pleading guilty be informed of certain rights and that a voluntary and intelligent waiver of those rights affirmatively appear on the record was not aimed at the evil of mistaken determinations of guilt, but at the uninformed relinquishment of constitutional rights, and consequently would not be applied retroactively. Similarly, the retroactive application of *Ellis* which Kerns seeks is not aimed at correcting any deficiency in the trial which determined him guilty of first degree sexual assault, but would go only to the manner in which his sentence was calculated. We therefore conclude that the *Ellis* rule is not to be applied retroactively and is not to be applied to Kerns.

Kerns' argument that § 29-2221 is, in any event, constitutionally infirm as denying him of fundamental fairness, equal protection, and federal due process of law is equally without merit. Section 29-2221 has repeatedly been held not to conflict with provisions of either the Nebraska or the U.S. Constitution in decisions both of this court (e.g., *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981) (due process challenge); *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977) (cruel and unusual punishment and double jeopardy challenges), *overruled on other grounds State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979); *State v. Graham*, 192 Neb. 196, 219 N.W.2d 723 (1974) (cruel and unusual punishment challenge); *State v. Martin*, 190 Neb. 212, 206 N.W.2d 856 (1973) (due process challenge); *State v. Losieau, supra* (due process and equal protection challenges)), and of the U.S. Eighth Circuit Court of Appeals (e.g., *Fowler v. Parratt*, 682 F.2d 746 (8th Cir. 1982) (U.S. Const. amend. VIII cruel and unusual punishment challenge); *Pierce v. Parratt*, 666 F.2d 1205 (8th Cir. 1981) (separation of powers, due process, equal protection, U.S. Const. amend. VIII challenges); *Goodloe v. Parratt*, 605 F.2d 1041 (8th Cir. 1979) (U.S. Const. amend. VIII challenge); *Brown v. Parratt*, 560 F.2d 303 (8th Cir. 1977) (U.S. Const. amend. VIII challenge); *Martin v. Parratt*, 549 F.2d 50 (8th Cir. 1977) (due process, equal protection, and U.S. Const.

amend. VIII challenges)).

Habeas corpus is available as a remedy to a person held pursuant to a judgment of conviction only upon a showing that the judgment, sentence, and commitment are void; persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ. *Anderson and Hochstein v. Gunter*, 226 Neb. 724, 414 N.W.2d 281 (1987). Similarly, postconviction relief is available only when a constitutional right has been infringed or violated. *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987); Neb. Rev. Stat. § 29-3001 (Reissue 1985). Since the 1978 judgment, sentence, and conviction are not void and suffer from no constitutional infirmity, the petition did not, and could not, state a cause of action for either a writ of habeas corpus or for postconviction relief. Therefore, whether the trial court erred in failing to permit the amendment Kerns sought becomes immaterial, and we do not concern ourselves with that issue.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. BRUCE L. MURPHY, RESPONDENT.

416 N.W.2d 257

Filed December 11, 1987. No. 87-1032.

Original action. Judgment of disbarment.

Dennis Carlson, Counsel for Discipline, for relator.

Craig L. Truman, P.C., for respondent.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an original proceeding submitted to this court upon

the respondent's voluntary surrender of his license to practice law. Respondent, Bruce L. Murphy, 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 his consent to the entry of an order of disbarment against him, we order that the respondent, Bruce L. Murphy, be, and hereby is, disbarred effective immediately.

JUDGMENT OF DISBARMENT.

DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA, RECEIVER FOR COMMONWEALTH SAVINGS COMPANY, APPELLANT, V. CHARLES R. DAVIS ET AL., APPELLEES.

416 N.W.2d 566

Filed December 18, 1987. No. 85-984.

1. **Principal and Agent.** Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent agency.
2. _____. Apparent authority is such authority as the agent seems to have by reason of the authority he actually has. A principal is bound by, and liable for, the acts which an agent does within his or her actual or apparent authority.
3. **Principal and Agent: Contracts.** An undisclosed principal is ordinarily bound by contracts made on his account by an agent acting within his authority.
4. _____: _____. As a general rule, one who contracts with the agent of an undisclosed principal, supposing that the agent is the real party in interest, and not being chargeable with notice of the existence of the principal, is entitled, if sued by the principal on the contract, to set up any defenses and equities which he could have set up against the agent had the latter been in reality the principal suing on his own behalf.

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

William G. Blake of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellant.

David A. Barron of Cline, Williams, Wright, Johnson & Oldfather, for appellee New York Guardian Mortgagee Corporation.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff, as receiver for Commonwealth Savings Company (Commonwealth), brought this action to foreclose a 1976 real estate mortgage originally given by the defendants Charles R. Davis and Colleen Davis (Davises) to Nebraska Modular Homes, Inc. (Modular). Plaintiff claims the mortgage and secured note were assigned by Modular to Commonwealth as collateral security for a debt Modular owed to Commonwealth. The assignment was neither acknowledged nor properly recorded in the county records. In 1978, Davises refinanced the loan, paid Modular in full, and received a mortgage release from Modular. Modular did not remit the proceeds to Commonwealth. Plaintiff claims that defendants had notice of its mortgage claim. The trial court found for the defendants and dismissed plaintiff's amended petition. We affirm.

Plaintiff assigns nine separate errors that are consolidated as follows: (1) It was error to find that defendants had no notice that the Davis-Modular note and mortgage had been assigned to Commonwealth; (2) it was error to find that Modular, as Commonwealth's agent, was clothed with ostensible and apparent authority to collect full payment of the mortgage principal and interest and to release the mortgage; (3) it was error to find that the notice provisions of article 9 of the Nebraska Uniform Commercial Code, Neb. U.C.C. § 9-318(3) (Reissue 1980), controlled rather than the statutory recording acts, Neb. Rev. Stat. ch. 76, art. 2 (Reissue 1986); and (4) it was error to find that the Davis-Modular mortgage was not a first lien on the subject property.

"A real estate foreclosure action is an action in equity . . . ." *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 328, 352 N.W.2d 921, 923 (1984); *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979).

In an appeal of an equity action, the Supreme Court

> tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Hughes v. Enterprise Irrigation Dist., 226 Neb. 230, 234, 410 N.W.2d 494, 497 (1987).

In December of 1976, the Davises purchased a home from Modular. As consideration, on December 10, 1976, the Davises executed and delivered to Modular their promissory note for $32,687.25 and a real estate mortgage securing the debt. The principal and interest on the note were to be paid in monthly installments of $286.98.

Stamped on the back of both the note and the mortgage was the statement "Assignment with Recourse." It was executed by Kenneth L. Ferguson, vice president of Modular, on December 7, 1976, which was 3 days before the Davises signed the note and mortgage. The "Assignment with Recourse" statement was not acknowledged on either the note or the mortgage. These assignments to Commonwealth by Ferguson for Modular were given as collateral security for a $32,687.25 loan from Commonwealth to Modular.

At the time the Davises executed the note and mortgage to Modular, they had no knowledge of the endorsed assignment from Modular to Commonwealth. Ferguson said nothing about the assignment, and the copies of the note and mortgage given to the Davises did not contain the stamped assignment. The mortgage was recorded with the Fillmore County register of deeds; however, it was incorrectly indexed as a mortgage from the Davises to Commonwealth. No assignment was listed on the index.

From January of 1977 through April of 1978, the Davises made monthly principal and interest payments of $286.98 to Modular. Most of the checks were endorsed by Modular to the order of Commonwealth and then delivered to Commonwealth. During the time they were making payments to Modular, the Davises had no knowledge of the assignment of

the mortgage and of the Modular note to Commonwealth. Commonwealth made no attempt to notify the Davises of the assignment until January 1980, when it discovered payments were not being received and the subject mortgage had been released by Modular. Commonwealth had received only four loan payments from Modular between May 1978 and September 1979.

In May 1978, the Davises obtained a VA loan from Western Securities Company (Western) to refinance the purchase of their home from Modular. In April of 1978, a title search was conducted by John Fahlberg, a licensed abstracter, which did not reveal any interest of Commonwealth in the subject property. The Davis-Western loan was closed on May 17, 1978. The Davises executed a note and a deed of trust to the property to Western. Western paid Modular $32,994.36, the balance due on the note and mortgage. Modular did not remit these funds to Commonwealth. The deed of trust was recorded and filed with the register of deeds on May 30, 1978. Also filed and recorded on May 30, 1978, was a release of mortgage, executed May 5, releasing a prior 1969 mortgage given by the Davises to Gartner Mobile Housing, Inc., on the subject property.

On September 12, 1978, Ferguson, on behalf of Modular, executed a release of the December 10, 1976, Modular mortgage given by the Davises. The release was recorded and filed with the register of deeds on October 2, 1978. On that same date, another release was filed which purported to release the same 1969 Davis-Gartner mortgage that had been released on May 5, 1978. The second release was notarized by S.E. Copple, then president of Commonwealth.

On January 30, 1981, the Davis-Western note and the deed of trust were assigned to defendant New York Guardian Mortgagee Corporation (Guardian). The assignment was recorded with the register of deeds. The Davises thereafter made payments to Guardian.

Plaintiff declared the Modular loan to be in default sometime after November 1, 1983, when Commonwealth was placed in receivership. This suit followed.

NOTICE

Plaintiff contends that the recorded assignment from

Modular to Commonwealth provided constructive notice to defendants. Section 76-241 provides: "All deeds, mortgages and other instruments of writing shall not be deemed lawfully recorded unless they have been previously acknowledged or proved in the manner prescribed by statute."

A deed is statutorily defined as follows:

> The term deed, as used in sections 76-201 to 76-281, shall be construed to embrace every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for a less time.

§ 76-203.

"The grantor must acknowledge the instrument to be his voluntary act and deed." § 76-216 (Reissue 1976). Neb. Rev. Stat. § 64-205 (Reissue 1986) sets forth the statutory definition for acknowledgment of an instrument. The definition requires:

> (1) That the person acknowledging appeared before the person taking the acknowledgment,
>
> (2) That he acknowledged he executed the instrument,
>
> (3) That, in the case of:
>
> (i) A natural person, he executed the instrument for the purposes therein stated;
>
> . . . .
>
> (4) That the person taking the acknowledgment either knew or had satisfactory evidence that the person acknowledging was the person named in the instrument or certificate.

After applying the foregoing statutory requirements to the facts, it is apparent that the endorsement on the mortgage did not qualify for recording; therefore, there was no constructive notice. Further, the register of deeds' error in indexing Commonwealth as the mortgagee did not provide such notice.

From the record, there is no other evidence that establishes that either Davises, Midwest, or Guardian had notice of the purported assignment and Commonwealth's claims thereunder. At most, there was evidence that the Davises' checks were endorsed by Modular as payee to the order of Commonwealth, which, standing alone, does not rise to notice of an assignment

of a mortgage.

AGENCY

" 'Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' " *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 114, 247 N.W.2d 434, 438 (1976).

"An undisclosed principal is ordinarily bound by contracts made on his account by an agent acting within his authority." *Mintken v. Nebraska Surety Co.*, 187 Neb. 215, 216, 188 N.W.2d 819, 820 (1971).

> As a general rule, one who contracts with the agent of an undisclosed principal, supposing that the agent is the real party in interest, and not being chargeable with notice of the existence of the principal, is entitled, if sued by the principal on the contract, to set up any defenses and equities which he could have set up against the agent had the latter been in reality the principal suing on his own behalf. Various reasons have been assigned for this rule, such as the estoppel of the undisclosed principal . . . .

3 Am. Jur. 2d *Agency* § 341 at 848-49 (1986). See, also, *Cheshire Provident Institution v. Feusner*, 63 Neb. 682, 88 N.W. 849 (1902). This court defines apparent authority as follows:

> Apparent authority is the power which enables a person to affect the legal relations of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestation to such third persons. A party who has knowingly permitted others to treat one as his agent is estopped to deny the agency.

Ryder Truck Rental v. Transportation Equip. Co., 215 Neb. 458, 461, 339 N.W.2d 283, 286 (1983). See, also, *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986).

"Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent agency." *Wolfson Car Leasing Co., Inc. v. Weberg*,

200 Neb. 420, 427, 264 N.W.2d 178, 182 (1978).

"Apparent authority is such authority as the agent seems to have by reason of the authority he actually has. . . . A principal is bound by, and liable for, the acts which an agent does within his or her actual or apparent authority." *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 752, 371 N.W.2d 732, 739 (1985).

From the onset, Commonwealth was an undisclosed principal that granted to Modular the apparent authority to act as its agent. The authority granted to Modular required Modular to act in a dual capacity as Commonwealth's agent. First, Modular was allowed to represent itself as mortgagee with full ownership of the mortgage and the secured debt and full authority to service the debt. Second, Modular acted in fact as Commonwealth's agent in servicing the debt. The service involved allowing Modular to collect the monthly installments of principal and interest and then to forward the payments to Commonwealth. Additionally, in servicing the debt, Modular was allowed to collect on the debt in full and then release the debt. In the absence of notice, this same agency situation continued up to and including the time that Davises refinanced the loan through Western. Commonwealth was satisfied with this arrangement and made no effort to protect itself until after plaintiff receiver was appointed, when it was discovered that Modular had violated its trust as its agent. Commonwealth could have asserted its claim at any time prior to the Davis-Western refinancing by advising Davises concerning its assignment. Commonwealth did nothing.

The facts in *Rehmeyer v. Lysinger*, 109 Neb. 805, 192 N.W. 337 (1923), are very similar to this case. In *Rehmeyer*, the court said at 812, 192 N.W. at 339: "[W]here one of two innocent persons must suffer loss he whose negligence caused the injury must bear it . . . ."

By its acts, omissions, and negligence, Commonwealth permitted Modular to represent to defendants and all persons that Modular was the sole owner of the Modular mortgage and secured note, with the apparent authority to service that loan, including receiving full payment and releasing the mortgage. Plaintiff is estopped from asserting its mortgage as a first lien

on the real estate against the interests of the defendants.

It is not necessary to discuss the other assigned errors. The trial court's decision to dismiss the petition was correct.

AFFIRMED.

HASTINGS, C.J., not participating.

RUTH R. FLETCHER, APPELLANT, V. DONALD D. FLETCHER, APPELLEE.

416 N.W.2d 570

Filed December 18, 1987. No. 85-1006.

1. **Judgments: Appeal and Error.** An appellant who voluntarily accepts payment of part of a judgment in his or her favor loses the right to prosecute an appeal.
2. **Judgments: Attorney and Client.** A client may be bound by his or her attorney's receipt of payment of a judgment if payment is made before the attorney's authority is revoked.

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

Alan Kirshen and Elizabeth Kountze, for appellant.

John J. Higgins of Higgins, Okun & Calkins, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Douglas County. The court modified the alimony provision of a divorce decree entered between the parties on January 11, 1979.

The original decree awarded appellant periodic nominal alimony in the amount of $1 per year for 5 years. She was also awarded a lien on the couple's real estate, her personal effects, attorney fees, and court costs.

On December 30, 1983, appellant filed a petition for modification of decree of dissolution in the district court, seeking an increase in alimony payments. After a hearing before the trial judge, the court held that petitioner-appellant

had proved that a substantial change in circumstances had taken place. Appellant's income had decreased from $105 per week to no regular income due to health problems, while appellee's income had increased from $460 per month to approximately $1,960 per month. The trial judge modified the original decree and entered an order requiring appellee to pay $200 per month for 36 months, commencing December 1, 1985.

Petitioner appeals from this order due to the trial judge's refusal to consider a personal injury award received by appellee as bearing on the issue of alimony. This personal injury action was pending at the time of the entry of the original decree and was settled after the decree became final.

Appellee has raised a question as to the propriety of this appeal, the answer to which may bar any consideration of appellant's assigned errors. Appellee asserts that appellant has waived her right to appeal the modification order because she has accepted the benefits of the decree. The record reveals that respondent-appellee remitted at least some of the $200 checks, as ordered, to the clerk of the district court. The clerk's office disbursed the checks to appellant's attorney, who, with the appellant's consent, endorsed, cashed, and deposited the proceeds into the attorney's trust account for the benefit of appellant.

The general rule at issue here is stated as follows: An appellant who voluntarily accepts payment of a part of a judgment in his or her favor loses the right to prosecute an appeal. *Berigan v. Berigan*, 194 Neb. 185, 231 N.W.2d 131 (1975). Appellant asserts that because the money is in an attorney trust account and she has "no use of the funds whatsoever," she cannot be said to have accepted the benefits of the decree. Reply Brief for Appellant at 2. We cannot agree.

There is no doubt that the funds in the attorney's trust account are now the property of appellant. Appellee has not challenged appellant's right to the $200 payments by appealing the determination as to his obligation, nor has he cross-appealed as to the issue of her right to the payments.

The funds in the trust account certainly are not the property of the appellant's attorney. In fact, those funds are entirely within the control of appellant. Canon 9, DR 9-102(B)(4), of

the Code of Professional Responsibility requires that "[a] lawyer shall . . . [p]romptly pay or deliver to the client as requested by a client the funds . . . in the possession of the lawyer which the client is entitled to receive." Appellant could demand the trust funds in question here at any time, and her attorney is required to release those funds promptly. Further, absent a cross-appeal in this court, Neb. Ct. R. of Prac. 8 (rev. 1986) gives appellant an absolute right to dismiss this appeal.

Appellant is trying to shield herself from the "waiver of right to appeal" rule by consenting to her attorney's accepting the alimony payments for her. We will not allow appellants to sidestep the clear intent of the law in this manner. A client may be bound by her attorney's receipt of payment of a judgment if payment is made before the attorney's authority is revoked. *Mason v. Forrest*, 332 S.W.2d 634 (Ky. 1959). See, also, 7A C.J.S. *Attorney & Client* § 202 (1980). The record in this case clearly indicates that appellant consented to her attorney's actions.

This court stated in *Berigan, supra*, the proper procedure in cases such as this where an appeal is contemplated. Appellants should apply to the trial court for temporary allowance of alimony pending appeal. Appellant in this case was not without a remedy or avenue for appeal.

APPEAL DISMISSED.

GRANT, J., participating on briefs.

DENISE MARIE LARSON, APPELLEE, V. RICHARD JAMES LARSON, APPELLANT.

416 N.W.2d 574

Filed December 18, 1987. No. 86-035.

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

Anthony S. Troia of Troia Law Offices, P.C., for appellant.

Peter C. Bataillon of Sodoro, Daly & Sodoro, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is a dissolution action in which the respondent-appellant husband, Richard James Larson, claims the trial court's division of the marital assets was unreasonable. We have reviewed the trial court's judgment de novo on the record and determined the trial court did not abuse its discretion in the division of those assets. Accordingly, the decree of the trial court is affirmed.

AFFIRMED.

PAMELA S. HEUER, APPELLANT, V. RUSSELL L. HEUER, APPELLEE.
416 N.W.2d 572

Filed December 18, 1987. No. 86-082.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, for appellant.

William L. Gilmore, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Appellant filed a petition in the district court for Lancaster County seeking modification of a divorce decree by an increase in child support. The district court, after hearing, sustained appellee's motion to dismiss after finding that there had been no material change in circumstances to warrant modification.

At the modification hearing petitioner-appellant testified that in 1982, the time of the original decree, her income was

$500 per month, or $6,000 annually. In 1985, when the modification petition was filed, appellant's income was estimated at $4,000 annually. Appellant remarried 6 months after the divorce decree was entered. Her new family's income in 1985 was approximately $21,000, which included the $300-per-month child support appellant receives.

Respondent-appellee testified that his salary in 1982 was $5.50 per hour and in 1985 was $8.72 per hour. Appellee was unmarried at the time of the hearing. Evidence was introduced regarding the current expenses, assets, and debts of each party.

Appellant was asking for an increase in child support payments mainly due to an increase in the expenses associated with her children's growing older.

Modification of child support is an issue entrusted to the sound discretion of the trial court. *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987). Our review of such issues is de novo on the record, but absent abuse of discretion by the trial court, its decision will be affirmed on appeal. *Id.*

Modification of an award of child support is not justified unless appellant proves that a material change in circumstances has occurred since entry of the decree. *Dobbins, supra.* After review of the record, we are of the opinion that the evidence is not sufficient to warrant modification of child support. Appellant failed to prove that a material change of circumstances has taken place that warrants an increased award.

AFFIRMED.

GAYNARD BROWN AND LUCILLE BROWN, HUSBAND AND WIFE, APPELLEES, V. CITY OF YORK, APPELLANT.
416 N.W.2d 574

Filed December 18, 1987. No. 86-162.

1. **Special Assessments: Waiver: Appeal and Error.** A landowner's right to challenge the validity and amount of a special assessment, pursuant to Neb. Rev. Stat. § 19-2422 (Reissue 1983), is not waived when such landowner attains a

deferral of payment of the assessment, pursuant to Neb. Rev. Stat. §§ 19-2425 to 19-2431 (Reissue 1983).

2. **Special Assessments: Proof: Appeal and Error.** It is the property owner who challenges the special assessment who has the burden of establishing its invalidity.
3. **Special Assessments: Presumptions.** The amount of the special assessment cannot exceed the amount of benefit conferred, but a presumption exists that the special assessment was arrived at with reference only to the benefits which accrued to the property affected.
4. **Special Assessments.** In assessing the amount of special benefits it is proper for a board of equalization to consider the present use made of the improvement, as well as the use which might reasonably be made of the improvement in the future.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded for a new trial.

Vincent Valentino and Wallace W. Angle of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

John Morgan of Morgan & Morgan, for appellees.

Richard J. Pedersen of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for amicus curiae League of Nebraska Municipalities.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

WHITE, J.

The appellees in this case, Gaynard and Lucille Brown, own certain property within a paving district created by the City of York. Within 90 days of the creation of the paving district the Browns made application, pursuant to Neb. Rev. Stat. §§ 19-2428 to 19-2431 (Reissue 1983), for deferral of payment of the assessment. Deferral is allowed under these sections when the land assessed is used exclusively for agricultural purposes. The city council determined that the land in question was used for agricultural purposes and approved the application.

Thereafter, the board of equalization met and determined that the properties within the paving district were specially benefited by the improvements. The board assessed individual properties within the district in an amount equal to that fraction of the total cost proportionate to the frontage share of such

property. The property of Gaynard and Lucille Brown was assessed in the amount of $27,627.13.

Despite the deferral, the Browns perfected an appeal from the assessment to the district court for York County, pursuant to Neb. Rev. Stat. § 19-2422 (Reissue 1983), which provides that any owner of real property adjacent to an improvement may challenge the validity and amount of such assessment. The City of York demurred to the petition, alleging the court lacked jurisdiction to hear the action. The demurrer was overruled. This ruling is the subject of the first and second assignments of error.

The appellant asserts that the appellees, by applying for and accepting a deferral of the special assessment, waived their right to challenge the assessment. The appellant cites no case law for this proposition, but relies on the rule stated in 63 C.J.S. *Municipal Corporations* § 1460 at 1248 (1950): "The validity of an assessment may be questioned only by persons whose rights are prejudiced thereby." The appellant would have us believe that because the appellees are not currently obligated to pay, the deferred assessment has not infringed upon any right belonging to the appellees. By not prosecuting their appeal, however, the appellees would have lost their right to ever challenge the validity and amount of the special assessment. Neb. Rev. Stat. § 19-2423 (Reissue 1983) requires that "[t]he owner appealing shall, within ten days from the levy of such special assessment, file a notice of appeal" and that "such appeal shall be prosecuted without delay." Additionally, there is nothing in the deferral statutes which purports to suspend the right to challenge the assessments. It should be recognized that the deferred status will generally be effectuated before the landowner knows the amount assessed, since under § 19-2429, application for deferral must be made within 90 days of the creation of the paving district. The appellant's contention would put the landowner in the untenable situation of having waived challenge to the assessment before knowing the amount of the assessment or the manner in which it was levied. Finally, the assessment, although deferred, could affect the marketability or value of the land for uses which are other than agricultural. For these reasons the appellees' right to bring the

initial challenge under § 19-2422 was not waived by reason of their attaining a deferred status under §§ 19-2428 to 19-2431.

The appellant's final assignments of error concern the district court's ruling. After a trial de novo on appeal, pursuant to § 19-2422, the district court vacated and set aside the assessment and in so doing said:

> The defendant [City of York] has the burden of proof to show an assessment is equal to special benefits conferred by the improvement upon the property assessed. This would be measured by the difference in the fair market value of the property assessed before and after the improvement, considering its highest and best use.
>
> To equate special benefits conferred to a proportional front footage cost without consideration of present or future use is pure speculation, conjecture and guess.

The appellant asserts that the court's ruling was erroneous both as to the burden of proof and as to the method of valuation of the special benefits. We agree. The City of York does not have the burden to show that the special assessment was valid. Rather, it is the property owner who challenges the special assessment, in this case the Browns, who has the burden of establishing its invalidity. *Bitter v. City of Lincoln*, 165 Neb. 201, 85 N.W.2d 302 (1957); *Chicago & N. W. R. Co. v. City of Albion*, 109 Neb. 739, 192 N.W. 233 (1923).

The amount of the special assessment cannot exceed the amount of benefit conferred on the property assessed. *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980); Neb. Rev. Stat. § 16-615 (Reissue 1983). Absent evidence to the contrary, however, it will be presumed that the amount of the special assessment was arrived at with reference only to the benefits which accrued to the property affected. *Bitter v. City of Lincoln, supra.*

In *Chicago & N. W. R. Co. v. City of Albion, supra*, the property owner asserted that the special assessments were based solely on the cost of the project and should therefore be set aside. In that case the court held:

> Unless there are circumstances which show that the special benefits found are excessive and unreasonable in amount, all things being considered, a finding by the board which

> in substance is based on the idea that the paving has added to the value of the lot a sum equal to the proportionate cost of the improvement is not so unreasonable as to justify setting the assessment aside for that reason alone.

Id. at 743, 192 N.W. at 234.

The board of equalization's valuation of the benefits conferred is not limited, as the district court's ruling might suggest, to the present use made of the improvement, but extends to the use which might reasonably be made of the improvement in the future. *Nebco, Inc. v. Speedlin*, 198 Neb. 34, 251 N.W.2d 710 (1977).

Had the district court's only error been as to the validity of the assessment, the above-mentioned principles would have warranted reversal, with an order to reinstate the assessment. However, the district court's error as to the burden of proof may have prejudiced the amount and type of evidence presented below. As such, the order of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CAPORALE and GRANT, JJ., not participating.

JAMES S. CLINTON, APPELLANT, V. FARWELL IRRIGATION DISTRICT ET AL., APPELLEES.

417 N.W.2d 1

Filed December 18, 1987. No. 86-169.

1. **Actions: Parties.** A court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights.
2. **Parties.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

3. **Actions: Parties.** Generally, in an action brought by a third-party beneficiary, the original contracting party is not an indispensable party.

Appeal from the District Court for Howard County: JOSEPH D. MARTIN, Judge. Reversed and remanded for further proceedings.

Leo A. Knowles and William F. Hargens of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Steven G. Seglin and Leroy W. Orton of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This was an action to recover for seepage damage to a tract of farmland in Howard County, Nebraska, owned by the plaintiff, James S. Clinton. The amended petition alleged that the damage was caused by water seeping from an irrigation canal operated and maintained by the defendants, Farwell Irrigation District and Loup Basin Reclamation District. The amended petition further alleged that the Farwell Canal and its laterals ran within a half mile of the plaintiff's property. The plaintiff claimed $5,000 for crop loss in 1984 and $80,000 for diminution in the market value of the land.

The defendants' answer denied that the Loup Basin Reclamation District is an irrigation district and denied that the Farwell Canal runs within a half mile of the plaintiff's property. The answer also alleged that the plaintiff's land was not suitable for irrigated row crop production and that the conversion of the land from grassland to such production caused or contributed to any damages sustained by the plaintiff. The answer further alleged that the U.S. Department of the Interior, Bureau of Reclamation (United States), owned a perpetual easement for "a grassed waterway to seep, flow and flood water over and across" a portion of the plaintiff's land; that the plaintiff had damaged or destroyed the grassed waterway, which caused or contributed to any damages sustained by the plaintiff; and that the plaintiff should be required to restore the grassed waterway. Later, the answer was amended to allege that the United States

was an indispensable party, and the defendants moved for an order requiring the plaintiff to join the United States as a party, or to dismiss the amended petition for failure to join an indispensable party.

On October 16, 1985, the trial court found that the United States was an indispensable party and ordered the plaintiff to join the United States as a party defendant within 30 days. On February 7, 1986, the amended petition was dismissed without prejudice for failure to join an indispensable party. From that order the plaintiff has appealed.

The plaintiff contends that the trial court erred in finding that the United States was an indispensable party to the action.

Neb. Rev. Stat. § 25-323 (Reissue 1985) provides:

> The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

We have held:

> " ' "Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . ." ' "

Koch v. Koch, 226 Neb. 305, 312, 411 N.W.2d 319, 323 (1987), citing *Johnson v. Mays*, 216 Neb. 890, 346 N.W.2d 401 (1984); *Burke Lumber & Coal Co. v. Anderson*, 162 Neb. 551, 76 N.W.2d 630 (1956).

As we understand the defendants' argument, the easement which the United States owns is for the benefit of the defendants and, apparently, includes some of the same land which the plaintiff alleges was damaged by seepage. Assuming that to be true, that does not make the United States an indispensable party to this action.

The plaintiff is not seeking relief against the United States, and a determination of liability and damages between the

plaintiff and the defendants will not affect the United States' interest in the plaintiff's property nor its rights under the easement.

"[W]hen relief can be granted to a party without affecting the United States, the government usually will not be held to be indispensable to the action." 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 1617 at 245-46 (2d ed. 1986).

"A joinder issue often arises in actions in which there are third-party beneficiaries to the disputed contract. In cases in which the beneficiary is a party, the courts uniformly reject the argument that all of the original parties to the contract must be joined." *Id.* at § 1613 at 186. The district court in *Central States, etc. v. Kraftco, Inc.*, 527 F. Supp. 420, 421 (M.D. Tenn. 1981), *rev'd on other grounds* 683 F.2d 131 (6th Cir. 1982), stated that "[w]here contractual rights are involved . . . and where third party beneficiaries are parties, the Courts have rejected the argument that all of the original parties to a contract must be joined." See, also, *Capital Fire Ins. Co. of California v. Langhorne*, 146 F.2d 237 (8th Cir. 1945).

In Nebraska, an action on a third-party beneficiary contract may be brought by the contracting party or by the beneficiary. See, Neb. Rev. Stat. § 25-304 (Reissue 1985); *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 84 N.W.2d 151 (1957); *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982). Generally, in an action brought by a third-party beneficiary, the original contracting party is not an indispensable party.

The order dismissing the amended petition was erroneous. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KENNETH M. CLONTZ III, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

416 N.W.2d 577

Filed December 18, 1987. No. 86-398.

1. **Implied Consent: Appeal and Error.** The findings of the trial court in an appeal from an order revoking a motor vehicle operator's license under the implied consent law are reviewed de novo as in equity. While our review is de novo, where there are conflicts in the evidence, we may give weight to the fact that the trial court saw, heard, and observed the witnesses.
2. **Constitutional Law: Implied Consent: Blood, Breath, and Urine Tests: Right to Counsel.** A driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled under either the Constitution or the implied consent statute to consult with a lawyer previous to giving a sample of blood, breath, or urine, or to have a lawyer present during the giving of the sample.
3. **Implied Consent: Blood, Breath, and Urine Tests.** Anything less than an unqualified, unequivocal assent to an officer's request to submit to a chemical test constitutes a refusal.
4. _____: _____. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to submit to a test and manifested an unwillingness to take it.
5. _____: _____. The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of a refusal or is not able to make a reasoned judgment as to what course of action to take.

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

Eric W. Kruger of Bradford & Coenen, for appellant.

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The plaintiff, Kenneth M. Clontz III, has appealed from the order of the trial court affirming the order of the director of the Department of Motor Vehicles revoking the operator's license

and operating privileges of the plaintiff under the implied consent law. Neb. Rev. Stat. § 39-669.08 (Reissue 1984).

The record shows that late in the evening of July 17, 1985, the plaintiff was the driver of a vehicle involved in a one-car personal injury accident. The plaintiff testified that he crossed over two lanes into a left-hand turn lane, failed to stop, and hit a guardrail. Nebraska State Patrolman John M. Bral was dispatched to the accident scene. Upon his arrival he saw the plaintiff sitting on the ground, receiving treatment from paramedics. The plaintiff had suffered minor head injuries, but did not appear to be seriously injured. Bral observed that the plaintiff's eyes were bloodshot and watery, and he detected an odor of alcohol. The plaintiff's speech was slurred, and he appeared to be somewhat disoriented. The plaintiff stated that he had been drinking at the Bay Hills golf course prior to the accident. Both the plaintiff and his passenger were taken to Midlands Community Hospital.

Bral contacted Patrolman Lloyd L. Peters and requested that he administer a chemical test to the plaintiff. Peters' initial contact with the plaintiff was at around 12:15 a.m. At that time he detected a strong odor of alcohol on the plaintiff's breath and that the plaintiff had bloodshot, watery eyes. Peters explained that his purpose was to request a chemical test. Peters then read the "Implied Consent Advisement Post Arrest" form to the plaintiff. The advisement form specifically provides that "if you refuse to submit to this test, the law provides you shall be guilty of an offense . . . ." It further states that

> if you refuse this test, I am required to make a sworn report of the circumstances and the refusal to the Director of Motor Vehicles, and the Director is required to schedule a hearing at which time you must show that your refusal to submit to a test was reasonable.

Peters asked the plaintiff to sign the form. The plaintiff handed the form back to Peters and stated that he wanted to consult an attorney before signing the form or submitting to a test.

The plaintiff testified that he did not understand what he was being asked to do and that he told Peters he would not do anything until he contacted an attorney. Peters explained that

the plaintiff was not being asked any incriminating questions and that the plaintiff had no right to have an attorney present before submitting to the test.

When Bral arrived, he was informed that the plaintiff had refused to sign the advisement form or submit to the test and that plaintiff wanted to contact an attorney. Bral then told the plaintiff that Bral did not have to let the plaintiff contact an attorney but that Bral would let him do so if it would make the plaintiff feel better. Bral never specifically informed the plaintiff that he did not have a right to consult an attorney. Bral then took the plaintiff to a pay phone, where the plaintiff was allowed to try to find an attorney. After failing to contact an attorney, the plaintiff was charged with refusal to submit to a test.

The director of the Department of Motor Vehicles found that the plaintiff had refused to submit to a chemical test of his body fluids after being requested to do so and that his refusal was not reasonable.

The plaintiff contends that the district court (1) erred in finding that the procedures employed by the troopers in administering the implied consent law did not tend to confuse the plaintiff; (2) erred in overlooking the deeper meaning of *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973), as it relates to the plaintiff's circumstances; and (3) erred in affirming the administrative order of the director of the Department of Motor Vehicles revoking the plaintiff's driver's license under the Nebraska implied consent law.

The findings of the trial court in an appeal from an order revoking a motor vehicle operator's license under the implied consent law are reviewed de novo as in equity. *Jensen v. Jensen*, 222 Neb. 23, 382 N.W.2d 9 (1986); *Jamros v. Jensen*, 221 Neb. 426, 377 N.W.2d 119 (1985). While our review is de novo, where there are conflicts in the evidence, we may give weight to the fact that the trial court saw, heard, and observed the witnesses. *Jensen v. Jensen, supra.*

The first two assignments of error will be considered together. The plaintiff contends that this case is controlled by the principles articulated in *Wiseman v. Sullivan, supra.* In the *Wiseman* case the plaintiff was arrested and taken to the police

station on charges of driving while intoxicated. At the station he was asked to submit to a breath test and was advised that if he refused, he would lose his driver's license for 1 year. The plaintiff consented to the test. The plaintiff was allowed to make three telephone calls, two of which were unsuccessful attempts to secure legal counsel. The officer then read to the plaintiff certain "warnings" prepared by the city's legal staff. The warnings stated why the plaintiff was under arrest. It further contained *Miranda* warnings, including the statement:

> "You have the right to consult with or obtain an attorney and have him present with you during the questioning or any part of my investigation. . . . Do you willingly waive your right to remain silent and your right to have an attorney present with you, or the right to consult with an attorney at this time?"

(Emphasis omitted.) 190 Neb. at 727, 211 N.W.2d at 909. Following these warnings, the writing included accurate information concerning the implied consent statute and the consequences of refusal. The plaintiff then refused to take the test and stated he wanted to consult with an attorney.

This court found that the warnings and the implied consent statements were inherently contradictory and that only a person trained in the law could reasonably understand from the warnings that a person had no right to contact counsel regarding the breath test. Because the plaintiff's request to see an attorney was induced by confusion from the commingling of the *Miranda*-type warnings with the requirements of the implied consent statute, the request for an attorney did not constitute a refusal. We held:

> If a Miranda type warning is given in connection with information concerning the implied consent statute, it is incumbent upon the arresting officer to explicitly inform the arrested person that the constitutional rights to counsel and against self-incrimination which may have been previously explained are not applicable to the decision the driver must make concerning the giving of samples, that he has no right to consult with an attorney before making that decision, and that the right against self-incrimination does not permit the driver to refuse to

make an answer to the request for such samples.

190 Neb. at 729, 211 N.W.2d at 910.

The plaintiff in this case contends that the same type of confusion as to *Miranda* rights occurred in this case and that the confusion led him to not reasonably understand that the implied consent law gave him no right to an attorney, and therefore he cannot be said to have unreasonably refused the test.

In this case both Peters and Bral informed the plaintiff that he had no right to an attorney. The record shows that Peters repeatedly informed the plaintiff that he had no right to an attorney, prior to the time Bral allowed him to use the phone. Bral told the plaintiff that he did not have to let him use the phone to call an attorney, but would let the plaintiff do so if it would make him feel better. This case does not involve the confusion created in *Wiseman* by the reading of *Miranda*-type warnings. The patrolmen gave the plaintiff every chance (including use of the telephone) to submit to a test before citing him for refusal. Their actions did not make the plaintiff's refusal to submit to a test reasonable.

The plaintiff contends in his third assignment of error that there was no refusal to submit to a test. He argues that because he only conditionally refused to submit to the test until consulting with an attorney, it cannot be said that he refused to submit to a test within the meaning of the implied consent law.

The law is clear that anything less than an unqualified, unequivocal assent to an officer's request to submit to a chemical test constitutes a refusal. *Guerzon v. Jensen*, 225 Neb. 712, 407 N.W.2d 788 (1987); *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984).

> A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to submit to a test and manifested an unwillingness to take it.

Pollard v. Jensen, 222 Neb. 521, 522-23, 384 N.W.2d 640, 641 (1986); *Winter v. Peterson*, 208 Neb. 785, 305 N.W.2d 803

(1981).

Both patrolmen testified that it appeared to them that the plaintiff understood he was being asked to submit to a test. Peters testified that the plaintiff "indicated that he understood the consequences and that he understood that he was being asked to take a test. His only misunderstanding that he indicated to me was that he didn't understand why he did not have the right to an attorney." Bral testified that it appeared the plaintiff understood he was being asked to take a test because "he would not take a test until he talked to an attorney."

The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of a refusal or is not able to make a reasoned judgment as to what course of action to take. *Pollard v. Jensen, supra; Winter v. Peterson, supra.*

We find that the evidence shows that the plaintiff understood he was being asked to submit to a chemical test and that he refused. As this court stated in *Wohlgemuth v. Pearson*, 204 Neb. 687, 691, 285 N.W.2d 102, 104 (1979), "any other result would force the director and the trial court into a psychological guessing game as to the [plaintiff's] state of mind and his degree of capability of comprehension."

The judgment of the district court is affirmed.

AFFIRMED.

TERRENCE T. CIMINO, APPELLANT, V. W. A. PIEL, INC., A NEBRASKA CORPORATION, APPELLEE.

416 N.W.2d 505

Filed December 18, 1987. No. 86-513.

1. **Motions to Dismiss: Appeal and Error.** Generally, in ruling on a motion to dismiss made at the close of the evidence, the court resolves the controversy as a matter of law, and such a motion may be sustained only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for that purpose, the party against whom the motion is made is entitled to the resolution of every controverted fact in his or her favor.

2. **Appeal and Error.** As a general rule, the Supreme Court will dispose of the case on appeal on the theory on which it was presented in the trial court.
3. **Equity: Appeal and Error.** An equity case is reviewed in this court de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we may consider that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Accounting: Proof.** In order for a plaintiff to recover in an action for an accounting, the plaintiff must allege and prove that he or she demanded, and the defendant refused to render, an accounting.
5. _____: _____. The burden is on the person seeking an accounting to allege and prove that there is something due him or her.
6. **Employment Contracts.** An employee's subjective understanding of "job security" is insufficient to establish an implied contract of employment to that effect.

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

George O. Rebensdorf, for appellant.

J. Thomas Rowen of Miller, Carpenter, Rowen, Fitzgerald and Coe, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Plaintiff, Terrence (Terry) Cimino, has appealed from the court's judgment dismissing his cause of action. The relevant assignment of error is that the trial court failed to find that plaintiff had proved his right to recover on an open account.

The procedural posture of this case is somewhat misleading and confusing. Both parties refer to plaintiff's action as one for an accounting. However, in his amended petition, plaintiff simply alleges that he was an employee of the defendant, that he was wrongfully discharged, and that he was owed the balance remaining in his deferred compensation account. At the conclusion of plaintiff's case, a ruling on defendant's motion for dismissal for failure to prove a right to an accounting was deferred. The defendant then presented its case, and, on final rest of both parties, defendant's motion to dismiss was sustained, as was plaintiff's motion to dismiss defendant's counterclaim.

Generally, in ruling on a motion to dismiss made at the close

of the evidence, the court resolves the controversy as a matter of law, and such a motion may be sustained only when the facts are such that reasonable minds can draw but one conclusion. *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). This means that in considering the evidence for that purpose, the party against whom the motion is made is entitled to the resolution of every controverted fact in his or her favor. *Herman v. Bonanza Bldgs., Inc., supra.*

However, in this case the parties apparently tried the case in the district court on the theory that this was an action for an equitable accounting. Therefore, we will follow the general rule that we will dispose of the case on appeal on the theory on which it was presented in the trial court. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). This means that we review this action de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we may consider that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of K.C. and C.C., ante* p. 84, 416 N.W.2d 24 (1987).

Joseph (Joe) Cimino was for all intents and purposes the owner and sole stockholder of the defendant corporation, a retail pharmacy. He owned 99 percent of the capital stock and was president of the corporation. He was also the father of the plaintiff.

Plaintiff was a registered pharmacist, and went to work full time for the defendant on January 1, 1978. He became a member of the board of directors and was made secretary-treasurer of the corporation. He was paid a beginning salary of approximately $17,000 per year. Joe Cimino testified at one point that plaintiff's basic salary was approximately $21,000. Joe discharged Terry on July 31, 1982. This appeal does not involve any question of cause for termination, and it is therefore unnecessary to detail the many complaints Joe had concerning plaintiff's conduct as an employee.

Sometime during Terry's employment, the corporation's accountant, Amil Chilese, suggested that the corporation should set up accrued salary accounts for its officers, who were Joe and Terry. Terry testified that these accounts were set up to

compensate the officers so as to reduce the corporation's liability for income taxes, and at some point in time, "it was, like, a savings account." Chilese testified that the account was set up for tax reasons and to help Terry buy the stores eventually. Every year the amount set aside for the accounts was based on excess cash available to the corporation in an amount Chilese felt would reduce the corporate liability for federal income taxes to a "quite reasonable level." The account was carried as a liability on the corporate financial reports each year and was figured into the amount listed on the corporation's income tax form for the officers' compensation.

Both Terry and Joe used the account for personal purposes. Because Terry was responsible for the books of the corporation, if Joe would write a check for personal purposes, Terry would subtract it from the accrued salary account. Terry, from time to time, would take money from the account to meet an obligation and then would replace it. He stated that he replaced the money because he did not want to deplete the account. Terry thought that if he depleted the account Joe would be concerned, but that Joe would not have a right to say anything. Terry did admit, however, that there was never any board resolution as to what would be done with the accrued salary account. His detailed testimony in that regard is particularly enlightening:

> Q. Who owned the company?
>
> A. He [Joe] did.
>
> . . . .
>
> Q. You were an employee of that company that he owned?
>
> . . . .
>
> A. That's correct.
>
> Q. Okay. You didn't have an employment contract?
>
> A. Correct.
>
> Q. You have nothing in writing about any compensation or this accrued salary that we have talked about in writing?
>
> A. We did not have a written agreement, no.
>
> Q. Okay. There was no board resolution as to how you were — you would get — would be compensated; is that correct?

A. We didn't have a formal board meeting with formal written resolutions.

Q. Do you understand the question? Was there a board resolution or not?

A. As to how I was to be compensated?

Q. Yes.

A. No.

Q. Was there a board resolution as to what would be done with the accrued officers' salaries?

A. No.

Q. Was there a board resolution as to when you would be paid or how you would be compensated?

A. No.

Amil Chilese testified that he knew of no board resolution that would entitle Terry to the account in the event he was terminated. He also stated that Terry would get the account if Terry stayed on with the corporation and if he performed properly, in Joe's opinion. Upon Terry's termination, there was $27,434.33 in his accrued salary account.

Joe Cimino testified that not only was there no written employment contract or board resolution authorizing the payment of the accrued salary account to Terry, there was nothing either written or oral by which he, Joe, was committed to pay the accrued salary account to Terry when Terry terminated his employment. Testifying further, Joe stated that the accrued salary account was set up by Chilese, basically for tax purposes, and eventually, if he, Joe, wanted to get out of the business, it would help Terry, and Joe's other two children, to buy into the store.

In order for a plaintiff to recover in an action for an accounting, the plaintiff must allege and prove that he or she demanded, and the defendant refused to render, an accounting. *Harmon Care Centers v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983). The plaintiff alleged that repeated demands were made for an accounting, but offered no evidence on that issue.

Additionally, the burden is on the person seeking an accounting to allege and prove that there is something due him or her. *Warren County v. Elmore*, 250 Iowa 348, 93 N.W.2d 756 (1958). The only evidence plaintiff offered as to his right to the

accrued salary account upon his termination was his own assertion that it belonged to him. Terry's own subjective understanding of his right to that account is insufficient to establish his entitlement to that account. See *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987), holding that an employee's subjective understanding of "job security" was insufficient to establish an implied contract of employment to that effect.

In this case Terry himself agreed that the main reason the account was set up was for tax purposes. The only understanding, if there ever was any, was that Terry could use the account while he was employed, but that his entitlement thereto was contingent upon Joe's being satisfied with Terry's work. That contingency was never met; therefore, Terry was not entitled to the account. See *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981).

We conclude that Terry failed to meet his burden of proving his right to an accounting, and judgment was properly entered in favor of the defendant.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARRELL D. PENCE, APPELLANT.
416 N.W.2d 581

Filed December 18, 1987. No. 86-1006.

1. **Verdicts: Appeal and Error.** A verdict of guilty will not be set aside for insufficiency of evidence if the evidence sustains some rational theory of guilt.
2. **Convictions: 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, evaluate explanations, or reweigh evidence.
3. **Criminal Law: Intent.** Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident.

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

Dennis R. Keefe, Lancaster County Public Defender, and Joseph D. Nigro, for appellant.

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

The defendant, Darrell D. Pence, was found guilty of burglary after a trial by jury. The defendant did not deny his involvement in the burglary at trial, but claimed that he lacked the requisite intent to commit the crime. The defendant injected cocaine into his body prior to the crime. His defense at trial was that the cocaine affected his memory and that he had not planned to commit, nor did he remember committing, the crime. The jury was instructed on the issue of intent with NJI 14.11.

The defendant's sole assignment of error is that there was insufficient evidence to support the jury's verdict of guilty because he lacked the intent to commit the crime. After a jury has considered the evidence and returned a verdict of guilty, that verdict on appeal may not, as a matter of law, be set aside for insufficiency of evidence if the evidence sustains some rational theory of guilt. *State v. Dwyer*, 226 Neb. 340, 411 N.W.2d 341 (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, evaluate explanations, or reweigh evidence. Such determinations are within the province of the jury. *Id.* See, also, *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986). Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident. *State v. Schott, supra.*

The jury in this case obviously did not believe the defendant's testimony as to intent and chose instead to infer intent from the defendant's conduct. There is sufficient evidence to support the verdict, and the judgment of conviction is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY BONCZYNSKI, APPELLANT.

416 N.W.2d 508

Filed December 18, 1987. Nos. 86-1063, 86-1064.

1. **Appeal and Error.** This court will not consider assignments of error which are not discussed in the brief.
2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress evidence, the Supreme Court will not overturn the trial court's findings of fact unless such findings are clearly erroneous.
3. **Search and Seizure.** The determination of whether a consent to search is voluntarily given is a question of fact, and voluntariness is to be determined from the totality of circumstances.
4. **Appeal and Error.** It is not the province of the Supreme Court to weigh or resolve conflicts in the evidence, credibility of witnesses, or weight to be given their testimony.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

John S. Mingus of Mingus & Mingus, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

HASTINGS, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and CORRIGAN, D.J.

WHITE, J.

The defendant, Terry Bonczynski, was prosecuted for leaving the scene of a property damage accident, flight to avoid arrest, willful reckless driving, speeding in excess of 95 miles per hour, and driving while intoxicated. After a trial to the county court for Buffalo County, the defendant was found guilty of all these charges except driving while intoxicated. The defendant was found not guilty on the latter charge. After sentencing, the defendant appealed to the district court. After a hearing, the district court affirmed the convictions. This appeal followed.

The charges against Bonczynski arise from an early morning incident on August 25, 1985. Officer McAndrew of the Kearney Police Department attempted to stop a pickup truck for a minor traffic offense. The pickup eluded police. Eventually,

sheriff's deputies of Buffalo County became involved in the chase. The fleeing pickup damaged a telephone pole in Gibbon, Nebraska, and at one point crossed the centerline and forced the oncoming vehicle of one deputy into a ditch. The officers lost sight of the pickup, but after running a check on the license plate number identified the owner and his address. Police officers proceeded immediately to the home in Ravenna, Nebraska, of Larry Bonczynski, to whom the vehicle was registered.

Upon arriving at the residence, officers observed the pickup involved in the chase, parked by the house. They saw a man walking from the area of the pickup into the front door of the home. Although the evidence is conflicting, apparently the officers contacted Larry Bonczynski at his front door. Larry Bonczynski, Terry's father, admitted he owned the pickup in question, and the officers told him he was under arrest for several offenses relating to the chase. Larry denied driving the pickup and indicated that they must be looking for his son, Terry Bonczynski. The officers testified that they asked Larry for consent to search the house for his son, and Larry voluntarily consented. Finding no one else in the home, one officer stepped out of the house and entered a dark shed some 20 feet from a side door. The defendant was found standing inside the shed and was placed under arrest. He was transported to the sheriff's office, where he was read his *Miranda* rights. Defendant then made several incriminating statements, including an admission that he was driving the pickup in question.

Appellant assigns several errors in his brief; however, the only error properly assigned and discussed relates to the trial court's overruling of his motion to suppress prior to trial. This court will not consider assignments of error which are not discussed in the brief. *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986); *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987); Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). Further, appellant discussed one alleged error at the district court level, but fails to assign error relating to that issue. Errors not properly assigned will not be considered. Both the rules of this court and prior case law require that each error relied upon for

reversal be separately and concisely stated and discussed. *Klug v. Smith*, 223 Neb. 202, 388 N.W.2d 515 (1986); *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984).

The only assigned error that merits review alleges that the trial court erred in failing to sustain defendant's motion to suppress the evidence and statements obtained pursuant to the officers' search of the home and arrest of defendant. In determining the correctness of a trial court's ruling on a motion to suppress evidence, the Supreme Court will not overturn the trial court's findings of fact unless such findings are clearly erroneous. *State v. Evans*, 223 Neb. 383, 389 N.W.2d 777 (1986). In reviewing the correctness of the findings of fact made by a trial court regarding a motion to suppress, the Supreme Court recognizes and takes into consideration that the trial court has observed the witnesses testifying regarding the motion to suppress, has determined credibility of the witnesses, and has weighed testimony from those witnesses to reach findings of fact regarding such motion. *Id.*

The appellant seems to be asserting that his arrest was somehow illegal and that the fruits of the arrest must therefore be suppressed. Without deciding whether the arrest would have been illegal if the search were nonconsensual, the trial court found that the search was consensual, and such a discussion is unnecessary if we affirm. The determination of whether a consent to search is voluntarily given is a question of fact, and voluntariness is to be determined from the totality of the circumstances. *State v. Ferrell*, 218 Neb. 463, 356 N.W.2d 868 (1984). From our review of the record we find that there was ample evidence to support the trial court's ruling that the consent given was in fact voluntary. The evidence on this question was conflicting to some degree; however, it is not the province of the Supreme Court to weigh or resolve conflicts in the evidence, credibility of witnesses, or weight to be given their testimony. *In re Estate of Odineal*, 220 Neb. 168, 368 N.W.2d 800 (1985).

We are satisfied from the record that the officers were lawfully present at the residence of the Bonczynskis, properly requested and received consent to search the premises for the

driver of the pickup involved in the chase, and conducted a legal arrest when they placed Terry Bonczynski in custody. The trial court's findings of fact were not clearly erroneous.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LONNIE C. PATMAN, APPELLANT.

416 N.W.2d 582

Filed December 18, 1987. No. 87-097.

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 finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Trial: Evidence: Appeal and Error.** The trial court is given broad discretion in the admission of evidence, and such rulings will not be overturned on appeal absent a showing of an abuse of discretion.
3. **Trial: Evidence: Presumptions.** In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
4. **Criminal Law: Appeal and Error.** In reviewing a matter tried to the court without a jury, the findings of a judge in a criminal case as to questions of fact will not be disturbed unless clearly wrong.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cathy K. Bashner, for appellant.

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

HASTINGS, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and CORRIGAN, D.J.

HASTINGS, C.J.

Following a bench trial, the defendant was convicted of first degree murder, second degree assault, and two counts of use of a firearm to commit a felony. He was sentenced to consecutive terms of life imprisonment, 20 months to 5 years, and two sentences of 2 to 4 years. He has appealed to this court, alleging, first, that the trial court erred in overruling his objection on the ground of insufficient foundation to the introduction into evidence of a certain written note and, secondly, that the trial court erred in overruling his motion for a directed verdict and motion to dismiss. We affirm.

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 finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). The trial court is given broad discretion in the admission of evidence, and such rulings will not be overturned on appeal absent a showing of an abuse of discretion. In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence. *State v. Parsons*, 226 Neb. 543, 412 N.W.2d 480 (1987).

There is little dispute concerning most of the evidence. On June 16, 1986, the defendant went over to a trailer house in which he and Juliana Moran (also known as Sam) had once lived. This was located in Omaha, Nebraska. Finding that his key no longer fit the lock, he broke a window and entered the trailer to await Moran's return. In the meantime, he retrieved his .25-caliber automatic weapon from a sewing basket where he had hidden it, and placed the gun in the spare bedroom. A short time later Moran and David Barrickman arrived at the trailer house.

According to Moran's testimony, Barrickman started down the hallway and saw the defendant. She immediately heard two "pops" like "fire crackers." According to the defendant, Barrickman had swung and hit the defendant in the head, then

threatened to kill the defendant, and "started going for his pocket." The defendant stated that he then reached for his gun and started shooting. Immediately thereafter, said the defendant, the victim Barrickman fell, and he, the defendant, started backing up, because he wanted to talk to "Sam." However, he claimed that she had a footstool with which she was going to hit him, so he shot her in the leg.

Defendant admitted that he went back "in there" to see how Barrickman was, and when defendant reached him, Barrickman was lying down but still threatening to kill him. Defendant then hit him on the head and arm with a double-barreled shotgun.

Moran testified that as Barrickman started down the hall, she did not hear him say anything; rather, she heard the two "pops," and the defendant then came back into the living room. She also denied that she had a footstool in her hand, but said that the defendant first pointed the gun at her head and then lowered it and shot her in the leg. She also said that when the defendant went back to where Barrickman was, she "heard like flesh-to-flesh beating, in the head beating, and then I heard David say, 'Quit, Lonnie, quit.' " She did not at any time hear Barrickman threaten the defendant, and she heard one more shot as she was going out the door for help.

The defendant left the premises and, after finding his brother, told him that defendant had done "something wrong," and then drove to Lincoln to catch a bus. On the way, he threw his gun out the window into the Platte River. The defendant further testified that he boarded a bus and was arrested in Grand Island early the next morning.

Dr. Jerry Wilson Jones, a pathologist, testified that the four gunshot wounds he found in the victim Barrickman would not necessarily have killed him; that he would have been alive and quite conscious, although unable to move from the waist down. He also described injuries to Barrickman's skull as

> very massive in that not only are the front part of both sides of the skull fractured, but there also are multiple and extensive fractures involving the entire right side of the skull and even extending into the back of the left side of the skull, and also in association with these there are

> massive bruises of both sides of the brain, swelling of the brain, and even bleeding into the brain stem.

In addition, Barrickman had several "defensive injuries," which "would most likely be produced as a result of the person defending themselves from some blunt object." Barrickman eventually died of these injuries.

Upon his arrest, the defendant had in his possession a handwritten note which read, "Who ever find this note, I want every one to know that I love Sam so much, that if I can't have her, no one will. I've told your family that I love you very much, and I can't live without you. I'm taking mine & your life. Lonnie." The defendant identified it as "a note I wrote and stuck it in my wallet." The defendant claims that he wrote it in February 1986, and kept it with him at all times.

The note was offered into evidence at the trial and received over the defendant's objection. Defense counsel said, "I would have no objection as to foundation," but he did object as to relevance and prejudice. The objections were overruled, and the defendant eventually was found guilty of all counts. Even though counsel did not object on foundation, because this is a first degree murder case, we will discuss that assignment of error.

It is quite apparent that the note was relevant on the issue of premeditation. It certainly was prejudicial, but that is no basis, standing alone, to deny its admission. The foundation argument is entirely without substance. Defendant argues that the note was "assumed" to have been written by the defendant, yet "[t]he handwriting was never compared with an authenticated exemplar," nor was the note "viewed by anyone familiar with the Defendant's writing." Brief for Appellant at 8. Defense counsel seems to overlook the fact that the defendant admitted that he had written the note. It was admissible as an admission by a party. Also, Neb. Rev. Stat. § 27-901(2) (Reissue 1985) provides that an item of evidence may be authenticated or identified by "(a) Testimony that a matter is what it is claimed to be . . . ."

The defendant argues self-defense. He claims that he feared that Barrickman, having threatened to kill him, would harm him, so it was necessary to shoot him. However, the defendant

himself testified that Barrickman was backing up toward the bedroom when the defendant shot him, and, as a matter of fact, he admitted shooting him twice in the back.

Clearly, viewing the evidence in the light most favorable to the State, the defendant's self-defense theory is not only inapplicable to the shooting of Barrickman, but is inapplicable to the beating as well. The defendant purposely returned to where Barrickman lay and, although the defendant could not at that point have reasonably believed his life was in danger, proceeded to kill Barrickman by beating him on the head with a double-barreled shotgun.

Furthermore, the facts fully support a finding of first degree murder and second degree assault, as well as the two counts of committing a felony with a firearm. "In reviewing this matter we must bear in mind that the factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong." *State v. Moniz*, 224 Neb. 198, 202, 397 N.W.2d 37, 40 (1986).

Since the judge's findings in this instance, including the presence of malice, premeditation, and deliberation, were fully supported by the evidence and not clearly wrong, the convictions should not be overturned, and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM L. MINSHALL, APPELLANT.

416 N.W.2d 585

Filed December 18, 1987. No. 87-253.

1. **Pleas.** After the entry of a plea of guilty or no contest (nolo contendere), but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.
2. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.

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

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

In an amended information, the State charged William L. Minshall with commission of two felonies, first degree sexual assault, Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1985), and use of a firearm to commit a felony, Neb. Rev. Stat. § 28-1205(1) (Reissue 1985). As the result of a plea bargain, Minshall later entered a no contest plea to the charge of attempted first degree sexual assault alleged in another amended information. Before the court accepted the no contest plea on December 9, 1986, Minshall expressly stated that no promises or inducements had been extended by law enforcement or anyone else in exchange for his no contest plea to the charge of attempted first degree sexual assault. In connection with entry and acceptance of Minshall's plea of no contest, the court fully complied with the requirements for a defendant's valid plea of no contest. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). After accepting Minshall's no contest plea, the court ordered a presentence investigation. Prior to any sentence hearing, Minshall, on February 10, 1987, requested to withdraw his no contest plea and informed the court that, before entry of the plea, he had told his attorney he would accept the plea bargain and enter his no contest plea because he had not seen his children for a long time. Minshall's children were in the custody of his former wife, who had been granted custody of the Minshall children as the result of a divorce decree. Minshall's attorney stated that the attorney would "try everything in his power to get the visit." Minshall's former wife balked at his visitation of the children. The only reason, then, for Minshall's request to withdraw his no contest plea was: "I'm afraid I won't

get to see them [the children] when I get out, when I go to the penitentiary and stuff."

The court rejected Minshall's request to withdraw his no contest plea and, later, sentenced Minshall to imprisonment for a term of 5 to 10 years, with credit for time awaiting disposition of the criminal charges against Minshall.

Minshall's only assignment of error relates to the trial court's refusal to permit Minshall's withdrawal of his no contest plea to the charge of attempted first degree sexual assault.

In *State v. Turner*, 186 Neb. 424, 426, 183 N.W.2d 763, 765 (1971), this court stated that the ABA Standards Relating to Pleas of Guilty "outline what should be the minimum procedure" regarding pleas of guilty or no contest (nolo contendere). Later, in *State v. Daniels*, 190 Neb. 602, 605, 211 N.W.2d 127, 129-30 (1973), this court held:

> Before sentence the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. Cf. State v. Turner, 186 Neb. 424, 183 N.W.2d 763 (1971). See, ABA Standards Relating to Pleas of Guilty, Approved Draft, 1968, § 2.1, p. 52, and Proposed Revisions, 1968, § 2.1, p. 3.

Approval of the ABA standards regarding withdrawal of pleas of guilty and no contest has often been expressed in previous opinions by this court; for example, *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977), and *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984). Even more recently, in *State v. Dixon*, 223 Neb. 316, 321-22, 389 N.W.2d 307, 310-11 (1986), this court held:

> This court has adopted ABA Standards for Criminal Justice § 14-2.1(a) and (b) (2d ed. 1980). *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984); *State v. Evans*, 194 Neb. 559, 234 N.W.2d 199 (1975). In his brief, defendant notes that his motion to withdraw the plea was filed prior to sentencing and that the applicable ABA standard is § 14-2.1(a). The trial court applied the standard of § 14-2.1(b). Section 14-2.1(a) sets out a standard different from the guidelines of § 14-2.1(b), which deals with a

> motion for withdrawal of plea after sentencing. Rather than requiring defendant to show that withdrawal of the plea is necessary to avoid "a manifest injustice," subsection (a) requires defendant to show only "any fair and just reason." After a plea is entered, but before sentence is imposed, a defendant's motion to withdraw his plea is governed by § 14-2.1(a).

Thereafter, without reference to the ABA standards, we stated in *State v. Hoffman*, 224 Neb. 830, 834, 401 N.W.2d 683, 686 (1987):

> As further stated in *State v. Nearhood, supra*, "[A]fter the entry of a plea of nolo contendere but before sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution would not be substantially prejudiced by its reliance upon the plea." 223 Neb. at 769-70, 393 N.W.2d at 532.

Likewise, this court, in *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986), which was mentioned in *State v. Hoffman, supra*, made no specific reference to ABA standards pertaining to a defendant's withdrawal of a plea of guilty or no contest.

In the case now before us, the State sets forth the proposition: "It is not proper as a matter of right for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice." (Emphasis omitted.) Brief for Appellee at 2. The "manifest injustice" standard relates to a defendant's withdrawal of a plea of guilty or no contest *after sentencing*, and not to a situation involving a defendant's request to withdraw a plea *before* sentence. See, *State v. Dixon, supra; State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984).

As we recently expressed in *State v. Irish*, 223 Neb. 814, 818-19, 394 N.W.2d 879, 882 (1986):

> Recognizing, however, that the work of the ABA, although good and useful, nevertheless does not rise to the status of legislative acts or judicial holdings . . . , we now specifically disapprove any statements that any form of the ABA Standards for Criminal Justice, including those

relating to guilty pleas, has been adopted by this state.

In the present case, we make an observation and comment similar to that expressed about ABA standards considered in *State v. Irish, supra.* Concerning ABA standards which relate to a defendant's withdrawal of a plea of guilty or no contest before imposition of sentence, we specifically disapprove any statements, heretofore appearing in opinions of this court, that any form of the ABA standards governs disposition of a defendant's request to withdraw a plea before sentencing. However, the correct standard in Nebraska is: After the entry of a plea of guilty or no contest (nolo contendere), but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.

The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. See *State v. Holtan, supra.*

The reason given by Minshall to support his request to withdraw his no contest plea was his wish to see his children, whom he had not seen for quite some time due to the actions of his former wife. Such a circumstance does not constitute a "fair and just reason" for a court to permit a defendant's withdrawal of a plea of guilty or no contest. There was no abuse of discretion by the trial court in refusing to allow Minshall to withdraw his plea of no contest. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE F. HOULTON, APPELLANT.

416 N.W.2d 588

Filed December 18, 1987. No. 87-340.

Evidence: Arrests. The rule rendering evidence derived either directly or indirectly from unlawful sources inadmissible does not apply to evidence obtained in a citizen's arrest unless such arrest was part of action taken by the State.

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

Anthony S. Troia, for appellant.

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

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and ROWLANDS, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

Defendant, Lawrence F. Houlton, appeals his conviction for second offense drunk driving and assigns as his sole error the failure of the trial court to suppress the evidence against him. We affirm.

On August 28, 1986, Kenneth Toms, an Iowa state trooper, was off duty and in Omaha on personal business. At about 1 p.m., he was driving his own automobile northward on 114th Street and saw Houlton driving southward toward Pacific Street. Houlton was slumped forward over the steering wheel of his automobile and was swerving on and off the shoulder.

Toms, who was wearing civilian clothing, turned his automobile around and drew up to Houlton's automobile, which was stopped at a traffic light. Toms got out of his vehicle, approached Houlton, and asked Houlton if he had been drinking. Houlton replied that he had. Toms then told Houlton that he was under citizen's arrest. Houlton turned his keys over to Toms as the latter requested. As Houlton left his automobile, he began to walk away, but Toms stopped him and had him wait while Toms moved both vehicles out of the traffic. Toms noted that Houlton exhibited all the characteristics of a person under the influence of alcohol: bloodshot eyes, slurred speech,

odorous breath, and poor balance and dexterity. Toms asked a witness to call the Omaha police.

After Toms described what had occurred, the Omaha officers arrested Houlton. Houlton failed an Alco-Sensor test which was administered by the police at the scene, and later tested at .298 on the Intoxilyzer.

Apparently recognizing that the evidence developed by Toms, combined with that developed by the police, if properly admitted, is sufficient to support his conviction, Houlton contends that all the evidence should have been suppressed because his initial arrest by Toms was unlawful. Neb. Rev. Stat. § 29-402 (Reissue 1985) provides: "Any person not an officer may, without warrant, arrest any person, if a petit larceny or a felony has been committed, and there is reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained." Driving while intoxicated is neither a felony nor a petit larceny; it is a Class W misdemeanor. Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). Thus, if Toms' actions constitute an arrest of Houlton, a matter we do not decide but assume to be so for the purpose of our analysis, it was an unlawful arrest.

The question thus becomes whether the evidence obtained as the result of Toms' unlawful citizen's arrest must be suppressed. In so arguing, Houlton notes that *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), declares inadmissible evidence directly or indirectly derived from an unlawful arrest. It must be understood, however, that the rule rendering evidence derived from unlawful sources inadmissible is designed to discourage lawless police conduct, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), and to discourage governmental officials from participating in or encouraging conduct which would be illegal if performed by the government. *Gundlach v. Janing*, 401 F. Supp. 1089 (D. Neb. 1975). It is not, however, a part of the "policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Coolidge v. New Hampshire*, 403 U.S. 443, 488, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

Thus, it has been held that the exclusionary rule does not apply to citizens' arrests, *Com. v. Corley*, 507 Pa. 540, 491 A.2d 829 (1985); *State v. Clark*, 454 So. 2d 232 (La. App. 1984); *State v. Polk*, 482 So. 2d 21 (La. App. 1986), unless such an arrest was a part of the action taken by the State. *People v. Zelinski*, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979); *People v. Martin*, 225 Cal. App. 2d 91, 36 Cal. Rptr. 924 (1964); *Thacker v. Commonwealth*, 310 Ky. 702, 221 S.W.2d 682 (1949). Indeed, this court, in *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985), held that an incriminating statement made by the defendant to his employer's representatives was admissible notwithstanding the fact that the defendant had not been given the *Miranda* warnings. See, also, *State ex rel. NSBA v. Douglas, ante* p. 1, 416 N.W.2d 515 (1987).

Defendant refers us, however, to *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962), wherein we held that evidence obtained by an Iowa officer purporting to act under the arrest authority granted by Neb. Rev. Stat. § 29-416 (Reissue 1985) to foreign officers in fresh pursuit of one thought to have committed a felony and entering this state should have been excluded. In so ruling, we reasoned that as no fresh pursuit had been involved, § 29-416 did not apply, and, thus, the arrest incident to which the search resulting in the seizure had been made was unlawful. The situation in the case presently before us is distinguishable. In *Goff*, it was an Iowa police officer acting in the scope and course of his duties as such who effected the initial arrest and obtained the evidence. Thus, the acts of the Iowa officer were the acts of a State. In this case no State action was involved in the arrest by Toms; he was an off-duty police officer acting as a private citizen. Toms as a citizen then told the police what he saw, and the police, acting on the probable cause provided by the citizen's description, then developed additional cumulative evidence.

Under the circumstances, all the evidence was properly admitted; accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. SYLVESTER FRANK PETTIT, APPELLEE.

417 N.W.2d 3

Filed December 18, 1987. No. 87-516.

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 the trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, 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. **Miranda Rights: Confessions.** If a person indicates in any manner, before or during interrogation by law enforcement personnel, that such person wishes to remain silent, the interrogation must cease.
4. **Miranda Rights.** The *Miranda* warning notifies a person of the constitutional right to be silent and assures that a person's exercise of such right will be scrupulously honored.
5. **Miranda Rights: Confessions: Waiver: Presumptions: Proof.** Once a person invokes the right to be silent, before or during interrogation by law enforcement personnel, there is a "presumption" against a subsequent waiver of the right to be silent regarding interrogation, and the State has the burden of proof that the interrogated person has voluntarily, knowingly, and intelligently waived the constitutional right to be silent.
6. **Miranda Rights: Waiver: Confessions.** After a defendant has invoked the right to be silent and terminate custodial interrogation by police, but there is subsequent police interrogation of the defendant, a court considers three factors to determine whether the defendant's right to be silent has been scrupulously honored: (1) Did the police immediately cease interrogation on the defendant's request? (2) Did the police resume an interrogation of the defendant only after passage of a significant time and a renewal of the *Miranda* warning? and (3) Did police restrict the subsequent interrogation to a transaction or occurrence which was not the subject of the prior interrogation which was discontinued?
7. **Waiver.** A waiver must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.
8. **Confessions: Waiver.** An accused may waive the privilege against self-incrimination or the right to remain silent, provided the waiver is made voluntarily, knowingly, and intelligently.

Appeal from the District Court for Blaine County: RONALD D. OLBERDING, Judge. Affirmed.

Joseph J. Divis, Blaine County Attorney, for appellant.

John O. Sennett and Brad Roth of Sennett & Roth, for appellee.

SHANAHAN, J.

Before trial and pursuant to Neb. Rev. Stat. § 29-115 (Reissue 1985), Sylvester Frank Pettit moved for suppression of his oral statements to law enforcement officers regarding a homicide which was later the basis of a manslaughter charge, Neb. Rev. Stat. § 28-305 (Reissue 1985). From the order of the district court for Blaine County, suppressing Pettit's statements, the State appeals. See Neb. Rev. Stat. § 29-116 (Reissue 1985).

SUPPRESSION OF STATEMENTS

In the motion to suppress his statements to law enforcement officers, Pettit alleged that his statements were involuntary and were obtained in denial of Pettit's privilege against self-incrimination, contrary to the provisions of the Nebraska Constitution and the U.S. Constitution. See, Neb. Const. art. I, §§ 3 ("due process") and 12 (privilege against self-incrimination); U.S. Const. amends. V and XIV.

The State and Pettit agree that Pettit made the statements to law enforcement personnel during custodial interrogation governed by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At the conclusion of the suppression hearing, the district court found that the State had failed to establish that Pettit waived the constitutional protection afforded by the privilege against self-incrimination.

ASSIGNMENTS OF ERROR

The State contends that Pettit waived the privilege against self-incrimination consistent with the "*Miranda* warning" which must be given to a suspect subjected to custodial interrogation by police. The district court also found that the State failed to prove that Pettit's statements were voluntary, and the parties have devoted part of their arguments to Pettit's lucidity or acuity in reference to voluntariness of his statements, see *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985). However, even with the appellate assumption that Pettit possessed the faculty for voluntary statements, disposition of

the question concerning Pettit's waiver of the constitutional protection against self-incrimination disposes of the State's appeal and renders unnecessary any consideration of the other errors assigned by the State.

STANDARD OF REVIEW

"In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous." *State v. Copple*, 224 Neb. 672, 689, 401 N.W.2d 141, 154 (1987). See, also, *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

"In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress." *State v. Dixon*, 222 Neb. 787, 795, 387 N.W.2d 682, 687 (1986). See, also, *State v. Copple, supra; State v. Vrtiska, supra.*

EVIDENCE AT SUPPRESSION HEARING

Responding to a call about a shooting, Blaine County Sheriff Lee Sinner and members of the Nebraska State Patrol arrived at the Pettit residence shortly after midnight on January 16, 1987. Sheriff Sinner entered the Pettit house and found Frank Pettit, covered with blood, kneeling over the body of Pettit's wife, Pandora. The body, with a bullet wound to the chest, was lying in a pool of blood on the bedroom floor. Pettit was pressing his hand against the gunshot wound in the body and was attempting to place some plastic substance in the bullet hole. A .22-250 caliber rifle rested against the bedroom wall. When Sheriff Sinner asked what had happened, Pettit did not answer, but arose and went into the kitchen, where Pettit fainted. When Pettit regained consciousness, Trooper Carrolle E. Harris of the Nebraska State Patrol placed handcuffs on Pettit, who was then arrested by Sheriff Sinner and transported to the Custer County jail at Broken Bow, because there was no jail in Blaine County.

Shortly after 2 a.m., a jailer obtained general information from Pettit's driver's license and observed that Pettit was "in shock or not comprehending anything, not talking." At 7:10

a.m. on the morning of January 16, Trooper Harris removed Pettit from his cell and took him to an interrogation room in the jail. Present in that room during Pettit's interrogation were Trooper Harris, Sheriff Sinner, Investigator Terry Ahrens of the Nebraska State Patrol, and a Sergeant Elliott of the Nebraska State Patrol. Sheriff Sinner, Trooper Harris, and Sergeant Elliott jointly participated in Pettit's interrogation. According to Trooper Harris, Pettit was "clear and understandable" at this time, and Sheriff Sinner indicated that Pettit "appeared to understand all the questions" during the interview.

Trooper Harris presented Pettit with a form entitled "ADVICE OF RIGHTS," utilized by the Nebraska State Patrol, which contained:

> You have the right to remain silent.
>
> Anything you say can be used against you in court.
>
> You have the right to talk to a lawyer before answering any questions and to have a lawyer with you during questioning.
>
> If you cannot afford a lawyer, one will be appointed for you at no cost before any questioning.
>
> If you answer questions now without a lawyer present, you have the right to stop answering at any time until you talk to a lawyer.
>
> * * * * *
>
> I have read the above statement of my rights. I understand my rights and I am willing to answer questions at this time without the services of a lawyer. I will answer questions freely, voluntarily and of my own free will. I do so without being under duress, coercion or threats, and without having been promised any leniency or immunity.

Trooper Harris read the "rights" form to Pettit, who declined to sign that document. Sergeant Elliott then commenced the interrogation, which was tape-recorded and later transcribed as "INTERVIEW OF SYLVESTER FRANK PETTIT, SUSPECT." The transcription was identified as exhibit 1 for the suppression hearing and was received into evidence.

After preliminary questions about identification of Pettit as the person being interrogated, the following evolved during

Pettit's interrogation:

Elliott: . . . okay Frank we need to ask you some questions about our, the accident tonight, but before we ask you the questions about the shooting, ah I need to read you some rights, do you understand me, I need to know you are hearing me Frank, please answer me, would you, can you hold your head up a little bit, I didn't hear ya

Pettit: Ya

Elliott: Okay, pause, you have the right to remain silent Frank, do you understand that, can you answer me Frank I can't hear ya

Pettit: Ya

Elliott: Okay, anything you say can be used against you in court, you have the right to talk to a lawyer before answering any questions and to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you at no cost before answering any questioning, if you answer questions now without a lawyer present you have the right to stop answering at any time until you talk to a lawyer. You . . . understand your rights in this matter? Okay Frank there's been a terrible accident tonight, and we need to get it resolved, we, we, we, you, I and this officer we need to get the facts down so that it's just exactly what happened, is determined so that it is fully understood, ah, pause, ah your your wife even made the statement that, that was an accidental shooting, ah, pause, what, what, what brought it about to you guys went out to do a little bit of drinking as I understand, right

Pettit: Ya

Elliott: Oh, can you fill me in from that point, we see your car along side of the road, ah what happened to the car

Pettit: Ran out of gas

Elliott: Ran out of, bummer, did you walk on into ah Halsey from there or did you just go back home

Pettit: Walked north

Elliott: Pardon me, I didn't hear ya Frank

Pettit: Walked home

Elliott: Walked home, pause, what happened when you

got home, ah did you and your wife get into a little bit of a flight [sic] or or what happened when you got home, that's the part we need to talk about, what happened at home Frank, pause, did you guys get into a fight, pause, Frank did you hear me, pause Frank let me know if you're hearing me please, Frank

Pettit: Huh

Elliott: What happened when you got home with your wife tonight, pause, with the gun, did you, you just, were we talking, we were talking about the gun, were we going to sell the gun or we're going hunting, what, how did the gun get out, pause, Frank talk to me Frank, help us get this squared away so we, so the county attorney, and everyone don't think the wrong things going on here, there's no point in you suffering any more than you need to suffer, you've lost your wife already through an accident, now let's get it all out on the table, so we can get it all cleared up, it's not gonna make it any better if we have to drag this thing through alot of a lovely court hearing because its an accident, let's get it opened up, pause, do you hear me Frank, talk to me help me get this squared away, Frank are you with me,

Harris: Frank do you want to talk to us, pause, come on we need your help

Pettit: No (faint)

Elliott: No what Frank, pause

Harris: Tell us what happened

Elliott: Frank, look up, look up, Frank, let me know you're at least hearing this, that we're not talking to nobody, are you alright Frank, pause, Frank talk to me

Sinner: You don't care if I speak to him do you

Elliott: Go ahead

The officers immediately continued the interrogation and obtained Pettit's answers to a series of leading questions, which indicated or suggested details concerning Pandora's death, including a quarrel between Pandora and Pettit in their home shortly before the shooting, involvement of the rifle found in the Pettit bedroom, and a struggle between Pettit and Pandora. Such questioning included:

Harris: Tell us what happened then Frank, so we know what happened, look up here Frank hey Frank look up here at me

Sinner: Frank ole boy, Frank, look over there at those there guys there just a minute

Harris: Tell us what happened Frank

Elliott: You don't want to tell us what happened

Elliott to Harris: Go ahead, he was talking to you go ahead

Harris: Frank, you went in the bedroom and you picked the gun up from behind the door, right is that right. Frank look at me a minute hey Frank look up here, I want to help you Frank, look up here, tell me what happened, you went in, you picked the gun up from behind the door, right or is that wrong, Frank, you picked it up, sat down on the bed with it, did you put a round in it, Frank or did it already have the round in it, Frank, Frank, look at me Frank, Frank, he, Frank look up here at me, would ya, talk to me, don't you want to talk to me no more would you talk to the other guys if I leave, would you talk to me if they leave

Elliott: Are you done talking to us Frank, Frank before we leave, understand that as of right now, it looks like a murder in the first degree, because you went into the bedroom, you got a gun you loaded the gun and she walked in and you wasted her that's brutal, but that's the way it is, now if it's a mistake if it's wrong, then let's get the facts out on the table, let's present them like it should be if it's an accident, let's talk about it, let's make it as an accident, but this sitting here and not answering questions and not talking to us, acting like you don't hear us isn't doing nothing but hurting you because as it is, you're dead you, you, you're cooked, we got your fingerprints all over the gun, we got you telling us you went into the bedroom and loaded it

Sinner: You better give 'em your facts

Elliott: Right now, it's murder one

Sinner: Frank

Elliott: Because you went in there with premeditation of shooting her

Harris: Talk to us Frank tell us what really happened

Elliott: That's let's find out what really happened so we can eliminate that, if that's not right let's get it out of there, but that's the possibility right now, it's big time, we're not talking small stuff here, this isn't a traffic court, this isn't a bad check

Sinner: If there's a big fussan [sic], and you think there's any chance of an accident or anything, well we want you to tell us

Elliott: If it happened during a fight, between you, you and Bambi that eliminates murder one and if would cooperate with us and tell us about it, it might be easier for a judge to believe it was an accident, but as long as you sit here and play games with us, it starts to look like an accident, it starts to look like you're trying covering something up. Now we already know you had a fight, you want to cooperate with us Frank, or do you want to play the game some more.

Pettit: I want to talk to a lawyer

Elliott: Okay, thank you for you [sic] time Frank

INTERVIEW ENDED

The State argues that Pettit's waiver of his right to remain silent or the privilege against self-incrimination is found in his responses, "Ya," made after Sergeant Elliott's comments containing reference to Pettit's "rights" pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

CUSTODIAL INTERROGATION AND *MIRANDA*

In *Miranda v. Arizona, supra*, and to counter potentially coercive circumstances surrounding a suspect's statement to police officers, the U.S. Supreme Court formulated prerequisites for admissibility of a suspect's in-custody statement(s) obtained "in a police-dominated atmosphere, resulting in self-incriminating statements," 384 U.S. at 445, namely, the "*Miranda* warning," by which law enforcement personnel must inform the person in custody "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444. The *Miranda* Court continued:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked,

384 U.S. at 473-74, and,

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. [Citation omitted.] This Court has always set high standards of proof for the waiver of constitutional rights [citation omitted] . . . .

384 U.S. at 475.

Finally, the Court in *Miranda* concluded that the "*Miranda* warning" serves as a means "to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." 384 U.S. at 479.

In considering admissibility of a defendant's statement made after invocation of the right to remain silent or the privilege against self-incrimination, this court, in *State v. Teater*, 209 Neb. 127, 131-33, 306 N.W.2d 596, 599 (1981), stated:

> This court has previously set out the *Miranda*-imposed requirements on police officers when a suspect invokes his constitutional right to remain silent and his right to counsel. In *State v. Euller*, 203 Neb. 233, 238-39, 278 N.W.2d 756, 759-60 (1979), this court said: "Although Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), does not require an absolute halt to all conversations by the police with the defendant once the right to silence is asserted, observance of the

constitutional right is tested by the circumstances to determine whether the right was 'scrupulously honored.' . . .

"Recent cases consider the validity of a subsequent waiver of the once-asserted right to counsel under certain circumstances. [Citations omitted.] These cases hold that the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. 'If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' [Citing *Miranda v. Arizona*.]"

In *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980), this court said: "Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

. . . .

. . . The evidence is undisputed that the defendant's assertion of his constitutional right to remain silent and right to counsel was not "scrupulously honored." The evidence was insufficient, as a matter of law, to meet the heavy burden resting on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. The motion to suppress should have been granted.

More recently, in *State v. LaChappell*, 222 Neb. 112, 118-19, 382 N.W.2d 343, 348 (1986), we stated:

Once an individual in custody indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent [illegible] ogation must cease, for at this point the individual being interrogated has shown that he or she intends to exercise his or her fifth amendment right to remain silent. [Citations omitted.] Moreover, once the right to remain silent has been invoked, there is a

strong presumption against its subsequent waiver.

See, also, *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984).

CONTINUED QUESTIONING AFTER INVOCATION OF *MIRANDA*

After *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court decided *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), which involved admissibility of Mosley's statement made after he had expressed his unwillingness to answer police questions about robberies under investigation. Approximately 2 hours after indicating that he wished to remain silent, Mosley was questioned about a homicide, an occurrence unrelated to the robberies which were the subject of Mosley's initial interrogation. A police officer who had not participated in Mosley's initial interrogation advised Mosley of the "*Miranda* rights," and Mosley then made a statement implicating himself in the homicide. In the course of its opinion in *Mosley*, the U.S. Supreme Court reviewed certain language in *Miranda v. Arizona, supra*, and stated:

> The issue in this case . . . is whether the conduct of the Detroit police that led to Mosley's incriminating statement did in fact violate the *Miranda* "guidelines," so as to render the statement inadmissible in evidence against Mosley at his trial. Resolution of the question turns almost entirely on the interpretation of a single passage in the *Miranda* opinion, upon which the Michigan appellate court relied in finding a *per se* violation of *Miranda*:
>
> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U. S., at 473-474.

> This passage states that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent." It does not state under what circumstances, if any, a resumption of questioning is permissible. The passage could be literally read to mean that a person who has invoked his "right to silence" can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Another possible construction of the passage would characterize "any statement taken after the person invokes his privilege" as "the product of compulsion" and would therefore mandate its exclusion from evidence, even if it were volunteered by the person in custody without any further interrogation whatever. Or the passage could be interpreted to require only the immediate cessation of questioning, and to permit a resumption of interrogation after a momentary respite.
>
> . . . Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.
>
> . . . Through the exercise of [a person's] option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

423 U.S. at 100-04.

In *Mosley*, the Court noted that after Mosley had invoked his right to remain silent, there was a 2-hour interval before resumption of questioning and that "[t]he subsequent questioning did not undercut Mosley's previous decision not to

answer [police] inquiries." *Michigan v. Mosley*, 423 U.S. 96, 105, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). The Court then concluded:

> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

423 U.S. at 105-06.

The U.S. Supreme Court, in *Michigan v. Mosley*, 423 U.S. at 104, held that the circumstances demonstrated that Mosley's " 'right to cut off questioning' " was " 'scrupulously honored' " in accordance with *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Thus, in view of *Michigan v. Mosley, supra*, after a defendant has invoked the right to be silent and terminate custodial interrogation by police, but there is subsequent police interrogation of the defendant, a court considers three factors to determine whether a defendant's right to be silent has been scrupulously honored, namely: (1) Did the police immediately cease interrogation on the defendant's request? (2) Did the police resume an interrogation of the defendant only after passage of a significant time and a renewal of the *Miranda* warning? and (3) Did police restrict the subsequent interrogation to a transaction or occurrence which was not the subject of the prior interrogation which was discontinued? See, *State v. Hartwig*, 123 Wis. 2d 278, 366 N.W.2d 866 (1985); *Jackson v. Wyrick*, 730 F.2d 1177 (8th Cir. 1984).

A waiver must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the

background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

An accused may waive the privilege against self-incrimination or the right to remain silent, "provided the waiver is made voluntarily, knowingly and intelligently." *Miranda v. Arizona*, 384 U.S. at 444.

In view of Sergeant Elliott's expression of the *Miranda* warning and the ensuing multiple questions directed to Pettit, the responses, "Ya," are equivocal and ambiguous. On the one hand, there were the officers' questions: "[Y]ou have the right to remain silent Frank, do you understand that . . . ?" and "You . . . understand your rights in this matter?" On the other hand, there may be the paraphrased inquiry: "Although you do have the right to remain silent, Frank, will you answer my questions?"

A person's mere acknowledgment or recognition of the constitutional right to remain silent and the privilege against self-incrimination does not constitute a waiver of the constitutional protection. As the U.S. Supreme Court noted in *Miranda v. Arizona*, there are "high standards of proof for the waiver of constitutional rights." 384 U.S. at 475. Equivocality and ambiguity do not provide requisite proof that a person has waived a constitutional right.

What is certain and not the least bit equivocal or ambiguous is the following, during Pettit's interrogation: "Harris: Frank do you want to talk to us? . . . [C]ome on we need your help. Pettit: No." At that point Pettit invoked his constitutional right to remain silent and terminate the interrogation in accordance with his privilege against self-incrimination. Nevertheless, there was no cessation or termination of Pettit's interrogation. After commencement, the interrogation continued until terminated on Pettit's request for an attorney, notwithstanding Pettit's manifest indication that he did not want to talk with the officers, that is, answer their questions about Pandora's death. As the U.S. Supreme Court very emphatically stated in *Miranda v. Arizona*, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966):

> If the individual indicates in any manner, at any time prior

> to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

When the factors indicated in *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), are applied in the present case, the officers' continuation in questioning Pettit, immediately after Pettit's invocation of the right to be silent and terminate the interrogation, warrants the conclusion that Pettit's right to remain silent was not "scrupulously honored." The nature of evidence presented to the district court is such that the court could and did find that Pettit did not waive his privilege against self-incrimination and his right to remain silent, and supports a finding that the State failed to meet its "heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination . . . ." *Miranda v. Arizona*, 384 U.S. at 475. After Pettit's invocation of his right to be silent, there is no evidence on which a waiver of that right might be predicated.

The district court's finding on waiver is not clearly erroneous. Consequently, the district court's order suppressing Pettit's statements reflected in exhibit 1, the transcribed interview, is affirmed.

AFFIRMED.

MICHAEL PHILLIPS, APPELLANT AND CROSS-APPELLEE, V. CITY OF OMAHA, APPELLEE AND CROSS-APPELLANT.

417 N.W.2d 12

Filed December 24, 1987. No. 85-420.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** The findings of fact of the trial court in a proceeding 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. _____: _____. In our review of a bench trial under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), this court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Martin A. Cannon of Matthews & Cannon, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Timothy M. Kenny, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Plaintiff-appellant, Michael Phillips, brought this action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), seeking damages from the defendant-appellee, City of Omaha, for injuries suffered by the plaintiff after having been struck by a police cruiser. In his amended petition, plaintiff alleged that the cause of the accident was the negligence of Officer Mark Foxall, an agent and servant of the City of Omaha, in failing to operate his vehicle at a safe rate of speed under the existing conditions, in failing to keep a proper lookout, in failing to maintain control of his vehicle, in turning from a direct course without first determining that such a move could be safely made, and in failing to activate his red lights or siren to signal his excessive speed. The defendant, City of Omaha, in its amended answer,

generally denied any negligence and pled that the proximate cause of the accident was plaintiff's own contributory negligence, which was more than slight and sufficient to bar recovery. The defendant alleged that plaintiff's contributory negligence included crossing a traveled street at a place other than that designated; crossing a street in a highly intoxicated state; becoming voluntarily intoxicated; and stepping from a point of safety into a traveled portion of the street, a place of danger. The defendant further alleged that the plaintiff had assumed the risk associated with his conduct in proceeding from a place of safety into the street from between parked vehicles without regard to oncoming traffic and while in a highly intoxicated state.

After the trial was concluded, but before the court rendered its decision, plaintiff filed a motion for the purpose of establishing that he had complied with the procedural requirements of the Political Subdivisions Tort Claims Act. The trial court found plaintiff had so complied, and determined that the court had jurisdiction of the case.

The district court found that Officer Foxall was negligent in operating his cruiser at a speed greater than reasonable and prudent under the conditions. The court also found that the officer had kept a proper lookout, that he had his vehicle under reasonable control, that he was not negligent in turning from a direct course on the highway, and that he was not negligent in not activating his red lights or siren.

The court concluded that because of the plaintiff's physical state relative to alcohol, the plaintiff could not have known and appreciated the danger, and therefore the defense of assumption of the risk was not applicable to the facts of this case. The court further found that the plaintiff's own conduct was negligent and that this negligence contributed proximately to the injury and was sufficient to bar recovery.

The plaintiff timely appealed to this court. The plaintiff set out 16 assignments of error in his appeal. They may be consolidated into three: (1) whether admissible evidence was sufficient to support the trial court's findings in determining that defendant's servant, Officer Foxall, was negligent only in operating his vehicle at an unsafe speed; (2) the court erred in

finding that that negligence was slight as compared to plaintiff's own negligence, which contributed proximately to the injury and which was gross and sufficient to bar recovery; and (3) the court erred in the manner in which it considered plaintiff's intoxication in connection with plaintiff's actions. In its cross-appeal, the defendant alleges that the trial court erred in determining that plaintiff had complied with the procedural requirements of § 23-2405 of the Political Subdivisions Tort Claims Act. For the reasons hereafter stated, the judgment of the trial court is affirmed.

Because defendant's cross-appeal attacks the jurisdiction of the trial court, it will be considered first. The record shows that on April 14, 1983, plaintiff filed a written claim with the city in accordance with the State of Nebraska Political Subdivisions Tort Claims Act, §§ 23-2401 et seq. On April 15, the city acknowledged receipt of plaintiff's "claim letter." On December 19, 1983, plaintiff filed his petition. In section I of this petition, plaintiff alleged:

> On or about April 14, 1983, Plaintiff made a claim for damages for the wrong alleged in this suit by mailing a certified letter to the City of Omaha. Defendant City of Omaha has failed to make final disposition of this claim within six (6) months of the initial filing, and by way of this Petition, Plaintiff gives notice of the withdrawal of that claim.

While apparently contending that plaintiff had not complied with the procedural requirements of the Political Subdivisions Tort Claims Act before filing his petition, the city has not complied with our rules and has not set out an assignment of error as required by Neb. Ct. R. of Prac. 9D(2)c (rev. 1986), which incorporates rule 9D(1)d. That rule provides that "consideration of the case will be limited to errors assigned and discussed." See *Baggett v. City of Omaha*, 220 Neb. 805, 373 N.W.2d 391 (1985). Although the cross-appeal does not contain an assignment of error, the city's point is clear, and we have examined the record on the point. The trial court's determination that it had jurisdiction is affirmed.

With regard to plaintiff's appeal, the record shows that on the evening of April 8, 1983, the plaintiff had been visiting with

friends and family at a recreational center located at 1812 North 24th Street, on the west side of the street. The weather at that time was rainy, with the rain intermingled with snow. At approximately 9:30 p.m., the plaintiff left the building to go to his car, which was parked on the east side of 24th Street. There was no marked crosswalk at this point. At this same time, Officers Mark Foxall and Rozalyn Smith of the Omaha Police Division, in a police cruiser, were patrolling their beat, which encompassed the approximately 3-mile strip of 24th Street between Cuming Street and Ames Avenue. Foxall was driving the vehicle in a southbound direction on 24th Street at approximately 30 to 35 miles per hour. At a point south of the alley in the middle of the block between Decatur and Parker Streets, plaintiff stepped from between two parked vehicles to cross the street. Plaintiff testified that he looked to his left before crossing and noticed headlights, which appeared to him to be two or three blocks away, and that he then looked to his right and then back left before crossing the street. As Foxall neared the alley in the middle of the block, Smith saw a person step into the street and shouted a warning to Foxall. The person kept walking and, according to Foxall, upon realizing the plaintiff was stepping into his driving lane, Foxall swerved to his left and slammed on the brakes. The cruiser struck the plaintiff with the right corner of the cruiser and lifted him onto the hood and into the windshield of the vehicle. The cruiser then struck the left rear fender of a car going north. The plaintiff was carried further and then thrown from the vehicle. As a result of the impact, the plaintiff suffered multiple injuries and was rendered a quadriplegic.

After trial, the court found, by a preponderance of the evidence, that defendant's officer was negligent in driving at 30 to 35 miles per hour, which was an excessive speed for the conditions of rain and snow present at the time of the accident. The court found defendant's officer was not negligent in the other particulars alleged by plaintiff.

The court then found that plaintiff was guilty of contributory negligence in that he failed to yield the right-of-way to defendant's officer. In so finding, the court determined that plaintiff had suddenly left the curb and had

walked into the path of defendant's vehicle, in violation of Neb. Rev. Stat. § 39-642(2) (Reissue 1984), and that plaintiff had violated the provisions of Neb. Rev. Stat. § 39-643(1) (Reissue 1984) in failing to yield the right-of-way. The trial court properly noted that "[t]he violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law, but is evidence of negligence to be considered by the trier of fact . . . ." *Schutz v. Hunt*, 212 Neb. 228, 322 N.W.2d 414 (1982).

The court specifically found:

> It is clear that Officer Foxall had the favored position. It also is important to note that a driver of a vehicle having the right-of-way is not required to anticipate that a pedestrian will violate such a law. Doan v. Hoppe, 133 Neb. 767 (1938). It is clear from the evidence that Michael Phillips breached this duty of care relative to right-of-way as he started to cross 24th Street on a dark, rainy-snowy night knowing that vehicles were coming from both directions. The Plaintiff was in a place of safety and moved into a danger zone in the area of mid-block. It has been stated many times that want of ordinary care and not knowledge of the danger is the test of contributory negligence.
>
> The Court finds that the Plaintiff was negligent in that he breached his duty of care and that he made an improper crossing of 24th Street under the circumstances then and there existing. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid obvious dangers, is negligent. Garcia v. Howard, 200 Neb. 57, 61 (1978). One who is in a place of safety and is aware of a moving vehicle in close proximity to him, and who moves from such place of safety into the path of a vehicle and is struck, is, by his own conduct, guilty of negligence more than slight sufficient to defeat his recovery. Although a pedestrian may have a perfect right to be where he is, nevertheless, he is bound to exercise reasonable care for his own safety. Ybarra v. Wassenmiller, 206 Neb. 164, 171, 172 (1980). The above rules apply to the facts of this case and to the Plaintiff.

The court, in its findings and order, also recognized that defendant had alleged in its answer that "Plaintiff was contributorily negligent based on alleged intoxication." The court properly noted that intoxication in and of itself does not constitute contributory negligence. This court specifically so held in *Webber v. City of Omaha*, 190 Neb. 678, 211 N.W.2d 911 (1973), a case involving this same defendant, but the city presented the issue in this case that plaintiff was guilty of an act of contributory negligence in "4) becoming voluntarily intoxicated." The city's contention in this regard is completely without merit.

The court then found "by a preponderance of the evidence, in comparing the negligence of the parties, that the Plaintiff's negligence was more than slight and in fact gross and in comparison Officer Foxall's negligence was less than gross and in fact slight." (Emphasis in original.)

Plaintiff's action is against the City of Omaha, a political subdivision of the State of Nebraska, and therefore the case was tried to the court sitting without a jury. § 23-2406. The findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987). In our review, this court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence. It is not the province of this court to resolve evidentiary conflicts or to weigh the evidence. *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986).

The trial court found Officer Foxall negligent only in driving at an excessive speed for the existing conditions, and found the officer was not negligent in the other particulars alleged by plaintiff. The court concluded, however, that this negligence was only slight when compared to the contributory negligence of the plaintiff and that plaintiff's negligence was gross in comparison. 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. *McMullin Transfer v. State*, 225 Neb. 109, 402 N.W.2d 878 (1987); *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984).

Our review of the record, in the manner set out above, shows that there was sufficient evidence, although contradicted in some respects, to fully support the trial court's findings as to the negligence of each party and as to comparative negligence of the parties.

A confusing issue is injected in the case in connection with the trial court's consideration of plaintiff's alleged intoxication. In the cross-examination of a neurosurgeon called as plaintiff's witness, the court admitted an exhibit offered by defendant, over plaintiff's objection as to foundation, and stated:

> With what I indicated in chambers. To make it a matter of record, I indicated that you cannot ask any questions in regards to that exhibit relative to any of the chemical tests, as to the question of intoxication or nonintoxication, or under the influence or not under the influence.

The exhibit was a hospital record and showed that a blood workup from samples of blood taken from plaintiff showed a blood alcohol level of .26 percent. There was no other evidence indicating that plaintiff was intoxicated. After the exhibit was received, defendant cross-examined the witness, without specific reference to the exhibit, as to the general effect of alcohol. The witness testified that the effect of such a blood alcohol level would vary from person to person and that "[j]ust the mere fact" of such a level, without other evidence, would not give a basis for an inference of any want of control of a person's mental or physical faculties.

Although the court had limited the consideration to be given the hospital record as set out above, the court did find that plaintiff's "blood alcohol was .26 based on an analysis shortly after the accident." It would appear that if this matter of intoxication were submitted to a jury, in the circumstances of this case, the court would have committed error.

Nonetheless, in this action tried to the court, a full reading of the trial court's detailed opinion lends to the conclusion that the court did not err. The court found specifically that plaintiff was

guilty of contributory negligence in his actions. We have set out above that the evidence before the court supports those findings. The court in further explanation stated in its order:

> The care required of a person who has voluntarily ingested alcohol is the same as that required of a non-consumer; but if he fails to exercise that degree of care for his own safety which an ordinary prudent sober person would exercise, under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence. Webber v. City of Omaha, 190 Neb. [678], 682 (1973). This rule is applicable to our facts.

The court thus determined that plaintiff, whether drinking intoxicating liquors or not, was guilty of negligence. The effect of the court's order was to state that plaintiff, if intoxicated, was held to the same standards as a person not intoxicated, and examination of plaintiff's actions in crossing the street, at the place and in the manner set out, constituted contributory negligence sufficient to bar recovery. We conclude that there was no prejudicial error in the trial court's treatment of the intoxication issue.

When determining the exercise of reasonable care or the breach of duty of that care, the determination must be made based on the circumstances of each case. In the case at bar, the trier of fact determined that plaintiff was guilty of contributory negligence. After a careful review of the record, we determine that, although there was evidence to the contrary, the trial court's finding that plaintiff was guilty of contributory negligence sufficient to defeat recovery is supported by the evidence and is not clearly wrong. In the absence of any error, the judgment of the trial court in favor of defendant, City of Omaha, is affirmed.

AFFIRMED.

GRANT, J., not participating.

LAURENCE A. LANPHIER, JR., APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, AND CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEES.

417 N.W.2d 17

Filed December 24, 1987. No. 86-022.

1. **Actions: Equity: Municipal Corporations.** A derivative action seeking an accounting, an injunction, and the return of moneys expended by a city is an equitable action.
2. **Equity: Appeal and Error.** In an equitable action, this court reviews the facts de novo without reference to the findings of fact made by the trial court, and reaches an independent conclusion.
3. **Actions: Municipal Corporations.** A plaintiff pursuing a derivative action on behalf of a city has no rights greater than the city itself.
4. **Quantum Meruit.** Where the action of a public organization is illegal and void not because of a lack of power but because of a failure to properly exercise that power, the organization is bound under the theories of quantum meruit.
5. **Public Utilities: Quantum Meruit.** In a case between a public organization and a public power district, the amount to which the district is entitled is the fair and reasonable value of the services it furnished to the public organization.

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

David J. Lanphier and Robert M. Gonderinger of McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Stephen G. Olson and Mary Kay Pryor of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Plaintiff, a resident and taxpayer of the City of Omaha, filed this action "for himself and on behalf of all other persons similarly situated . . . and for the benefit of the City" as a class action, against defendants, City of Omaha and Omaha Public Power District. The petition sought an injunction, an accounting, and the return of moneys paid by the city to the district for streetlighting services rendered to the city for the period since January 31, 1975, up to the filing of the petition on October 27, 1978. Plaintiff sought relief because during that

period there was not a contract between the city and the district for such services. Separate demurrers of the city and the district were overruled, but the court found that while a cause of action was stated, the petition did not "justify a class action and the matter will proceed as a derivative suit under Section 14-810 Nebraska statutes." Apparently, without objection from any of the parties, the case did so proceed.

After separate answers filed by defendants, the matter was tried to the court. After trial, judgment was entered in favor of defendants. Plaintiff timely appealed and has assigned two errors: (1) that the trial court erred "in placing the burden of proof on Plaintiff to establish the fair and reasonable value of the street lighting services received by the City of Omaha"; and (2) that the trial court erred in "its finding of the fair and reasonable value of streetlight maintenance services received by the City of Omaha." We affirm.

In his petition, plaintiff alleged that the payments made by the City of Omaha to the district after January 31, 1975, for streetlighting services were unlawful expenditures of public funds in violation of § 5.17 of the Omaha home rule charter and Neb. Rev. Stat. § 14-108 (Reissue 1983), primarily because the Omaha City Council had not approved any contract between the city and the district for such services. Plaintiff further pled that the payments made by the city to the district were in excess of the fair and reasonable value of the electrical service, equipment, and maintenance furnished by the district for streetlighting. In addition to injunctive relief, the plaintiff requested an accounting from the district for payments received by the district from the city in excess of the fair and reasonable value of the streetlighting services provided by the district.

In its answer, the district alleged that the district and the city had continued their contractual relationship from 1975 through 1979, until a new contract was entered into, and that the district was entitled to the fair and reasonable value of the services provided to the city. In its answer, the city alleged that its contractual relationship with the district extended beyond January 31, 1975, and that the payments made by the city to the district were fair and reasonable for the services provided by the district.

The record shows that the district is a public service corporation furnishing electric power and light, since 1946, to a 13-county area in eastern Nebraska, including Omaha. Among the services furnished to Omaha and various smaller towns in the district's service area, and to various sanitary and improvement districts, are streetlighting services.

Pursuant to Neb. Rev. Stat. § 70-655 (Reissue 1976), the board of directors of the district is required to establish the rates charged by the district. These rates are required by statute to be fair and reasonable and are subject to adjustment in order that the benefits of a successful and profitable operation are conferred upon the consumer. Customarily, the district and the City of Omaha entered into contracts for streetlighting for a 4-year period. These contracts are required to be approved by ordinance, pursuant to Omaha home rule charter § 5.17 and § 14-108.

On February 9, 1971, the Omaha City Council approved a contract with the district for the furnishing of electrical service, equipment, and maintenance for streetlighting in the city, in accordance with the city charter and the statute. This contract expired by its terms on January 31, 1975. The city and the district were unable to agree on a new contract, but after the expiration of the contract the district continued to provide services to the city, and the city continued to pay for those services, until an agreement was reached on a new contract to become effective on January 1, 1980.

During the period between January 31, 1975, and January 1, 1980, the city continued to pay the district on a monthly basis, as billed by the district, without protest. During this time, the city and the district continued the contractual operating procedures set out in the earlier contract. The city requested the district to install a total of 4,141 streetlights during the period from 1975 to May of 1979, and the district installed the lights and furnished the capital for the cost of installation.

An official of the district testified that the district considered shutting off the streetlight service, but did not do so because of concerns about "the safety of the situation." After the expiration of the 1971 contract, there was discussion between the city and the district concerning the level of the rates.

In April of 1977, the board of directors of the district formed a citizens' advisory committee to study the district's rates and policies. In 1978, after studying the aspects of rate structure and design, the committee found that the rate of return on the streetlighting services was lower than the rate of return of the district as a whole and that the rates charged by the district compared favorably to the rates charged by other utility companies in the surrounding area.

In 1978, the city commissioned R.W. Beck and Associates, a consulting firm, to study the reasonableness of the rates charged by the district for the streetlighting services. The independent consultant concluded that (1) the district's cost of service methodology is in accordance with generally accepted utility practices; (2) the rate of return on the rate base for the streetlighting class, and for streetlighting in particular, was below the district's system average rate of return; (3) the district's accounting methods were in accordance with generally accepted utility practices; and (4) the rates charged by the district for the streetlighting services are similar to those charged by other utilities in the region.

At the trial, plaintiff's witness, an associate professor of decision sciences at the University of Nebraska-Omaha, testified that, in his opinion, the city had overpaid the district in the amount of $1,593,313 during the period of time from February 1, 1975, to December 1, 1979. He calculated that overpayment based on consideration of only the maintenance charges within the overall rate. He testified the maintenance charges for the streetlighting services were excessive. His conclusions were based on rates obtained from a firm which provided maintenance services only, and not full streetlighting services for municipalities. He compared these maintenance rates to the rates charged by the district. The study did not take into account the district's methods of allocating maintenance charges and did not utilize cost figures of the district.

The division manager for customer service operations for the district testified that during the period of time between January 31, 1975, and December 31, 1979, the district had a generally negative rate of return on its streetlight operations, and as this was the lowest rate of return of any classification compared to

the rates of return for the total district. The streetlighting class was the only class of customers serviced by the district which had a negative rate of return. He further testified that the amount charged by the district did not cover the cost of providing the service, and the purpose of the increase in the rates for streetlighting services in the 1970s was an attempt to bring the streetlight rate of return in accord with the rates of return on the other classes of customers serviced by the district.

In his first assignment of error plaintiff alleges that the district court erred in placing the burden of proof on the plaintiff to establish the fair and reasonable value of the streetlighting services received by the city.

In its order dismissing plaintiff's petition, the district court found that "the Plaintiff has failed to convince this Court by a preponderance of the evidence of the rightness of its position . . . ." We determine that this was a general statement which did not amount to a specific finding on any question of fact, and cannot be said to be any assignment of the burden of proof by the trial court.

In addition, the disposition of this assignment of error does not control this court's decision because, as stated by plaintiff, "this case is entitled to de novo review without reference to the findings of fact made by the trial court." Brief for Appellant at 16. Since plaintiff's action is a derivative action seeking an accounting, an injunction, and the return of moneys expended by the city, it is an equitable action. *Darnell v. City of Broken Bow*, 139 Neb. 844, 299 N.W. 274 (1941). In an equitable action, this court reviews the facts de novo without reference to the findings of fact made by the trial court, and reaches an independent conclusion. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Hiegel Farms Corp. v. Casselman*, 217 Neb. 506, 349 N.W.2d 382 (1984). Plaintiff's first assignment of error is without merit.

In his second assignment of error, plaintiff alleges that the district court erred in its finding of the fair and reasonable value of streetlight maintenance services received by the City of Omaha.

In our de novo review, we first note that plaintiff, in pursuing this derivative action, has no rights greater than the

city itself possesses. *Pederson v. Westroads*, 189 Neb. 236, 202 N.W.2d 198 (1972). See, also, *Nielsen v. SID No. 229*, 208 Neb. 542, 304 N.W.2d 385 (1981); *Cathers v. Moores*, 78 Neb. 17, 113 N.W. 119 (1907).

The case presented, then, is one in which we must determine whether the city could have recovered payments it had made to the district, where statutes forbade this payment of such moneys by the city, since an appropriate ordinance had not been adopted. This court has held that where the action of a public organization is illegal and void not because of a lack of power but because of a failure to properly exercise existing power, the organization is bound under the theories of quantum meruit. *Fulk v. School District*, 155 Neb. 630, 53 N.W.2d 56 (1952); *Cathers v. Moores, supra*. The remedy of the other party to such an agreement (the district in this case) is to recover in quantum meruit from the public organization (the city in this case). *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N.W. 349 (1898). Where the provided services are illegal and prohibited, however, there can be no quantum meruit recovery. *Davy v. School Dist. of Columbus*, 192 Neb. 468, 222 N.W.2d 562 (1974); *Arthur v. Trindel*, 168 Neb. 429, 96 N.W.2d 208 (1959).

It is undisputed that the city had the power to contract with the district, pursuant to § 14-108 and Omaha home rule charter § 5.17. The city did not properly exercise that power because the city council did not approve a contract with the district, nor did it enact an ordinance for the streetlighting contract. The services were furnished. Under these circumstances, the district is entitled to a quantum meruit recovery.

In determining whether quantum meruit applies, the initial determination which must be made is whether the district has conferred a benefit on the city. We find that the district did confer a benefit on the city by continuing to furnish streetlighting service. A witness for the district testified as to concerns about safety. Plaintiff does not allege that no benefit was conferred and, indeed, states in his reply brief at 5, "Plaintiff admits OPPD is entitled to retain some amount under a quantum meruit theory."

The difficulty in this case is in determining the amount to

which the district is entitled. Plaintiff's position is that the amount due under a quantum meruit theory must be determined to be fair and reasonable "from the standpoint of the benefits received by the City." Reply Brief for Appellant at 5.

In past cases, cited by plaintiff, we have made general statements to the effect that in such cases, the party furnishing services and materials to a municipal organization under a contract not properly authorized is entitled to recover "the reasonable value of the benefits received [by the public organization]," *Gee v. City of Sutton*, 149 Neb. 603, 609, 31 N.W.2d 747, 751 (1948); " '[t]he reasonable value of the benefits received,' " *Cathers v. Moores, supra* at 22, 113 N.W. at 121 (1907); and " 'the value of what the defendant has actually received the benefit of,' " *Lincoln Land Co. v. Village of Grant, supra* at 77, 77 N.W. at 351.

The district, on the other hand, contends that, on this issue, it is entitled to the reasonable value of the services which it provided, calculated from the point of view of the party furnishing the services. The district cites Nebraska cases supporting that contention, and, to point up the confusion, some of the same cases are cited by plaintiff.

The question presented, then, is, Shall the amount due a party furnishing services under a quantum meruit theory be calculated based on the reasonable value of benefit received by the party accepting the services, or on the reasonable value of the services furnished?

In the case before us, between a public organization and a public power district, we hold that the amount to which the district is entitled is the fair and reasonable value of the streetlighting services it furnished to the city. When the cases relied on by plaintiff are examined, those cases either support that theory of recovery or do not dispose of the issue.

In *Gee v. City of Sutton, supra*, while we did set out the statement quoted above, we also said at 608, 31 N.W.2d at 750, "The sole issue involved in this appeal is the reasonable value of the street repairs and surfacing done by the partnership for the city." The evidence considered in deciding the case consisted of the partnership's costs (reduced by the elimination of profit—a

matter discussed below). There is no discussion of the "benefits received." In the *Gee* case, we held that the trial court had properly determined the reasonable value of the services rendered.

In *Cathers v. Moores*, 78 Neb. 17, 113 N.W. 119 (1907), we held that the plaintiff, who was prosecuting a derivative action in the same fashion as plaintiff in the instant case, could not prevail because the city could not have prevailed and because the plaintiff had not appealed from the allowance of the claims on which the money sought to be received was disbursed. The amount of the recovery was not an issue in that case, and the court's remarks concerning the amount were dicta.

In *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N.W. 349 (1898), plaintiff's petition seeking recovery of $900 for rental of 15 water hydrants was dismissed on the defendant's demurrer, and, on appeal, the cause was remanded for trial. Any discussion of the theory of damages was dicta, but we note we cited with approval cases from other jurisdictions holding a city should pay the reasonable value of the services received, and other cases holding that a city should pay the amount of the benefit received. The *Lincoln Land* holding is not dispositive of this issue.

We stated in *Hancock v. Parks*, 172 Neb. 442, 451, 110 N.W.2d 69, 74 (1961), " 'An action based on quantum meruit . . . is grounded upon an implied promise to pay the reasonable value thereof.' " In *Ruzicka v. Petersen*, 213 Neb. 642, 645, 330 N.W.2d 913, 914 (1983), we said, "Where services are furnished to a party and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services. *Denton v. Nelson*, 205 Neb. 833, 290 N.W.2d 462 (1980)." Those rules should be applied to this action between a municipal organization and a public power district. We hold that, under a quantum meruit theory, the defendant city owed to defendant district the reasonable value of the services as rendered by the district, rather than an amount equal to the benefit received by the city.

This is not to say that, in some cases, either of the parties might wish to proceed on the theory that the measure of recovery might be the amount of the benefits received. To

attempt to proceed on that theory in this case would be to enter into the realm of speculation. What is it worth to have lighted streets rather than dark streets? Were any crimes averted by light as opposed to darkness, or any vehicle collisions avoided? That problem is noted in the Restatement (Second) of Contracts § 371 at 204 (1981), where the following example is set out:

> A, a surgeon, contracts to perform a series of emergency operations on B for $3,000. A does the first operation, saving B's life, which can be valued in view of B's life expectancy at $1,000,000. The market price to have an equally competent surgeon do the first operation is $1,800. A's restitution interest is equal to the benefit conferred on B. That benefit is measured by the reasonable value to B of A's services in terms of the $1,800 that it would have cost B to engage a similar surgeon to do the operation regardless of the rule on which restitution is based.

The proper measure of recovery in this case is the reasonable value of the services rendered by the district to the city. The district adduced evidence that its rates for streetlighting were fair and reasonable. The city consented to such rates by paying them.

Although the plaintiff produced evidence that the maintenance charges within the district's rates for streetlighting services may have been higher than the maintenance rate charges of companies operating a maintenance business only, the plaintiff's witness did not consider the district's overall operation and did not attempt to make any allocation of costs. The witness considered only one segment of a rate set by a public power district. We do not find his testimony controlling on the issue of fairness and reasonableness.

There is evidence before us that the district's rates were comparable to rates charged for such services elsewhere. Such evidence is competent evidence tending to show value. *Sorensen Constr. Co. v. Broyhill*, 165 Neb. 397, 85 N.W.2d 898 (1957). The evidence also showed that the rates charged during the period in question were promptly paid, without protest, and thus operated as an agreed price. We have held that a price

agreed on by parties is competent evidence of the reasonable value of services. *Koehler v. Boyler*, 190 Neb. 143, 206 N.W.2d 646 (1973).

We find that the district sustained its burden of proof in determining the fair and reasonable value of the services rendered to the city. Such proof would have entitled the district to a quantum meruit recovery and, in this case, operates as a defense to plaintiff's petition seeking repayment.

We note that the streetlighting contracts before 1975 and after 1979 each contained a clause that the district rates were subject to change by the district's board of directors. Thus, it is clear that the district, both before and after the relevant time period in which it was operating without a contract, had the ability to raise the rates without the city's consent, pursuant to § 70-655.

We further note that, in *Gee v. Village of Sutton*, 149 Neb. 603, 609, 31 N.W.2d 747, 751 (1948), we said, "Generally, [in quantum meruit cases] the courts will not allow profits which might have been obtained if the contract had been legal and valid . . . ." The question of profit on the rendering of services is not a problem in this case. First of all, the case presents a dispute between a municipal corporation and a public power district. There is no contention or evidence showing that the district was operated to make a profit as such. Second, the district's evidence is not disputed insofar as that evidence shows the streetlighting services were furnished at a level resulting in a negative rate of return. There was no profit. In addition, the streetlighting rates were within the rates which the board of directors had the authority to establish so that the district could be operated in a successful manner. § 70-655. See, also, *City of O'Neill v. Consumers Public Power Dist.*, 179 Neb. 773, 140 N.W.2d 644 (1966).

For the reasons set out above, the judgment of the trial court is affirmed.

AFFIRMED.

IN RE INTEREST OF J.S., A.C., AND C.S., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. P.L., APPELLANT.

417 N.W.2d 147

Filed December 24, 1987. No. 87-037.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
2. **Parental Rights: Juvenile Courts.** The Nebraska Juvenile Code must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
3. **Rules of Evidence: Parental Rights: Juvenile Courts.** Although the Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code, the Nebraska Evidence Rules do not apply at a dispositional hearing, including an action to terminate parental rights, under the Nebraska Juvenile Code.
4. _____: _____: _____. Once there has been the adjudication that a child is a juvenile within the meaning of the act, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law. To accomplish such goal and fashion a dispositional remedy beneficial to the juvenile, a judge should have access to the best evidence available which is relevant, reliable, and trustworthy concerning a correct disposition for the juvenile.
5. _____: _____: _____. Under certain conditions specified in Neb. Rev. Stat. § 43-292 (Reissue 1984), termination of parental rights may be an appropriate disposition under the Nebraska Juvenile Code.
6. **Constitutional Law: Due Process: Parental Rights: Juvenile Courts.** As constitutionally required by Neb. Const. art. I, § 3, and U.S. Const. amend. XIV, the State must accord a parent due process in a hearing to terminate parental rights.
7. **Due Process: Rules of Evidence: Parental Rights: Proof.** While the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985), are not applicable in a dispositional hearing, including a hearing to terminate parental rights, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated.
8. **Parental Rights: Juvenile Courts: Due Process: Witnesses.** In proceedings to terminate parental rights under the Nebraska Juvenile Code, a parent has the due process right to cross-examine an adverse witness.

9. **Parental Rights: Evidence: Appeal and Error.** Because factual questions concerning a judgment or order terminating parental rights are tried by the Supreme Court de novo on the record, impermissible or improper evidence is not considered by the Supreme Court.
10. **Parental Rights: Juvenile Courts: Evidence: Appeal and Error.** In an appeal from a judgment or order terminating parental rights, the Supreme Court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.
11. **Parental Rights.** When a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights.
12. _____. A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
13. **Parental Rights: Evidence: Proof.** Neb. Rev. Stat. § 43-292 (Reissue 1984) imposes two requirements before parental rights may be terminated. First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is "clear and convincing."
14. _____: _____: _____. Under Neb. Rev. Stat. § 43-292(6) (Reissue 1984) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.
15. **Parental Rights.** A provision in a rehabilitative plan is material to rehabilitation of a parent if such provision tends to correct, eliminate, or ameliorate the situation or condition on which an adjudication is obtained under the Nebraska Juvenile Code.
16. **Parental Rights: Juvenile Courts: Rules of Evidence.** After an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986) of the Nebraska Juvenile Code and before entering an order containing a rehabilitative plan for a parent, a juvenile court shall inform the juvenile's parent that the court may order a rehabilitative plan and thereafter shall hold an evidential hearing to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. Because the evidential hearing for a rehabilitative plan is a dispositional hearing, the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985), shall not apply at such hearing. The record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the

parental rehabilitative plan. The juvenile court's specific findings of facts supporting the provisions contained in the parental rehabilitative plan shall be stated in the record.

Appeal from the County Court for Hall County: RICHARD E. WEAVER, Judge. Reversed and remanded with directions.

Thomas L. Kovanda of Anderson, Vipperman, Hinman, Hall, Kovanda & Kovanda, for appellant.

Jerom E. Janulewicz, Deputy Hall County Attorney, and Patrick Brock of Cunningham, Blackburn, Livingston, Francis, Cote, Brock, and Cunningham, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

P.L., mother of children involved in these proceedings (J.S., A.C., and C.S.), appeals from an order of the county court for Hall County, sitting as a juvenile court, which, pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984), terminated P.L.'s parental rights on account of her failure to correct conditions which led to the adjudication that P.L.'s children were juveniles within Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986). We reverse and remand with directions.

ADJUDICATION AND THE PLAN

In its petition filed on January 17, 1985, the State alleged that P.L.'s children, J.S. (a daughter born on February 25, 1974), A.C. (a son born on October 17, 1981), and C.S. (a son born on November 7, 1983), were juveniles under § 43-247(3)(a), because those children lacked proper parental care by reason of the fault or habits of their parent. On the same day that the State filed its adjudication petition, the court entered an order placing temporary custody of the children in the Nebraska Department of Social Services ("Social Services"). Before the adjudication hearing, P.L. entered into an agreement with Social Services to follow certain child-care guidelines suggested by that department. On February 4, in the juvenile court, P.L. appeared with counsel and denied the allegations in the State's petition.

On March 4, a Social Services caseworker, who held a position entitled "child protective service worker II" and whose first contact with P.L. was in 1983, removed the children from P.L., who had custody according to an agreement with Social Services, after the caseworker received an unconfirmed report that P.L.'s daughter had been sexually assaulted by an adult babysitter's friend while P.L. was away for an evening. According to the caseworker, who was an employee of Social Services since 1980, removal of the children was also necessitated by information that P.L. might take her children to Kansas, although neither P.L. nor her children were required to remain in Nebraska as the result of an order or lawful directive from a legally empowered authority. After their removal from P.L., the children were placed in foster care by Social Services, pending further action by the juvenile court.

At the adjudication hearing on April 4, P.L., accompanied by her court-appointed attorney, withdrew her previous denial of the State's petition and admitted the petition's allegations concerning her children. The juvenile court then determined that it had jurisdiction by virtue of § 43-247(3)(a), which, in part, provides juvenile court jurisdiction regarding "Any juvenile . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian . . . ." As a result of a dispositional hearing, the court placed legal and physical custody of the children with Social Services, subject to P.L.'s visitation at the department's discretion, and also ordered a plan for rehabilitation of P.L., which included counseling specified by Social Services, attendance at parenting classes identified and required by Social Services, and a job workshop program established by Social Services. On April 25, P.L. and Social Services' caseworker signed a rehabilitation agreement incorporating the provisions ordered by the court. As directed in the court's initial plan for rehabilitation, P.L. obtained counseling from family therapists. At a review hearing on October 10, the court renewed its order regarding custody of P.L.'s children and further ordered that P.L. and her adult male companion comply with the provisions specified in the April 25 rehabilitation agreement between P.L. and Social Services.

In chambers on April 16, 1986, the juvenile court conducted

a "review conference" which, among others, was attended by P.L.'s court-appointed attorney and the caseworker assigned to P.L. The record does not contain evidence which may have been presented at that review conference concerning alteration of the existing rehabilitation plan ordered in April 1985. Nevertheless, on April 16, 1986, the court continued child custody in Social Services, and then ordered that P.L. enter into a more detailed agreement with Social Services, specifically requiring that P.L.: (1) attend and complete Social Services' "parenting classes"; (2) participate in counseling or therapy directed by Social Services; (3) attend a job workshop, with proof of attendance; (4) participate in educational programs established for her son, C.S., and offered by the Grand Island public school system; (5) regularly visit her children, in conformity with arrangements by Social Services; (6) at the least, weekly attend a meeting of Alcoholics Anonymous; and (7) establish an independent residence, unless her husband, whom P.L. married after the rehabilitative agreement of April 25, 1985, entered into an agreement which would supplement the agreement to be signed by P.L. and Social Services. By reference, the order of April 16 incorporated the agreement to be signed by P.L. and Social Services, which further obligated P.L. to (1) maintain a suitable residence; (2) deliver monthly rent receipts to the caseworker; (3) attend her daughter's special activities as requested by the caseworker; (4) provide responsible, adult babysitters for P.L.'s 5-month-old daughter, J.D.L., who was not involved in the proceedings before the juvenile court; (5) refrain from leaving the children with "anyone" during any period of visitation; (6) prevent the children from riding a motorcycle; (7) abstain from entering, or being near, bars or lounges while she was in the company of her children; (8) report to the caseworker concerning any loans to P.L.; (9) inform the babysitter of P.L.'s whereabouts and the anticipated time of return home, when J.D.L. (not involved in these proceedings) was left with a babysitter; and (10) truthfully and fully report changes of circumstances. On April 17, P.L. signed the rehabilitative agreement submitted by Social Services which had been incorporated into the court's order of April 16. Therefore, the rehabilitative plan for P.L. included 17 provisions.

STANDARD OF REVIEW

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.

In re Interest of T.C., 226 Neb. 116, 117, 409 N.W.2d 607, 609 (1987).

TERMINATION PROCEEDINGS

In its motion filed on August 8, 1986, the State sought termination of P.L.'s parental rights and alleged that P.L. had persisted in neglect of her children, refused to provide parental care and protection for the children, and was unfit as a parent on account of her "habitual use of intoxicating liquor which conduct is seriously detrimental to the health, morals or well being of the juveniles." Consequently, the State's action to terminate P.L.'s parental rights is based on § 43-292, which provides in part:

> The court may terminate all parental rights between the parents [and a] juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> . . . .
>
> (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247,

reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

Background. P.L. was married before the juvenile court ordered the rehabilitative plan in question and was still married at the date of the termination hearing. That marriage accounts for the presence of P.L.'s daughter J.D.L., but does not explain J.D.L.'s inclusion in the rehabilitation plan inasmuch as J.D.L. was not even born at the time of the adjudication in April 1985. Therefore, at the time the juvenile court ordered the rehabilitative plan in April 1986, P.L. was 31 years old, married, and an unemployed waitress or barmaid with a GED. When the termination hearing was held, and for purposes in this appeal, the ages of P.L.'s children were: J.S.—12 years; A.C.—5 years; and C.S.—3 years. At the termination hearing held on November 24 and December 16, 1986, evidence established that P.L. and her husband resided in a well-kept and suitable home with J.D.L., whom the caseworker always found to be the recipient of adequate care. P.L. regularly visited her children, whom she took on field trips, picnics, and shopping trips. The three children were moved from one foster home to another because some placements in foster homes did not "work out," but such moves were not attributable to the character, condition, or personality of P.L.'s children. Social Services removed the children from one foster home after P.L. reported that one of the foster parents had physically abused C.S. At times P.L.'s children were separated from one another during their stays in various foster homes. The juvenile court found that P.L. had complied with several of the provisions in the judicially ordered plan for rehabilitation, such as P.L.'s maintenance of a suitable home, regular exercise of visitation, and prevention of motorcycle riding by the children. Therefore, our opinion will discuss only those provisions which the juvenile court found to be completely unfulfilled as bases for terminating parental rights, and the evidential question raised by P.L.

Documentary Evidence Questioned. At the termination hearing, the State offered a Social Services written report concerning P.L. The report appears to have been admitted into

evidence at the adjudication hearing. That report pertained to the period from 1974 to 1985 and documented departmental contacts with P.L. through unidentified personnel of Social Services during that period, including P.L.'s noncompliance with a plan departmentally dictated by Social Services before the adjudication. P.L. objected (hearsay) to that report as evidence. Although the court did not admit that report as documentary evidence, the court considered the contents of the report, or, as expressed by the court:

> It's the Court's viewpoint . . . that the exhibit having already been received and having been a basis of the original petition and the original adjudication, need not be received at this time but *must be considered by the Court as a basis for determination with regard to the motion.* That is, the Court, in each instance, would sustain the objections for today's hearing *but must consider all of the material as basis for the motion.*

(Emphasis supplied.)

Parenting Classes. The parenting classes available to P.L. and which apparently would have satisfied the "parenting classes" provision in the rehabilitative plan lasted for an hour on 1 day of each week over a 4-month period. These classes, sponsored by Social Services, were conducted on a "group basis." As one instructor characterized those classes:

> We talk about child development. What your children should do [developmentally] at what age.
>
> . . . .
>
> . . . And, then we go to discipline because you have to know your child to be able to discipline them. And, then we do negative discipline techniques, you know, what can happen if you use this technique and then positive discipline techniques.

An objective of the course was establishment of "social contact" between parent and child. Although the parenting classes included items such as sex education and [illegible] classes did not provide instruction in elemental child care, for example, bathing and feeding children, or information about budget management for a family. Apparently, parenting classes commenced shortly after P.L. signed the rehabilitative plan.

P.L. did not attend those parenting classes, which were not reoffered until September 1986. J.S., the oldest daughter, testified that P.L. would spank her "once in a while . . . [o]n the behind . . . when I got in trouble" and concluded by testifying that she loved P.L. and wanted to go home with her.

Job Support Workshop. According to a representative of Social Services, the "job workshop" program exists to help the unemployed "toward eventual self-supporting full time employment." Early in 1986, before the rehabilitative plan, P.L. had contacted Social Services personnel about the workshop program, which was carried on over a 2-week period. When P.L. did not enroll, Social Services later attempted to notify P.L. by mail concerning availability of the program, but that notice was sent to the wrong address. Instructors in the job workshop worked with attendants at the classes in areas of "self-esteem, appearance, [and ways to] show liking skills," and techniques for a successful job interview, including eye contact and shaking hands. Although she did not attend the Social Services workshop, P.L. did contact the vocational rehabilitation department of the State of Nebraska, which provided a program substantially similar to the workshop offered by Social Services. P.L. was evaluated by the vocational rehabilitation department, which, at the time of the termination hearing, had invited P.L.'s return for further evaluation regarding a program for prospective employment.

Rent Receipts. P.L. delivered rent receipts to her caseworker for May and June of 1986, but produced no other rent receipts. However, P.L. actually paid the rent for July and succeeding months before the hearing on termination. Nothing indicated that payment of rent would be a problem for P.L. and her husband.

Attendance at Classes for C.S. An instructor in special education classes, which were offered through the Grand Island public school system, testified that C.S., the 3-year-old son, was experiencing "delay in language skills." By attendance at speech therapy classes, a parent might learn some exercises to be adapted for a child's daily routine and thereby assist in anticipated amelioration of slowness in a child's speech. Those classes were offered twice a month in April and May 1986. P.L.

did not attend the April-May classes. School recessed at the end of May for the summer months, but therapy classes were scheduled to recommence in the fall of 1986. Therefore, before the State filed its motion for termination of parental rights, only four, or fewer, speech therapy classes had taken place.

Babysitting during Visitation. The caseworker assigned to P.L. and her children testified about the usual babysitting situation when P.L. exercised her visitation right by having the children in her home. When the three children were visiting, P.L.'s 12-year-old, seventh-grade daughter babysat her two brothers while P.L. would leave temporarily, for instance, to run errands. During such babysitting episodes, no harm came to any of P.L.'s children. According to the caseworker, the 12-year-old daughter (J.S.) was "not a very mature 12 year old" and "has become very frustrated and upset when having to control or deal with two active little boys." The caseworker concluded that J.S. was "not capable of dealing with active children." When counsel asked the caseworker: "But, you just don't think it's appropriate for [J.S.] to look after the younger kids?" the caseworker responded: "Absolutely."

Entering Bars and Lounges. Because P.L. did not have a telephone in her residence, she went to a nearby bar, owned by her relatives, to use the phone. The caseworker was aware that there was a phone in the bar because she had placed calls to that phone several times. When the children accompanied P.L. to their relatives' bar, they visited with their cousins. On such visits, P.L. never drank any alcohol.

Meeting of Alcoholics Anonymous. P.L. never attended any meeting of Alcoholics Anonymous, notwithstanding the requirement in the rehabilitative plan. The caseworker never saw P.L. take a drink of alcohol, detected no odor of alcohol on P.L., and saw no alcohol in P.L.'s home when the caseworker inspected the residence. P.L. has never been evaluated for alcoholism or diagnosed as an alcoholic. There was and is no professional recommendation that P.L. undergo any course of treatment for alcoholism or take action for an alcohol-related problem. According to the caseworker, P.L. had some unidentified alcohol problem in the past, "[t]hat was like 1977, so it was a long time back." The caseworker felt that AA

meetings "would be a good way for [P.L.] to understand alcohol better and it would help her generally in her understanding." P.L. told the caseworker that P.L. was not experiencing an alcohol problem and saw no reason to attend the AA meetings.

Findings and Judgment of Juvenile Court. As the result of the termination hearing, the court determined that evidence was insufficient to prove the State's allegation based on § 43-292(4) (parental unfitness due to habitual use of intoxicating liquor), but did not determine whether P.L.'s conduct came within the provisions of § 43-292(2) (persistent neglect and refusal to provide care or protection). However, among its findings the court concluded:

> The Court further finds that the state has proven by clear and convincing evidence that the natural mother has total failure of compliance with regard to parenting classes; job support workshop; monthly receipts of rent; attendance at [C.S.'s] classes or any training for him; leaving the children with other persons during visitation; going to bars and lounges while the children were with her and her failure to comply with the requirement to attend [Alcoholics] Anonymous.

Finally, the court found that "reasonable efforts under the direction of this Court over a period of 18 months have failed totally to correct the conditions leading to adjudication." The court then terminated P.L.'s parental rights regarding her children.

ASSIGNMENTS OF ERROR

In her assignments of error, P.L. contends that the juvenile court erred in (1) failing to apply the "customary rules of evidence" at a termination hearing when the court received or considered Social Services' written report containing hearsay; (2) determining that the State had clearly and convincingly proved P.L.'s failure to comply with the rehabilitative plan designed to correct the conditions leading to the adjudication under § 43-247(3)(a); and (3) finding that, in the best interests of the children, termination of P.L.'s parental rights was the only reasonable alternative in view of noncompliance with the rehabilitative plan.

NEBRASKA EVIDENCE RULES AND THE JUVENILE CODE

Regarding the use of Social Services' written report as evidence, P.L. argues that the report, replete with hearsay, had no place as evidence at the dispositional hearing because the "customary rules of evidence" preclude such documents as evidence.

Neb. Rev. Stat. § 43-2,128 (Cum. Supp. 1986) reminds us that the Nebraska Juvenile Code "shall be liberally construed to the end that its purpose may be carried out . . . ." Consequently, in *In re Interest of L.D. et al.*, 224 Neb. 249, 257, 398 N.W.2d 91, 97 (1986), we stated: "[T]he Nebraska Juvenile Code must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act."

As stated in Neb. Evid. R. 1101(1) (Neb. Rev. Stat. § 27-1101(1) (Reissue 1985)) concerning applicability of the Nebraska Evidence Rules in certain courts, "These rules apply to . . . juvenile courts."

However, the Nebraska Juvenile Code contains explicit standards pertaining to the adduction of evidence at adjudication and dispositional hearings. The standard for permissible evidence at an adjudication hearing is stated in Neb. Rev. Stat. § 43-279(1) (Cum. Supp. 1986), as a part of the Nebraska Juvenile Code, which provides that admissibility of evidence shall be governed by "the customary rules of evidence in use in trials without a jury." The Nebraska Juvenile Code also provides: "Strict rules of evidence shall not be applied at any dispositional hearing." Neb. Rev. Stat. § 43-283 (Reissue 1984). Although expressed in loose legislative language, the "rules of evidence" mentioned in §§ 43-279(1) and 43-283 are the Nebraska Evidence Rules, that is, Neb. Evid. R. 101 to 1103 (Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985)). We note that, since adoption of the Nebraska Evidence Rules in 1975, this court has held that the Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code. See, *In re Interest of L.D. et al., supra; In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985); *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982). Regarding adduction of evidence at a dispositional

hearing, we have consistently held that the Nebraska Evidence Rules do not apply at a dispositional hearing, including an action to terminate parental rights, under the Nebraska Juvenile Code. See, *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987); *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979); *State v. Bailey*, 198 Neb. 604, 254 N.W.2d 404 (1977).

The reason that the Nebraska Evidence Rules do not apply at a dispositional hearing, including a hearing to terminate parental rights under the Nebraska Juvenile Code, becomes readily apparent.

In *State v. Duran, supra*, this court commented concerning the distinction between an adjudication and a dispositional hearing:

> The issue in a disposition hearing where a child has been found to be neglected or dependent is not the adjudicated offense with which the children are involved, but rather a broader concern of overall conduct of the children and their parents and what ought to be done to correct the situation in the best interests of the children. . . . [T]he court must be concerned with the effect which the actions of a parent may create on the impressionable minds of young children.

204 Neb. at 554, 283 N.W.2d at 387.

Thus, once there has been the adjudication that a child is a juvenile within the meaning of the act, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law. To accomplish such goal and fashion a dispositional remedy beneficial to the juvenile, a judge should have access to the best available evidence which is relevant, reliable, and trustworthy concerning a correct disposition for the juvenile. See, *State v. Bailey, supra; In re Melissa M.*, 127 N.H. 710, 506 A.2d 324 (1986); *Matter of C.J.H.*, 371 N.W.2d 345 (S.D. 1985); *In re Hinson*, 135 Mich. App. 472, 354 N.W.2d 794 (1984).

Frequently, parental conduct may be the cause, or a

contributing factor, in the adjudication that a child is a juvenile within the Nebraska Juvenile Code. Quite obviously, the best interests of a juvenile cannot require termination of the juvenile's parent(s), but a juvenile's best interests may require legal extinguishment or judicial termination of the child-parent relationship which caused or contributed to the adjudication under the Nebraska Juvenile Code. Therefore, under certain conditions specified in § 43-292, termination of parental rights may be an appropriate disposition under the Nebraska Juvenile Code. See, *In re Interest of J.K.B. and C.R.B., supra; In re Interest of Hollenbeck, supra; State v. Duran, supra.*

In view of the purpose or objective of a dispositional hearing, including a hearing to terminate parental rights under the Nebraska Juvenile Code, and in the light of our previous decisions in which we have held that the Nebraska Evidence Rules do not apply at a dispositional hearing pursuant to the Nebraska Juvenile Code, we expressly disapprove and reject the language found in *In re Interest of R.A.*, 226 Neb. 160, 166, 410 N.W.2d 110, 115 (1987): "Termination proceedings are subject to the customary rules of evidence applied in nonjury cases. Neb. Rev. Stat. § 43-279(1) (Reissue 1984)."

FUNDAMENTALLY FAIR PROCEDURES

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.
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> . . . .
>
> . . . When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.

Santosky v. Kramer, 455 U.S. 745, 753-54, 759, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). See, also, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985).

In *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 704, 414 N.W.2d 266, 268 (1987), involving hearsay evidence and a fundamentally fair procedure concerning termination of parental rights, this court stated:

> While the rules of evidence do not apply at a dispositional hearing, Neb. Rev. Stat. § 43-283 (Reissue 1984), a proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) . . . .

Therefore, while the Nebraska Evidence Rules, §§ 27-101 to 27-1103, are not applicable in a dispositional hearing, including a hearing to terminate parental rights, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. See, Neb. Const. art. I, § 3; U.S. Const. amend. XIV.

IMPROPER DOCUMENTARY EVIDENCE

In the present case, Social Services' report was offered to prove the truth of the matters asserted in the reports, namely, a factual basis for the conclusion that P.L. had willfully failed to comply with the rehabilitative plan. Therefore, such reports constitute hearsay. See Neb. Evid. R. 801 (definition of hearsay) (§ 27-801). Under the circumstances, the hearsay report effectively eliminated P.L.'s right to cross-examination regarding the contents of the departmental written report, which included prejudicial information embodied in entries by unidentified persons and which covered events outside the personal knowledge of any witness at the termination hearing. In proceedings to terminate parental rights under the Nebraska Juvenile Code, a parent has the due process right to cross-examine an adverse witness. *In re Interest of R.A., supra; In re Interest of J.K.B. and C.R.B., supra.* Without the test of cross-examination, the hearsay report was unreliable evidence

for termination of parental rights. Therefore, the juvenile court committed error in considering the Social Services report.

PROOF BEYOND IMPERMISSIBLE OR IMPROPER EVIDENCE

The trial court's consideration of improper evidence does not, by itself, require reversal of a judgment terminating parental rights under the Nebraska Juvenile Code. Because factual questions concerning a judgment or order terminating parental rights are tried by the Supreme Court de novo on the record, impermissible or improper evidence is not considered by the Supreme Court. See, *In re Interest of J.K.B. and C.R.B., supra; In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987); *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987). In an appeal from a judgment or order terminating parental rights, the Supreme Court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code. See *In re Interest of J.K.B. and C.R.B., supra.* Cf. *Santosky v. Kramer, supra* ("clear and convincing evidence" is the correct standard applicable for proof sufficient to terminate parental rights). "[C]lear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

"As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code." *In re Interest of T.C.*, 226 Neb. 116, 121, 409 N.W.2d 607, 611 (1987). See, also, § 43-292 (termination of parental rights; failure to correct conditions leading to adjudication). However, when a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights. *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). As we expressed in *In re Interest of W.*, 217 Neb. 325, 330, 348

N.W.2d 861, 865 (1984): "When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require that a final disposition be made without delay." Also, "when a rehabilitation plan is implemented, the plan must be reasonable and conducted under the direction of the juvenile court before failure to comply with the plan can be an independent reason for termination." *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 603, 407 N.W.2d 189, 195 (1987).

> In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Cum. Supp. 1982 & Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.

In re Interest of T.C., supra at 117, 409 N.W.2d at 609. A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. See, *In re Interest of K.L.N. and M.J.N., supra; In re Interest of J.W., supra.*

The unequivocal language of § 43-292 imposes two requirements before parental rights may be terminated. First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is "clear and convincing."

Therefore, regarding parental noncompliance with a court-ordered rehabilitative plan, under § 43-292(6) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.

Materiality of a provision in a court-ordered rehabilitative plan is determined by a cause-and-effect relationship: Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to the preceding question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Otherwise, a court-ordered plan, ostensibly rehabilitative of the conditions leading to an adjudication under the Nebraska Juvenile Code, is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures. Similar to other areas of law, reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis.

An illustration of materiality is *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987), in which medical evidence showed that immediate availability of cardiopulmonary resuscitation was necessary on account of a child's precarious physical condition. When the child's mother did not comply with the court's plan requiring the mother's receipt of instruction in CPR, the mother's noncompliance, on clear and convincing evidence, was a basis for termination of parental rights, as authorized by § 43-292(6). This is not to say that materiality exists only when there is a life-threatening situation as the consequence of parental noncompliance with a rehabilitative plan. Materiality regarding a rehabilitative plan does exist, however, when a parent's noncompliance results in a continued condition which was the basis for the adjudication and which is deleterious to a child expected to benefit from parental compliance with the rehabilitative plan.

As the result of our de novo review of the record and trial anew concerning factual questions, our findings require reversal of the judgment or order of the juvenile court. Our decision is necessarily based on the evidence, or lack of evidence, in the record brought from the juvenile court.

Regarding parenting classes required by the rehabilitative plan, the courses apparently contained a great deal of theory but nominal practicality regarding P.L.'s relationship with her

children. According to the record, the parenting classes may provide general knowledge which some day will be significant to P.L. in raising her children. True, P.L. did not attend the parenting classes. However, contained in the juvenile court's decision, either explicitly or implicitly as well as factually substantiated, are the conclusions that P.L. has satisfactorily complied with the rehabilitative plan's requirement pertaining to a suitable home, prevention of motorcycle riding, visitation of the children, counseling, participation in the older daughter's activities, and babysitters for J.D.L., the daughter not involved in the proceedings under review. Why the rehabilitative plan contains a provision directed toward a child who is not under the juvenile court's jurisdiction remains a mystery. Nevertheless, P.L. satisfactorily complied with many items which have a direct and immediate bearing on "parenting" or raising her children insofar as the situation existed under custodial constraints. As we view the record, there is a relationship and familial bond between P.L. and her children which probably comes from intuitive maternal knowledge irrespective of some classroom instruction on parenting.

Given P.L.'s work history, the job support workshop sponsored by Social Services may have some remedial value, but we cannot disregard P.L.'s contact with the vocational rehabilitation department of the State of Nebraska. At trial, the Social Services caseworker conceded that the programs of the two departments or agencies are very similar. Whatever may be the departmental interplay, we find that P.L. has made a bona fide effort to correct the condition of unemployment, regardless of the particular mandarin method specified in the rehabilitative plan.

The requirement of rent receipts deserves little comment. Suffice it to say, the record conclusively establishes that P.L. paid her rent for the period under examination relative to the rehabilitative plan. We do not recognize the absence of paperwork in the form of rent receipts as a basis to extinguish parental rights, which would be a triumph of form over substance, when evidence has established the very fact to be reflected by the missing documentation.

The speech therapy classes for C.S. are appropriate under

the circumstances, and P.L. should have obtained assistance by professional instruction concerning C.S.'s difficulty in speech. As far as their bearing on the disposition in the present case, the speech therapy classes were offered twice a month in April and May of 1986. The rehabilitative plan was ordered in mid-April 1986. Assuming that P.L. was given immediate information about the availability of speech therapy classes, four such classes, at the most, would have transpired before suspension of the therapy classes for summer recess. The State's motion for termination was filed in August. Such hasty action unfavorably reflects on the otherwise considered judgment required of the State seeking the serious dispositional consequence of parental rights termination. Whether plaintiff could have, or would have, successfully attended speech therapy classes is undisclosed or inconclusive in the record.

The babysitting provision, namely, that P.L. refrain from leaving the children with "anyone" during P.L.'s visitation is a troublesome and ill-advised provision apparently submitted by Social Services and summarily incorporated into the court-ordered plan for rehabilitation. That babysitting provision effectively precluded P.L.'s temporary absence for any reasonable purpose, such as a trip to the store to buy food for her family. If for some good reason, or even an absolute necessity, P.L. were required to temporarily leave her children during visitation, the provision in question dictates that P.L. shall leave the children by themselves, unattended by a babysitter. At that point, P.L. runs the risk of an administrative assault in the form of the allegation that P.L., by her literal obedience to the babysitting provision, is not providing suitable care or protection for her unattended children. Regarding the caseworker's comment that P.L.'s 12-year-old daughter (J.S.), as a babysitter, "has become very frustrated" in dealing with her brothers, who were "two active little boys," a similar feeling of frustration undoubtedly has been experienced by a multitude of parents while raising their children. The oldest daughter's babysitting has not been shown to be harmful or likely to continue any injurious condition which existed at the time of adjudication in the present proceedings. Under a literal or liberal construction, the babysitting provision compels the

conclusion that such provision is entirely impractical and, therefore, unreasonable. By contrast, the plan's provision that P.L., while accompanied by her children, is prohibited from entering bars and lounges may be reasonable, but the evidence fails to establish that P.L.'s presence in the bar was for anything but a reasonable purpose—use of a telephone which was unavailable at P.L.'s residence. The evidence before us leads to the conclusion that P.L.'s explanation for her presence in the bar is credible and negatives the State's assertion of willful noncompliance with the rehabilitative plan.

The requirement concerning the meetings of Alcoholics Anonymous fails to meet the test for materiality necessary in a rehabilitative plan. Most assuredly, we do not dispute that everyone should be fully informed about alcohol's nature and the abuse of alcohol. However, a requirement that a parent obtain such knowledge as a condition to retaining parental rights, when the parent has no alcohol-related problem, appears to be a somewhat draconian dictate. Under the circumstances, P.L.'s attendance at AA meetings was immaterial to the correction, elimination, or amelioration of a condition which resulted in the adjudication in this case and, therefore, was irrelevant in the termination proceedings. Further, the court's specific finding that the State had failed to prove existence of the specific condition described in § 43-292(4) (parental unfitness due to "habitual use of intoxicating liquor") only underscores the irrelevancy of the subject provision under the circumstances.

Consequently, we find that the State has failed to present clear and convincing evidence which shows P.L.'s willful noncompliance with the rehabilitative plan's provisions concerning a job workshop, rent receipts, babysitting, and entry into a bar or lounge while P.L. was accompanied by her children. Additionally, although the evidence sufficiently establishes that P.L. failed to attend parenting classes and the speech therapy classes for C.S. as well as the meetings of Alcoholics Anonymous, the State's evidence does not clearly and convincingly establish that such noncompliance necessitates termination of parental rights as the only alternative in the best interests of the children. Therefore, we

must reverse the judgment of the juvenile court.

DISPOSITION ON REMAND

No doubt exists about the good intention of anyone involved in the formulation of the rehabilitative plan in these proceedings. Undoubtedly, everyone was trying to render assistance by a 17-point plan, but all that help can hurt when a rehabilitative plan becomes a fulcrum for termination of parental rights. The record does not contain evidence supporting the necessity for some provisions in the plan which precipitated this appeal. Deficiency of a factual basis for certain provisions of the rehabilitative plan is illustrated by the provisions concerning attendance at meetings of Alcoholics Anonymous and suitable babysitting for a child outside the jurisdiction of the juvenile court in this case.

We are frequently asked to review the reasonableness of a rehabilitative plan, as well as the very reason or objective underlying such plan. Without an adequate record reflecting the parental shortcomings or the parental conduct to be corrected, eliminated, or ameliorated through a rehabilitative plan, it is virtually impossible for this court to evaluate the efficacy of a rehabilitative plan and, more basic, to determine whether a plan is reasonable under particular circumstances. More crucial, however, is the fundamental fairness which must exist concerning proceedings to terminate parental rights, a subject of due process protection under the Constitutions, both state and federal. See, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Fundamental fairness requires adduction of appropriate evidence as a factual foundation for a rehabilitative plan which eventually may be used as a ground or condition for termination of parental rights. If a court's order for a rehabilitative plan is not supported by the record, the plan may be some pro forma judicial inscription of activity which occurred outside the open courtroom or an unsubstantiated order which necessarily would be characterized as an arbitrary act. Either situation defies due process.

We hold, therefore, that, after an adjudication under § 43-247(3)(a) of the Nebraska Juvenile Code and before

entering an order containing a rehabilitative plan for a parent, a juvenile court shall inform the juvenile's parent that the court may order a rehabilitative plan and thereafter shall hold an evidential hearing to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. Because the evidential hearing for a rehabilitative plan is a dispositional hearing, the Nebraska Evidence Rules, §§ 27-101 to 27-1103, shall not apply at such hearing. The record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the parental rehabilitative plan. The juvenile court's specific findings of facts supporting the provisions contained in the parental rehabilitative plan shall be stated in the record. The foregoing procedural rule, which we have enunciated today, is prospective only and shall apply to a juvenile court's order which is entered after the filing date of this opinion and contains a rehabilitative plan for a parent.

Therefore, regarding the proceedings now before us for review, we reverse the judgment and order of the juvenile court and remand this matter to the juvenile court for further proceedings. The juvenile court shall forthwith hold an evidential hearing. Based on the proper evidence adduced at that hearing, the juvenile court shall determine whether custody of the children shall be returned to P.L. and, if child custody is returned to P.L., whether Social Services' supervision of custody is warranted. If the juvenile court finds that a rehabilitative plan is necessary, the court shall proceed to determine and specify a realistic remedial plan, based on evidence presented at the hearing on remand, and in the light of current circumstances, to correct, eliminate, or ameliorate the conditions constituting, or contributing to, the basis for the adjudication. We believe that such disposition by remand is a reasonable alternative to the termination of parental rights, which is the "last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code." *In re Interest of T.C.*, 226 Neb. 116, 117, 409 N.W.2d 607, 609 (1987).

REVERSED AND REMANDED WITH DIRECTIONS.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD E. RICHARDSON, APPELLANT.

417 N.W.2d 24

Filed December 24, 1987. No. 87-454.

1. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh the evidence.
2. **Criminal Law: Appeal and Error.** In a trial to the court in a criminal case, the factual findings will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Hitchcock County: JACK H. HENDRIX, Judge. Affirmed.

David A. Bergin, for appellant.

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

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The defendant was convicted of third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 1985) and sentenced to 30 days' imprisonment. Upon appeal to the district court the judgment was affirmed. Upon appeal to this court the defendant contends the evidence was insufficient to support the conviction.

The record shows that the defendant's version of the facts is that the victim, Laura Skiver, arrived at his home around 1:15 p.m. on September 5, 1986, to give him some chair covers in exchange for some pieces of jewelry. The victim had a can of beer with her when she arrived, and then asked for more to drink. She then proceeded to consume homemade wine, along with creme de menthe and Southern Comfort. She continued to drink until approximately 3 p.m. and became intoxicated. At that time, when she attempted to stand up from a platform rocking chair, she fell forward onto the coffee table, hitting her face. She then proceeded to vomit on the defendant's carpet. The defendant retrieved a towel and cleaned her up. He could tell she was sick, and he could not do anything with her, so he

went outside and continued working. Approximately 3 hours later the defendant went back inside, got the victim up from the floor, and told her she had to leave because he had a date.

The defendant testified that as the victim awakened, she thought the defendant was her husband and said, "Leave me alone, Bob!" Then she realized she was not at home and said, "Oh my God! Bob's gonna kill me!" She stumbled to the bathroom, and the defendant heard her knock something over. She then left at approximately 6:15 p.m.

At 7:15 p.m., just as the defendant was leaving, the victim returned and asked if she had left her billfold and checkbook, which she found beside the coffee table. She asked the defendant what had happened, and he told her she had gotten drunk. The defendant noticed a bump on her lip and a bruise on her face. The defendant testified he had nothing to drink that day.

The victim's testimony described a different series of events. Skiver testified that she had been friends with the defendant for 3 1/2 years and that during that time he had made verbal suggestions of a sexual nature. During her conversation with him that day, she testified, he again made verbal suggestions but that it did not surprise her because "[t]hat's just being Cliff." She did not have anything to drink prior to arriving at his house, but testified she drank a quart of the homemade wine and possibly some sloe gin at the defendant's home. The defendant also was drinking.

The victim testified that the defendant wanted to dance with her, and kiss and hug her, but that she rejected him. The defendant then hit her with his hand on the right side of her face and pushed her to the floor. She left the defendant's home at approximately 3:30 p.m. and went to tell her husband what had happened. Later, she returned to the defendant's home to find her wallet, but she did not recall the time because she was still in a state of shock after being hit. She further testified that her husband did not like to have her go to the defendant's home and that she knew her husband would disapprove of her visit that day.

Robert Skiver, the victim's husband, testified that his wife came to him between 3:30 and 4 p.m. that day and that she had

a black eye, fat lip, and bruise on her cheek. He took her home and then went to see John Richardson, a nephew of the defendant. Robert Skiver told Richardson that the defendant had hit his wife and that Skiver was going to go after the defendant. Richardson talked Skiver into calling the sheriff instead. Skiver testified that he called the sheriff around 5 or 5:30 p.m.

John Richardson testified that he received a visit from Robert Skiver somewhere between 5:30 and 7 p.m. Skiver was carrying a knife and told him that he wanted to do physical violence to the defendant.

Sheriff William Cemer testified that he received a call from Robert Skiver at around 7 p.m. and then met with him. Later that evening, he observed the victim's bruise marks and black eye and that she was intoxicated. The sheriff did not take a statement from the victim at that time because she had been beaten up and was intoxicated, and he did not believe she was capable of making a statement.

On September 8, 1986, Cemer took a statement from the victim, at which time she told him that the defendant had made advances toward her and had hit her.

In resolving a challenge to the sufficiency of the evidence to sustain a conviction in a criminal case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh the evidence. *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987).

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. *State v. Laue*, 225 Neb. 57, 402 N.W.2d 313 (1987). It is not the function of this court to accept one version of the case over another. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).

In this case there was direct, corroborated evidence which linked the defendant to the crime and which was sufficient to sustain a finding of guilt beyond a reasonable doubt. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SHELIA A. LEE, APPELLANT.

417 N.W.2d 26

Filed December 24, 1987. No. 87-456.

1. **Motions to Suppress: Appeal and Error.** The Nebraska Supreme Court will, in determining the correctness of a trial court's ruling on a motion to suppress, uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings in ruling on a motion to suppress are clearly erroneous, the Nebraska Supreme Court recognizes that the trial court has observed witnesses testifying regarding such motion.
3. **Criminal Law: Trial: Joinder: Indictments and Informations.** Neb. Rev. Stat. § 29-2002(3) (Reissue 1985) allows the joinder of criminal defendants for trial "if . . . the defendants . . . could have been joined in a single indictment, information or complaint."
4. **Criminal Law: Joinder: Indictments and Informations.** The joinder of criminal defendants in an indictment or information is governed by Neb. Rev. Stat. § 29-2002(2) (Reissue 1985), which allows joinder if the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."
5. **Criminal Law: Joinder: Trial.** A joinder of criminal defendants for trial in a manner inconsistent with Neb. Rev. Stat. § 29-2002 (Reissue 1985) is prejudicial per se, and severance is not a matter of discretion but a matter of right.
6. **Convictions: Double Jeopardy: Appeal and Error.** An appellate finding of insufficient evidence to convict is tantamount to an acquittal, and, therefore, the double jeopardy clause precludes a second trial once the reviewing court has found the evidence legally insufficient.
7. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
8. **Controlled Substances: Proof: Evidence.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance.
9. **Controlled Substances: Intent: Circumstantial Evidence.** The intent to deliver or distribute a controlled substance may be inferred from circumstantial evidence.
10. _____: _____: _____. Possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute.

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

Mark S. Trustin of Smith, Trustin & Schweer, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

On March 11, 1987, following a jury trial, defendant-appellant, Shelia A. Lee, was found guilty of one count each of possession of marijuana with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1986), and possession of cocaine, in violation of § 28-416(3). Lee was subsequently sentenced to concurrent periods of imprisonment, 3 to 5 years on the marijuana conviction and 3 years on the cocaine conviction. In this appeal Lee assigns as error, among other things: (1) the denial of her motion to suppress statements, (2) the joinder of her case with another defendant's for trial, and (3) the sufficiency of the evidence to support her convictions. We reverse and remand for further proceedings.

On October 21, 1986, acting principally on information gleaned from a confidential informant to the effect that one Kim Britt was selling drugs from a designated residence in Omaha, officers of the Omaha Police Division executed a search warrant at that address. The warrant authorized a search of the premises, together with the persons of Britt and "a black female, and John and/or Jane Doe." At the residence the officers found Lee, a second black female, and Lee's infant child in the living room. They also found a quantity of marijuana packaged in 23 "baggies" inside a corn chip canister on a coffee table in the living room, a bit over an ounce of marijuana in a paper sack in the kitchen, several items covered with cocaine residue in various parts of the residence, and several items indicating that Lee lived at the premises, such as envelopes bearing her name, as well as other items not material to the resolution of this appeal.

As the officers engaged in the search, an automobile stopped across the street from the residence, and Britt exited from the passenger's side and approached the residence. Officers immediately moved to detain both the driver of the automobile, one Donald E. Gorum, and Britt. Gorum gave the officers permission to search the automobile. As a result of that search, officers found several tinfoil packages of heroin and a black or blue jacket containing several packages of marijuana.

Lee was then transported to the Central Police Station detention area, where she was informed of her *Miranda* rights by Officer Stephen Sanchelli. Lee initially declined to make a statement, but later changed her mind and spoke with Sanchelli for about 15 minutes. Lee asserted that she had no knowledge of the contents of the corn chip canister, but admitted that other marijuana found in the house was hers and that she used, but did not deal in, cocaine.

Subsequently, Lee was charged as stated earlier; Britt was charged with possession with intent to deliver heroin and possession with intent to deliver marijuana.

Notwithstanding the different charges, the State moved to consolidate Lee's trial with Britt's. That motion was denied on December 29, 1986. At some later proceeding not in the record before this court, the State's motion to consolidate was apparently reconsidered and granted, for on March 9, 1987, the trial resulting in this appeal was begun against both Lee and Britt. What is in the record is Lee's continued objection to the consolidation.

As part of its case in chief against Britt, the State adduced testimony regarding the jacket, and the jacket itself was received in evidence. The following exchange was then had between Omaha Police Officer Gary Boldt and Lee's attorney on cross-examination:

> [Attorney] And I believe it was your testimony that you recognized Kim as soon as he got out of the car; is that right?
>
> [Boldt] That's correct.
>
> [Attorney] How was it that you recognized him?
>
> [Boldt] I have seen photographs of Mr. Britt before.
>
> [Attorney] In what connection?

[Boldt] Other narcotics investigations.

Although Britt did not immediately object to this statement, a sidebar conference was requested shortly thereafter, and, out of hearing of the jury, Britt moved for a mistrial. As Britt's attorney observed in the course of that discussion, "It wasn't the State's problem. I think it's a problem with consolidating these matters." The district court granted Britt's motion for mistrial, and the jacket was subsequently withdrawn from evidence.

The trial against Lee continued, the State's theory being that Lee had cooperated with Britt in the sale of drugs from the subject residence. Over Lee's objection, Gorum testified to the effect that he had seen Lee give Britt sums of money and that he had seen Britt handle the canister and the marijuana in it. Gorum also testified that he had purchased marijuana from Britt in the past, but never from Lee, and that he had never seen Lee "with her hands in that canister or taking things out of that canister . . . [or] exchange marijuana with anybody including Kim Britt."

We will first consider Lee's assertion that the trial court erred in overruling her motion to suppress the statement she made to Sanchelli. This court will, in determining the correctness of a trial court's ruling on a motion to suppress, uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Bonczynski, ante* p. 203, 416 N.W.2d 508 (1987). In determining whether a trial court's findings in ruling on a motion to suppress are clearly erroneous, we recognize that the trial court has observed the witnesses testifying regarding such motion. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

A hearing on Lee's suppression motion was held on February 6, 1987. Sanchelli testified that Lee was placed under arrest at the residence and transported to the Central Police Station, where he advised her of her *Miranda* rights, using a standard rights advisory form, and made note of Lee's responses. On direct examination by the State's attorney, Sanchelli testified:

[Sanchelli] The last question is: "Knowing your rights in this matter, are you willing to make a statement to me

now?" Sheila [sic] Lee stated, "No." But a few seconds later changed her mind to "Yes," that she would be willing to make a statement.

[Attorney] Tell the Court exactly in your best memory what happened when you read her that last question. She said, "No?"

[Sanchelli] She said, "No." And I started to gather some paperwork, and I told her, I said, "If you don't want to talk to me, that's all right.["] And then she said that she would change it to "Yes," and she would make a statement.

[Attorney] Okay. Between the time she said "No," and the time she said, "Yes," did you make any promises to her or threaten her in any fashion to get her to change her mind?

[Sanchelli] No, sir.

Sanchelli was vigorously cross-examined at the suppression hearing and repeated this testimony. Sanchelli also testified that Lee did not appear to be ill, injured, or under the influence of alcohol or drugs during this interview, nor did she complain of any such difficulty; that Sanchelli had had no difficulty understanding what Lee was saying; and that she seemed able to understand him. Lee offered no evidence at all in dispute of Sanchelli's testimony.

It was recently suggested, in a single-judge opinion in *State v. Pettit, ante* p. 218, 417 N.W.2d 3 (1987), that after a defendant has invoked the right to be silent but there is subsequent police interrogation of the defendant, this court should employ three analytic criteria to determine whether the defendant's right to be silent has been scrupulously honored: (1) Did the police immediately cease interrogation on the defendant's request? (2) Did the police resume an interrogation of the defendant only after passage of a significant time and renewal of the *Miranda* warning? and (3) Did police restrict the subsequent interrogation to a transaction or occurrence which was not the subject of the prior discontinued interrogation? The interrogation of Lee passes muster under all three criteria: it is the uncontroverted testimony of Sanchelli that interrogation ceased immediately upon Lee's refusal to answer questions and

that the police did not resume subsequent interrogation; rather, Lee changed her mind and spoke voluntarily. Because Lee's statement was voluntary, the third criterion is inapplicable.

On these facts we cannot say that the trial court's ruling on Lee's suppression motion was clearly erroneous; the suppression motion was properly denied and evidence of Lee's statements properly admitted at trial.

We next consider Lee's contention that her case was improperly joined with Britt's for trial. As we noted in *State v. Brehmer*, 211 Neb. 29, 34, 317 N.W.2d 885, 889 (1982):

> The matter of consolidating criminal prosecutions for the purpose of trial is governed by Neb. Rev. Stat. § 29-2002 . . . . Section 29-2002(3) allows the joinder of defendants for trial "if . . . the defendants . . . could have been joined in a single indictment, information or complaint." The joinder of defendants in an indictment or information is governed by § 29-2002(2), which allows joinder if the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

It is clear that the charges Lee faced and those against her codefendant could not have been joined in a single information. Britt was charged with possession of heroin with intent to distribute; there was no "act or transaction or . . . series of acts or transactions" alleged which linked Lee to the heroin. Similarly, Lee was charged with possession of cocaine; there was no "act or transaction or . . . series of acts or transactions" alleged which linked Britt to the cocaine. Although *Brehmer, supra*, did not adopt a single test to determine if two defendants' actions constitute the "same act or transaction" under Neb. Rev. Stat. § 29-2002(2) and (3) (Reissue 1985), it is clear that the facts outlined herein do not satisfy any of the tests mentioned in *Brehmer*.

Therefore, joinder of Britt's case with Lee's was improper. In former times it would next have been appropriate to ask if Lee had in fact been prejudiced by that improper joinder. Under *Brehmer* it is no longer necessary to do so. As we noted there:

> "The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established

> procedural safeguard. . . . It is not 'harmless error' to violate a fundamental procedural rule designed to prevent 'mass trials.' ". . .
>
> . . . .
>
> . . . [I]n cases where multiple defendants are joined for trial in a manner inconsistent with § 29-2002, such misjoinder is prejudicial per se and severance is not a matter of discretion but is a matter of right.

(Citations omitted.) *Id.* at 38-39, 317 N.W.2d at 891. As in *Brehmer, supra*, we are compelled to reverse Lee's conviction.

We are not yet finished, however, as we must consider Lee's challenge to the sufficiency of the evidence to reach a complete resolution of this appeal. As we noted in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986): "[T]he U.S. Supreme Court [has] held that an appellate finding of insufficient evidence to convict is tantamount to an acquittal and, therefore, that the double jeopardy clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Id.* at 295-96, 399 N.W.2d at 718 (citing *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). In light of our determination that joinder was improper, it is now necessary to examine the sufficiency of the evidence to support Lee's convictions. If it appears the evidence is sufficient to support the convictions, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient under *Palmer, supra*, the cause must be dismissed.

In determining whether the evidence is sufficient 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 the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction. *State v. Richardson, ante* p. 274, 417 N.W.2d 24 (1987); *State v. Patman, ante* p. 206, 416 N.W.2d 582 (1987); *State v. Pence, ante* p. 201, 416 N.W.2d 581 (1987).

The jury found Lee guilty of possession of marijuana with intent to deliver. Constructive possession of an illegal substance

may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977). The evidence adduced supports the inference that Lee was in possession of the marijuana found in the corn chip canister. The intent to deliver or distribute may be inferred from circumstantial evidence; possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute. *State v. Hunt*, 224 Neb. 594, 399 N.W.2d 806 (1987); *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976); *State v. Sullivan*, 190 Neb. 621, 211 N.W.2d 125 (1973). Thus, the evidence supports the inference that Lee had the necessary intent.

The jury also found Lee guilty of possession of cocaine. In her statement to Sanchelli, the content of which we have concluded was properly admitted at trial, Lee admitted using cocaine, and cocaine residue was found on several items in Lee's residence. Therefore, the evidence also supports the jury's finding that Lee possessed cocaine.

Consequently, we find that the evidence adduced at trial was sufficient to support Lee's convictions as to both charges; the requirements of *State v. Palmer, supra*, having thus been met, we remand the cause to the district court for further proceedings on both charges.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOHN L. HAMMANN, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

417 N.W.2d 323

Filed December 31, 1987. No. 86-223.

1. **Administrative Law: Municipal Corporations: Appeal and Error.** The Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 to 84-916 (Reissue 1981), and its appeal procedures, Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981), are applicable only to agencies of the state, and not to administrative agencies of municipal government.
2. _____: _____: _____. Where it appears in an error proceeding that an administrative agency of a municipal government has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the agency will be affirmed.
3. _____: _____: _____. The review by this court of an action taken by an administrative agency of a municipal government is conducted solely upon the record made by that agency, and no new facts or evidence can enter into the consideration of the court.
4. **Evidence: Words and Phrases.** Competent evidence means evidence that tends to establish the fact in issue or, stated otherwise, evidence that is admissible and relevant on the point in issue, or that which the very nature of the thing to be proven requires.
5. **Administrative Law: Municipal Corporations.** The action of a municipal administrative agency must not be arbitrary and capricious.
6. **Administrative Law: Municipal Corporations: Appeal and Error.** In reviewing the findings and decision of an administrative agency of a municipal government, it is not for the Supreme Court to resolve conflicts in the evidence. Instead, credibility of witnesses and the weight to be given to testimony are for the agency or tribunal as the trier of fact, which is in a better position to evaluate evidence offered at the hearing.
7. **Administrative Law: Proof: Appeal and Error.** The burden of proof lies with the appellant to establish error in the action or order from which an appeal has been taken in an error proceeding.
8. **Public Officers and Employees: Termination of Employment: Words and Phrases.** "Cause," when referring to the dismissal of an employee, means some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his or her no longer holding the position.
9. **Contracts: Intent.** Contracts must receive a reasonable construction so as to give effect to the intention of the parties thereto and carry out rather than defeat the purposes for which they were executed.

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

James E. Schaefer of Gallup & Schaefer, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Michael A. Goldberg, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

This is an appeal from the district court, which affirmed an order of the Omaha Personnel Board terminating the employment of the plaintiff-appellant, John L. Hammann, with the Omaha Police Division.

Appellant assigns as errors the finding that his conduct adversely affected the economic or efficient conduct of the business of the City of Omaha or the city's best interests and the failure to impose some time limitation when imposing disciplinary action. We affirm.

Contrary to the appellant's assertion, this is not an appeal from the decision of an administrative agency which must be reviewed de novo on the record under Neb. Rev. Stat. § 84-918 (Reissue 1981). That section is applicable only to agencies of the state. *Harnett v. City of Omaha*, 188 Neb. 449, 197 N.W.2d 375 (1972). Neb. Rev. Stat. § 84-901(1) (Reissue 1981) provides: "Agency shall mean each board, commission, department, officer, division, or other administrative office or unit *of the state government* . . ." (Emphasis supplied.) In *Harnett*, the personnel board of the City of Omaha was *not* found to be an agency within the act, so de novo review was improper.

Instead, where it appears in an error proceeding that an administrative agency of a municipal government has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the agency will be affirmed. *Matula v. City of Omaha*, 223 Neb. 421, 390 N.W.2d 500 (1986). "The review is solely upon the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into the consideration of the court." *Harnett, supra* at 188 Neb. at 451, 197 N.W.2d at 377.

Shepherd v. City of Omaha, 194 Neb. 813, 235 N.W.2d 873 (1975), provides further insight with its definition of competent

evidence:

> "Competent evidence" means evidence that tends to establish the fact in issue. Or, stated otherwise, evidence that is admissible and relevant on the point in issue. Black's Law Dictionary (4th Ed.), p. 355, defines it as: "That which the very nature of the thing to be proven requires, * * *."

Id. at 817, 235 N.W.2d at 875. Additionally, the action of the agency must not be arbitrary and capricious. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983). Furthermore, in reviewing the findings and decision of the agency, it is not for the Supreme Court to resolve conflicts in the evidence. Instead, credibility of witnesses and the weight to be given to testimony are for the agency or tribunal as the trier of fact, which is in a better position to evaluate evidence offered at the hearing.

Hammann was an 18-year employee of the Omaha Police Division when he was questioned at an interview with the internal security unit of the division on June 11, 1985, regarding his involvement with or usage of marijuana. Hammann had been identified in a photograph where he was seated at a table with two other individuals who had been involved in a drug conspiracy case in Iowa. Also pictured on the table were plastic bags of large quantities (in excess of 1 pound) of cannabis (marijuana) and a weighing scale.

In the interview, Hammann admitted possession, periodic use, and purchase of marijuana at various times throughout a 10- to 13-year period. The last time apparently occurred in February of 1985. Hammann also admitted contact with cocaine on at least three occasions.

Hammann was charged with violations of the police labor contract, specifically, article 6, § 1:

> (j) Commission of acts or omissions unbecoming an incumbent of the particular office or position held, which render his admonishment, reprimand, suspension, demotion, or discharge necessary or desirable for the economical or efficient conduct of business of the City or for the best interest of the City government;
>
> . . . .
>
> (q) Use of illegal controlled substance.

After a June 21, 1985, meeting with the personnel director of the City of Omaha, Hammann was suspended without pay for a 30-day period commencing June 25, 1985, and was discharged effective July 25, 1985. Hammann's appeal to the personnel board of the City of Omaha was denied by a vote of 5 to 0. The denial was affirmed by the district court for Douglas County.

The burden of proof lies with the appellant to establish error in the action or order from which the appeal has been taken. *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982). In *Martin v. City of St. Martinville*, 321 So. 2d 532 (La. App. 1975), the court held that the dismissal or discipline of a tenured police officer had to be done in good faith and for cause. This means that the "dismissal or disciplinary action must be reasonably necessary for the continued efficiency of the service being rendered" and that the "failure to dismiss or discipline the officer would be detrimental to the city or to the service which it is required to perform." *Id.* at 535. "Cause" has also been defined as "some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer holding the position." *Coursey v. Board Fire & Police Com'rs of Skokie*, 90 Ill. App. 2d 31, 37, 234 N.E.2d 339, 341-42 (1967). These cases were cited and similar standards were enunciated in the Nebraska case of *In re Appeal of Levos, supra*.

It was further stated in *Riley v. Board of Police Commissioners*, 147 Conn. 113, 118, 157 A.2d 590, 593 (1960), that "wide discretion must be lodged in the board in determining what conduct on the part of members of the force is injurious to the efficiency of the department."

Police Chief Robert Wadman aptly summarized the concern for corruption when police officers are involved with drugs: "[A]ny involvement in narcotics trafficking activity is a major concern because of the vulnerability that police officers have with their responsibility and the access to information." Chief Wadman noted that the photograph showed a salable quantity of narcotics as well as scales. He stressed that users do not weigh narcotics, only sellers do. He surmised that appellant's

knowledge of such a compromising photograph would cause him to "become vulnerable obviously to drug dealers using either blackmail tactics or just coercive tactics . . . ." Such is of great concern to police management.

Appellant admitted being present in the photographed scene, sitting at a table with two known narcotics dealers and bags of marijuana. Appellant also testified that he had tried cocaine on a total of three occasions, twice with cocaine obtained from arrests he had made. In his interview with the internal security unit, appellant admitted possession, periodic use, and purchase of marijuana at various times over a 10- to 13-year period. The date on the back of the photograph was August 1975. As with the dismissal of an Omaha police officer for falsification of records and reports in *Stradley v. City of Omaha*, 201 Neb. 378, 381, 267 N.W.2d 541, 543 (1978), "We are not dealing with a single impulsive act done under pressure but several separate acts performed over a period of time."

Appellant was aware that possession of less than an ounce of marijuana was a misdemeanor and that delivery of marijuana was possibly a felony, yet he failed to take appropriate action as an Omaha police officer with regard to the activity portrayed in the photographic exhibit.

Due to the obvious potential for abuse, it is clear that the facts at hand give rise to a situation of police corruption having a major impact on the activity of the city and its best interests.

Because of testimony of a former supervisor of the appellant, retired Sgt. Daryl Simmons, that he never had a basis to question the appellant's integrity, honesty, or professionalism as a police officer, the appellant suggests that the city was not injured in any fashion.

However, a nearly identical situation has recently arisen and has been decided adversely to the appellant. In *Ostwald v. City of Omaha*, 224 Neb. 530, 399 N.W.2d 783 (1987), Ostwald, a 911 operator, was discharged as a result of telephone conversations held between Ostwald and his wife concerning the purchase and use of marijuana for their personal consumption. This court ruled:

> We believe that it is clear that when an employee of the city, whose duties in part are to help apprehend persons using

> marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.

Id. at 532, 399 N.W.2d at 784. These words are clearly dispositive of the case at bar.

Appellant's second assignment of error refers to the provision of the police labor contract at article 6, § 9 (i.e., the 35-day rule), which provides: "Any disciplinary action must be initiated within thirty-five (35) days of the incident occasioning the disciplinary action. . . . This time limitation shall not apply whenever the disciplinary action results from or is the product of a criminal investigation." The rule has recently been addressed by this court in *Matula v. City of Omaha*, 223 Neb. 421, 390 N.W.2d 500 (1986), where disciplinary action was found to be initiated within the confines of the rule although the violations charged had occurred as early as 6 months before the petitioner-in-error was served with written notification of the investigation.

With regard to the rule above, the personnel board made the following finding: "That the existence of the above photograph and other circumstances and admissions of unlawful activity by appellant as referenced above, became known to the administration of the Omaha Police Division on or after June 6, 1985." This finding is in line with the testimony of Officer Verlin Sieh, who identified Hammann in the photo shown to him by a prosecutor. The first time Officer Sieh became aware of the picture was on the 4th or 5th of June, 1985. This was his first knowledge of any involvement of Hammann with drugs.

The facts indicate that Hammann was then given advance written notice that the misconduct charged and the circumstances of this case were under consideration for disciplinary action. Hammann was interviewed by Lieutenant Howard of internal security on June 11, 1985. A meeting was held with the personnel director on June 21, 1985, and disciplinary action was taken on June 25, 1985.

A reasonable construction of this statute-of-limitations-type provision is that disciplinary action must be initiated within 35

days from the date that the underlying incident is brought to the attention of the proper department to commence action. As to the 35-day rule, it was stated in *Matula, supra* at 223 Neb. at 424, 390 N.W.2d at 502, that " '[c]ontracts must receive a reasonable construction so as to give effect to the intention of the parties thereto and carry out rather than defeat the purposes for which they were executed.' "

Additionally, the disciplinary action resulted from a federal narcotics investigation in Des Moines, Iowa, which uncovered the photograph of appellant, who was identified on June 4 or 5, 1985. Thus, the disciplinary action "results from or is the product of a criminal investigation" under the police labor contract, which is specifically exempted from the 35-day rule.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR UEHLING STATE BANK, APPELLEE, V. WILLARD D. HEYNE, APPELLANT.

417 N.W.2d 162

Filed December 31, 1987. No. 86-299.

1. **Guaranty: Liability.** The rule of strictissimi juris applies in determining the effect of a contract of guaranty. When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
2. _____: _____. The liability of a guarantor is not to be enlarged beyond the strict terms of the contract.
3. _____: _____. A contract of guaranty which lists as obligors one party *and* another party covers the joint debts of those two parties, and not the individual debt of either.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for further proceedings.

John F. Kerrigan and David G. Hartmann of Kerrigan, Line & Martin, for appellant.

Thaddeus G. Fenton, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

On November 13, 1985, the Federal Deposit Insurance Corporation (FDIC) filed a petition at law seeking judgment against Willard D. Heyne. The FDIC had previously been appointed as receiver of the Uehling State Bank after the Department of Banking and Finance of the State of Nebraska determined that the bank was insolvent. The petition alleges that "[o]n or about August 20, 1984 Robert E. Johnson borrowed $17,900.00 from Uehling State Bank and that said borrowing was made under terms of a mortgage note . . . ." The petition further alleges that "[o]n or about January 4, 1978 the Defendant Willard Heyne executed a continuing guaranty to the Uehling State Bank unconditionally and continually guarantying the prompt payment to the Uehling State Bank when due of any and all notes at any time made by Robert and MaeNell Johnson . . . ." Copies of the mortgage note and the guaranty were attached as exhibits A and B. Finally, the petition alleges that Robert E. Johnson defaulted on the note and that the FDIC is entitled to judgment thereon against the defendant by reason of the guaranty agreement.

The defendant demurred to the petition on the grounds that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by an order dated February 18, 1986. The defendant elected to stand upon his demurrer, after which a default judgment was entered against him.

The defendant appeals from the judgment, and in his first assignment of error alleges that the petition does not state a cause of action because the written guaranty agreement is limited to the joint debts of two persons and does not cover a note signed by one of them. The guaranty agreement, exhibit B, states in relevant part as follows:

I hereby request Uehling State Bank to give and

> continue to give credit to *Robert & MaeNell Johnson* and in consideration of all and any such credit given, I hereby unconditionally guarantee prompt payment to the Uehling State Bank when due, of any and all notes at any time made by said debtor to said bank and any renewal or renewals thereof, together with any other indebtedness (now existing or hereafter incurred) of said debtor to said bank arising from overdrafts, notes discounted or otherwise.

(Emphasis supplied.) The note which is the subject of the action was signed by Robert E. Johnson only.

The issue here is whether the guaranty agreement covers both the joint and individual debts of Robert and MaeNell Johnson. The FDIC asserts that this is a question of fact, while the appellant asserts that it is a question of law.

Nebraska adheres to the rule of strict construction of guaranty contracts. In *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922), this court said: "The rule of *strictissimi juris* applies in determining the effect of a contract of guaranty. When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms." (Syllabus of the court.) See, also, *Bash v. Bash*, 123 Neb. 865, 244 N.W. 788 (1932) (quoting and approving this language from *Hunter*). We have also held that the liability of a guarantor is not to be enlarged beyond the strict terms of the contract. See *Furst v. Kruger*, 132 Neb. 54, 271 N.W. 156 (1937). With these rules in mind, we hold that the guaranty agreement was clear and unambiguous and required no construction. The agreement guaranteed the debts of Robert *and* MaeNell Johnson, and not Robert *or* MaeNell Johnson. The guaranty does not, therefore, extend to cover the individual debts of Robert Johnson.

Although this precise issue has not been litigated often, several other courts have come to the same conclusion on similar facts. See, *Hamilton Trust Co. v. Shevlin*, 156 A.D. 307, 141 N.Y.S. 232 (1913), *aff'd* 215 N.Y. 735, 109 N.E. 1077 (1915) (court holds that guaranty covering loans to five persons does not cover loans made to four of the five persons, and the

judgment sustaining the demurrer was therefore proper); *O'Grady v. Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978) (guaranty covered only the joint and several debts of the three individuals listed as obligors).

The order of the district court overruling the demurrer was, therefore, improper, and the cause is reversed and remanded for further proceedings not inconsistent with this decision. Given the nature and effect of this holding, it is unnecessary for us to address the appellant's second assignment of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RICHARD T. KINGSLAN, APPELLEE, V. JENSEN TIRE CO. ET AL., APPELLANTS.

417 N.W.2d 164

Filed December 31, 1987. No. 87-022.

1. **Workers' Compensation: Appeal and Error.** A finding with regard to causation of an injury is one for determination by the fact finder; it will not be set aside unless clearly wrong.
2. **Workers' Compensation: Proof.** The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition.
3. _____: _____. In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award.
4. _____: _____. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of the employment.
5. **Workers' Compensation: Appeal and Error.** In reviewing workers' compensation cases the Supreme Court is not free to weigh the facts anew. The Supreme Court's standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
6. _____: _____. An order of the compensation court may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference

that can be drawn therefrom. Such findings on rehearing will not be set aside on appeal unless clearly wrong.

7. _____: _____. Where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact made by the Workers' Compensation Court do not support the award, this court must modify, reverse, or set aside the award.
8. **Workers' Compensation: Proof: Expert Witnesses.** Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony the causal connection between the alleged injury, the employment, and the disability.
9. **Workers' Compensation: Proof.** To sustain an award in a workers' compensation case, it is sufficient to show that an injury, resulting from an accident arising out of and in the course of employment, and preexisting disease or condition combined to produce disability.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions to dismiss.

Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

Jeannine L. Prince and Robert A. Laughlin, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

In this workers' compensation case, defendants appeal from a three-judge panel order, with one judge dissenting, awarding plaintiff $200 per week temporary total disability for 19 2/7 weeks and, thereafter, $200 a week for 22 1/2 weeks for a 10-percent permanent partial disability to the left arm; vocational rehabilitation services; and a $250 attorney fee. Some credits were allowed to defendants.

The accident dislocated plaintiff's shoulder. Prior thereto, he had a history of a recurring dislocating left shoulder that sometimes required medical attention. At other times he was able to reduce the dislocation himself.

The parties agree that a finding with regard to causation of

an injury is one for determination by the fact finder; it will not be set aside unless clearly wrong. *Ceco Corp. v. Crocker*, 216 Neb. 692, 345 N.W.2d 20 (1984).

Defendants assign three errors: (1) the finding that the plaintiff's medical treatment, surgery, and disability are causally related to his accident of July 25, 1984; (2) the finding that a recurrent dislocated shoulder is an objective injury not requiring expert medical testimony; and (3) the finding that the defendants should pay to the plaintiff an attorney fee.

There is no real conflict in the following. Plaintiff, Richard T. Kingslan, age 26 years, was first employed as a mechanic by defendant Jensen Tire Co. (Jensen) in March 1984. On July 25, 1984, while plaintiff was balancing a tire, a part of the balancing assembly loosened, striking plaintiff and forcing plaintiff's left arm to be thrown above his head, dislocating his left shoulder. Three days later, plaintiff consulted his physician, Dr. Daniel Mergens, Omaha, Nebraska, who referred him to Dr. James W. Dinsmore, Omaha, Nebraska, an orthopedic surgeon. Dr. Dinsmore testified that he first examined plaintiff in August of 1984 "because of a recurrent dislocating left shoulder." Dr. Dinsmore made reference to the July 25 dislocation neither in his notes nor in his testimony. Prior to the July 25 incident, plaintiff had suffered two major dislocations of his left shoulder that required emergency medical attention by Dr. Mergens: the first on Christmas Day 1982, while wrestling with a relative, and the second about 1 year later, while he was employed as a mechanic at Huber Chevrolet, Omaha, Nebraska. After the Huber dislocation and prior to July 25, 1984, plaintiff also suffered several other minor dislocations that he reduced himself. Plaintiff explained that after the Huber dislocation, he began experiencing more frequent minor dislocations. When he raised his arm, he would sometimes feel his arm slipping out of joint; usually, when he continued his work, the arm would slip back into the joint. Between July 25 and September 24, 1984, plaintiff suffered four or five other minor left shoulder dislocations that he reduced himself, one of which was reported by telephone to Dr. Dinsmore on September 19. Plaintiff quit work on September 24, 1984. He was discharged by Jensen on December 10, 1984.

Dr. Dinsmore testified by deposition that he first examined plaintiff in August 1984, and thereafter, on September 25, 1984, he performed a Bristow stabilization surgery procedure on plaintiff's left shoulder. One year later, a second surgical operation was performed to remove a screw which had worked loose from the bone. Dr. Dinsmore estimated that the permanent impairment to the shoulder was approximately 10 percent. Dr. Dinsmore released plaintiff to return to work in February 1985. Defendants presented no evidence.

Defendants paid plaintiff the ordered awards up to February 24, 1986, together with $5,574.26 medical and hospital expenses.

From the evidence and the panel's findings, it is established that prior to July 25, 1984, plaintiff had suffered several recurrent dislocations of his left shoulder which were caused by a preexisting condition of his physical body structure and that on July 25, 1984, while plaintiff was employed by defendant Jensen, he was involved in an accident (dislocation of his left shoulder), Neb. Rev. Stat. § 48-151(2) (Cum. Supp. 1986), in the course of that employment, § 48-151(4).

The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. *Narduzzo v. Sunderland Bros.*, 212 Neb. 852, 326 N.W.2d 673 (1982); *Aguallo v. Western Potato, Inc.*, 208 Neb. 66, 302 N.W.2d 41 (1981); *Taylor v. Benton*, 205 Neb. 203, 286 N.W.2d 755 (1980). "In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award." *Masters v. Iowa Beef Processors*, 220 Neb. 835, 838, 374 N.W.2d 21, 23 (1985). "[T]he presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment." *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 584, 400 N.W.2d 244, 248 (1987).

> In reviewing workmen's compensation cases the Supreme Court is not free to weigh the facts anew. The Supreme Court's standard of review accords to the

> findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
>
> An order of the compensation court may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can be drawn therefrom. Such findings on rehearing will not be set aside on appeal unless clearly wrong.

(Syllabi of the court.) *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). However, "where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact made by the Workmen's Compensation Court do not support the award, this court must modify, reverse, or set aside the award." *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 541, 308 N.W.2d 734, 736 (1981).

We first consider defendants' second assigned error, which we conclude to be well taken. It relates to the second sentence of paragraph VIII of the panel's order, "A dislocated shoulder is an objective injury not requiring expert testimony as to causation."

"There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment." § 48-151(2).

> [U]nless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony; and that *where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science.* Such a question must necessarily be determined from testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony the

> causal connection between the alleged injury, the employment, and the disability.

(Emphasis supplied.) *Hamer v. Henry*, 215 Neb. 805, 809, 341 N.W.2d 322, 325 (1983); *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981); *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

Although an isolated incident of a dislocated shoulder might be an objective injury under circumstances where its nature and effect are plainly apparent, it is otherwise under the evidence in this record which shows that plaintiff had an unusual recurrent dislocating left shoulder that sometimes was self-reduced without debilitating effects. Expert scientific and/or medical evidence was required to show the nature and effect of the July 25 dislocation and to show its causal connection, if any, with plaintiff's employment, disability, and claims for medical services.

From a reading of the panel's order it is not clear whether or not the panel applied the rule in *Hamer*; however, defendants' claim does not rise to reversible error, since the evidence considered by the panel does include expert scientific and medical testimony relating to the issue of causation.

We turn to defendants' first assigned error related to causation and, particularly, the panel's reliance on a part of *Tilghman v. Mills*, 169 Neb. 665, 669-70, 100 N.W.2d 739, 743 (1960), which the panel cites: "It is sufficient to show that the injury and preexisting [condition] *combined to produce disability*, and it is not necessary to prove the injury accelerated or aggravated the disease, in order to satisfy the requirement . . . that the disability arose out of the employment." (Emphasis supplied.)

" '[A]rising out of' describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job." *Union Packing Co. v. Klauschie*, 210 Neb. 331, 336, 314 N.W.2d 25, 29 (1982).

The "combined" rule referred to in *Tilghman* has a long history in this jurisdiction. As early as 1922 this court, in

Gilcrest Lumber Co. v. Rengler, 109 Neb. 246, 190 N.W. 578 (1922), considered a case where a piece of lumber struck Rengler's leg, causing a bruise. Rengler also suffered from syphilis, which caused the bruise to become ulcerated. The medical evidence established that the disease aggravated the wound, but without the wound there would have been no ulceration and resulting disability. In its analysis, the court said,

> The crucial question, then, is whether or not there is any causal connection between the trauma and the disability of appellee [Rengler]. If such disability is attributable only to the disease, that is the only proximate cause; if, however, the disability is the result of a combination of trauma and disease, the former is a part of the proximate cause.

Id. at 248, 190 N.W. at 579. The court then held that there was such a combination and that the disability was proximately caused by both his disease and his injury.

In 1944 this court, citing *Gilcrest*, announced this rule in *Yakal v. Henkle & Joyce Hardware Co.*, 145 Neb. 365, 370, 16 N.W.2d 531, 533 (1944): "To sustain an award in a workmen's compensation case, it is sufficient to show that an injury, resulting from an accident arising out of and in the course of the employment, and preexisting disease combined to produce disability." That rule was followed in *Sporcic v. Swift & Co.*, 149 Neb. 246, 30 N.W.2d 891 (1948). Later, in 1960, *Tilghman v. Mills, supra*, was decided, where the plaintiff had a preexisting congenital spondylolisthesis condition. He was injured in an auto accident while being transported to work by his employer; he received burns and recurring pains in his legs and back. There was great conflict in the medical evidence on whether the accident aggravated his preexisting condition, which was not resolved by the court; rather, the court found causation by applying *Yakal* and *Sporcic* and added, "[I]t is not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the disability arose out of the employment." 169 Neb. at 669-70, 100 N.W.2d at 743.

From the analysis in *Gilcrest*, plaintiff had the burden to prove that his disability was caused by more than his preexisting

condition; rather, that the July 25 injury (dislocation) combined with his preexisting condition to cause his claimed disability. This proof required expert medical testimony.

Dr. Dinsmore, the only medical expert presented, related details of the Bristow stabilization procedure, "which is what we do for recurrent dislocating shoulders." The Bristow procedure involves cutting off the tip of a bone called the coracoid process. This bone piece, and the muscle attached, is then attached by a screw to another bone approximately 3 centimeters below its original location. As a result, the muscle comes across the head of the humerus to keep the humerus from sliding out of its socket, thereby preventing further dislocations. Neither attorney asked, and Dr. Dinsmore did not opine, whether Kingslan's need for surgery was caused by the injury he sustained at Jensen.

Kingslan introduced into evidence a set of interrogatories he had answered at defendants' request. Included is a letter from Dr. Dinsmore to Kathleen Berg, a representative of Jensen's insurance company. In this letter, dated December 17, 1985, Dr. Dinsmore states, "Mr. Kingslan's problems started when he first dislocated his shoulder. He then developed a recurrent dislocating shoulder. It was following these recurrent episodes which precipitated the necessity for shoulder surgery." This is the only statement by the doctor which indicates his opinion as to the cause of Kingslan's need for the Bristow stabilization procedure.

Dr. Julian Baumel, an anatomy professor at Creighton University Medical School, also testified. He used colored slides and a skeleton to relate exactly how the Bristow stabilization procedure is performed.

Kingslan testified that his ability to work was not hindered until after the accident at Jensen. Kingslan stated that after the surgery he was shifted from his position as a mechanic to one as a salesman due to his slow work ability. Kingslan also offered exhibit 4, which shows his demotion at Jensen on August 20, 1984, but there is no indication that this demotion was due to inability to perform as a mechanic.

After considering all of the evidence, resolving controverted facts in favor of plaintiff together with inferences, we conclude

that plaintiff's evidence in support of causation was less than definite and certain and that he failed to sustain his burden to prove that the July 25 dislocation was more than a normal recurrence of a preexisting dislocating shoulder condition and to prove that his preexisting condition did combine with the July 25 dislocation to establish a causal connection with his employment, disability, and claims for medical and hospital expenses. The panel's award was clearly contrary to the evidence; it should be set aside and plaintiff's petition dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. JOHN P. CRONIN, APPELLANT.

417 N.W.2d 169

Filed December 31, 1987. Nos. 87-221, 87-222.

1. **Criminal Law: Proof.** The burden is on the State to prove all of the essential elements of the crime charged.
2. **Criminal Law: Motions to Suppress.** An objection to the voluntariness of a statement in a criminal case must be made by a pretrial motion to suppress as provided in Neb. Rev. Stat. § 29-115 (Reissue 1985).

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Judgment in No. 87-221 affirmed. Judgment in No. 87-222 affirmed in part, and in part reversed and remanded with directions to dismiss.

James E. Schaefer of Gallup & Schaefer, for appellant.

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

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and ROWLANDS, D.J., and COLWELL, D.J., Retired.

BOSLAUGH, J.

In case No. 87-221 the defendant was charged with operating a motor vehicle while his operating privileges had been revoked.

In the county court he was found guilty and sentenced to the corrections center for 30 days, and his operator's license was suspended for 1 year.

In case No. 87-222 the defendant was charged with leaving the scene of a property damage accident and operating a motor vehicle with expired registration. He was found guilty in the county court of both charges and fined $100 on the first charge and fined $165 and costs on the second charge.

Upon appeal to the district court the judgments in both cases were affirmed. Upon the motion of the defendant the cases were consolidated for briefing and argument in this court.

The defendant's assignments of error are that the evidence was insufficient to sustain the convictions and that the trial court erred in receiving the defendant's confession over objection.

The record shows that at about 12:30 a.m. on July 16, 1986, Jeff Carlson was proceeding east in the center lane of Harney Street in Omaha, Nebraska. At about 26th and Harney Streets, Carlson noticed a pale green Buick Electra automobile, also moving east in the lefthand curb lane of Harney Street. Carlson testified that he saw the Buick suddenly swerve to the left and strike a car parked on the curb. Carlson further testified that there was no road construction in the lane in front of the Buick when it collided with the parked car. Upon impact, the parked car was "shoved forward and up onto the curb, struck in the rear end," the "trunk lid popped open and the rear end pushed in." Carlson had not seen the parked car before the collision and did not know whether the parked car had been damaged before the accident. Carlson proceeded to drive for two blocks and then pulled to the side of the road and watched the accident scene through his rearview mirror. Carlson did not see the defendant exit his car following the accident, but did see him back up "slightly and then stopping and kind of shaking or shuddering. Just a brief shudder." Additionally, Carlson testified that after the impact, somebody had come out from the building right in front of the car, approached the Buick Electra within about 10 feet, and began "yelling at the driver," but the driver did not exit his vehicle at any point. The witness stated that he was unable to see whether the defendant

displayed his driver's license and registration to anyone. The defendant remained at the scene for about 1 minute and then proceeded "up the block" to a stoplight near Carlson's car. Carlson noted the license number of the defendant's car and saw that the driver was a white male. Carlson subsequently provided this information to the police.

Omaha Police Officer James Haiar conducted a followup investigation of the accident on the following day. Haiar traced ownership of the Buick Electra to the defendant and Sue Cronin. At about 9 a.m. on July 17, Officer Haiar spoke with the defendant at his residence. Officer Haiar testified, "I asked him if he knew anything about the accident." The defendant said that "he was involved, that he blacked out and left the scene because he was scared." The officer did not ask the defendant whether he had provided his driver's license and registration to the owner of the struck vehicle, and the defendant made no statements relating to that matter.

Haiar found that the defendant's license plates were not current and that the defendant's driver's license had been suspended at the time of the accident. Upon examination of the defendant's automobile, Officer Haiar found evidence of fresh damage.

The evidence was clearly sufficient to establish that the defendant was operating a motor vehicle while his operating privileges had been suspended and the registration had expired.

With respect to the charge of leaving the scene of a property damage accident, Neb. Rev. Stat. § 39-6,104.02 (Reissue 1984) provides in part:

> The driver of any vehicle involved in an accident either upon a public highway, private road, or private drive, resulting in damage to property, shall (1) immediately stop such vehicle at the scene of such accident, and (2) give his name, address, and the registration number of his vehicle and exhibit his operator's or chauffeur's license to the owner of the property struck or the driver or occupants of any other vehicle involved in the collision.

Although there is evidence that there was property damage to the automobile that the defendant collided with, there is no evidence that the defendant failed to comply with requirement

(2) set out in the statute. Although there is no evidence that the defendant did comply with the statute, the burden was upon the State to prove affirmatively that the defendant did not comply with requirement (2). The burden is on the State to prove all of the essential elements of the crime charged. *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951). Since there was a failure of proof as to a material element of the offense, the judgment on the first charge in case No. 87-222 must be reversed and remanded with directions to dismiss.

The defendant's second assignment of error relates to the testimony of Officer Haiar as to the statements made to him by the defendant on July 17, 1986. The defendant had objected to this testimony on the ground that there had been no "affirmative showing that the defendant was read his rights at the time."

The evidence shows that the officer was conducting an investigation of an accident, the defendant was not in custody, and a pretrial motion to suppress as required by Neb. Rev. Stat. § 29-115 (Reissue 1985) had not been made.

In *State v. Warren, ante* p. 160, 416 N.W.2d 249 (1987), we held that § 29-115 requires that, except in certain circumstances, a motion to suppress must be filed before trial if a statement of the defendant is to be objected to as having been obtained in violation of the fifth or sixth amendments to the Constitution of the United States. A failure to file a motion to suppress waives any objection to the statement. None of the exceptions stated in the statute are applicable here.

The objection was properly overruled, and the assignment of error is without merit.

The judgment in case No. 87-221 is affirmed. The judgment in case No. 87-222 on the charge of operating a motor vehicle with expired registration is affirmed. The judgment on the charge of leaving the scene of a property damage accident is reversed and the cause remanded with directions to dismiss.

All costs are taxed to the defendant.

JUDGMENT IN NO. 87-221 AFFIRMED. JUDGMENT IN NO. 87-222 AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

DONALD R. WARD, APPELLANT, V. CITY OF ALLIANCE, NEBRASKA, APPELLEE.

417 N.W.2d 327

Filed January 8, 1988. No. 85-906.

1. **Limitations of Actions: Time: Words and Phrases.** For the purposes of statutes of limitations, a claim "accrues" at the time of the plaintiff's injury, although this rule has been modified in many jurisdictions to provide that such accrual does not occur until the injury manifests itself, i.e., when the plaintiff learns, or in the exercise of reasonable diligence should have learned, of the injury and the actions that caused it.
2. _____: _____: _____. By applying a "discovery" rule, this does not mean that the statute of limitations does not begin to run until someone either advises an individual that the injury or damage which one already knows one has sustained is actionable or advises such individual who it is that should be sued. Discovery, as applied to such statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in the court.
3. **Limitations of Actions: Time.** A cause of action accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action.
4. **Malpractice: Limitations of Actions: Time.** A plaintiff may be advised or may be wrongfully advised by both the medical and legal fields, but the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make. The running of the statute is not tolled until the plaintiff is led to suspect negligence.
5. **Limitations of Actions: Time.** The statute of limitations runs when plaintiff (1) knows or should have known of both the injury and the cause of harm or (2) has some awareness or imputed awareness that his or her injuries were the result of some wrongdoing on the part of the defendant. This does not mean that plaintiff has to (1) be aware of all the elements of a legal cause of action, (2) be aware of the probability of success in such a lawsuit, or (3) have his or her knowledge of wrongdoing rise to the level of certainty.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

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

Francis L. Winner of Winner, Nichols, Douglas, Kelly and Arfmann, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

The plaintiff has appealed from a judgment in favor of the City of Alliance in his action under the Political Subdivisions Tort Claims Act. That judgment was based on the running of the statute of limitations.

In July of 1981, the plaintiff was an employee of the city of Mitchell. It had purchased part of an electrical substation, including a transformer, from the City of Alliance. As part of his duties for the city of Mitchell, the plaintiff dismantled this equipment in preparation for its move to Mitchell and in September began assisting in reconstructing this same equipment after it arrived in Mitchell. As a part of this operation, it was necessary for the plaintiff to have his arms in oil, contained in the transformer, for extended periods of time.

This oil was later found to contain PCB (polychlorinated biphenyl), a toxic substance. Plaintiff was hospitalized several times after that for excessive fatigue, weakness, and numerous physical complaints. As a proximate result of such exposure, plaintiff alleged in his pleadings, he suffered severe illnesses, including liver damage, multiple physical illnesses, pain, and total permanent disability.

According to the record, the city of Mitchell had filed a workers' compensation report of injury in which it alleged illness on the part of the plaintiff, resulting from exposure to transformer oil while doing maintenance on a transformer. This report was dated January 27, 1982, and alleged that plaintiff had been feeling ill for about 6 weeks as of December 16, 1981, and was hospitalized for tests on January 11, 1982.

On March 8, 1982, a trade magazine, Public Power Weekly, published an article, entitled "Neb. utility superintendent is ill from exposure to PCBs," disclosing results of an interview with plaintiff a week earlier. The article, in relevant part, provides:

> "I remembered I'd been working on a transformer shortly before Thanksgiving and it occurred to me the oil could have contained PCBs" Ward said last week.
>
> "Doctors asked me if I'd been around any toxic

> chemicals and I said no. Then I remembered I'd spent two days with my arms immersed to my elbows in transformer oil repairing an old transformer which we bought used from another municipality," he said.
>
> A test on a sample of the transformer oil shows it contained 229 parts per million of PCBs. . . .
>
> . . . .
>
> . . . He [Ward] said he experiences severe headaches, terrible weakness, abnormal appetite, itching on his arms and aching in his shoulder, knee, and arm joints. His vision sometimes seems impaired too, he said.
>
> . . . .
>
> Doctors plan to do further tests on his liver. He is being treated by his local family physician and expects to see a specialist in Chicago, Dr. Daniel Hryhorczuk, who has done research on the effects of PCBs.

The plaintiff testified by deposition that in January of 1982 he suspected PCB contamination and directed three of his employees to have tests run on their blood.

Plaintiff argues in his brief that among the various medical personnel there was an inability to develop and stick with a definitive diagnosis throughout the period from July 1981 through 1985. He continues by pointing out that in late 1983, the treating physician could not give a definite opinion of causation. However, in a letter dated October 11, 1983, that same physician wrote: "The possibility of PCB poisoning came to our attention in November of 1981 in regard to Mr. Ward . . . ."

On April 6, 1985, the plaintiff reported to his attending physician with a suspicious lesion on the right side of his nose, which was excised and submitted for laboratory analysis which disclosed it to be a basal cell carcinoma.

The claim in this case was filed against the City of Alliance on November 11, 1983, and the petition was filed in the district court on April 19, 1985.

Dr. Janette D. Sherman, a toxicologist, testified that she reviewed the plaintiff's records and examined him on August 20, 1985, and, as a part of that examination, she reviewed certain of plaintiff's medical records. She gave as her opinion that the cause of the basal cell carcinoma was plaintiff's

exposure to PCB. Additionally, although the testimony is a trifle vague, Dr. Sherman suggested that if she had been given the history and laboratory reports which were available in 1981, she could have made the diagnosis of exposure to PCB at that time. Dr. Sherman also commented that Dr. Lowell A. Stratton, plaintiff's local physician, did an outstanding job of diagnosing possible PCB involvement as early as June of 1982.

The trial in this case was bifurcated and, at the outset, concerned only the issue of the statute of limitations. At the close of all of the evidence the district court concluded that attaching a discovery exception to Neb. Rev. Stat. § 23-2416 (Cum. Supp. 1984), as was mandated by this court in *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), with respect to Neb. Rev. Stat. § 25-208 (Reissue 1964), would result in a bar to the present action.

Section 23-2416 requires that every claim against a political subdivision shall be forever barred unless a claim in writing is made within 1 year after such claim accrued. Additionally, all lawsuits permitted by that section must be brought within 2 years after such claim accrued, with certain exceptions which we need not discuss here.

Specifically, the trial court found that the evidence established that by March 9, 1982, if not earlier, the plaintiff had sufficient information to trigger the running of the time requirements and that he failed to file a notice of his claim or commence suit within the time stated in the statute. Because plaintiff's claim was not filed with the City of Alliance until November 11, 1983, which we find is well beyond the requirements of § 23-2416, we need not discuss the matter of the filing of the petition.

As previously stated, every claim against a political subdivision shall be forever barred unless a claim in writing is made within 1 year after such claim accrued. The critical question then becomes, When did the claim accrue?

The general rule in tort law is that a claim "accrues" at the time of the plaintiff's injury, but this rule has been modified in many jurisdictions to provide that such accrual does not occur until the injury has manifested itself. *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979). *Kubrick* is

cited for the proposition that an action accrues when a plaintiff learns, or in the exercise of reasonable diligence should have learned, of the injury and the actions that caused it.

This court, as early as *Spath v. Morrow, supra*, applied a discovery rule to avoid the harshness of a strict statute of limitations application in a medical malpractice case under then-existing § 25-208. A judicial exception to § 23-2416 should be wholly consistent with the discovery exception to § 25-208 carved out by *Spath*.

The case of *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984), involved a personal injury upon use of a defective product. A discovery rule was applied, with the statute of limitations beginning to run "on the date on which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage." *Id.* at 68, 349 N.W.2d at 627. The court went on to clarify:

> By applying a discovery rule to § 25-224(1), we are not providing that the statute of limitations does not begin to run until someone advises an individual either that the injury or damage which they already know they have sustained is actionable or advises them who it is that should be sued. Discovery, as we apply it to § 25-224(1), refers to the fact that one knows of the existence of an injury or damage and not that one knows he or she has a legal right to seek redress in the court.

Id.

A cause of action accrues, then, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action. *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985). See *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). Also, 54 C.J.S. *Limitations of Actions* § 205 at 216 (1948) provides: "In the absence of a statute providing otherwise, ignorance of the existence of a cause of action ordinarily does not toll the statute of limitations, particularly where the facts may be ascertained by inquiry or diligence."

Condon cited the federal case of *Davis v. United States*, 642

F.2d 328 (9th Cir. 1981), *cert. denied* 455 U.S. 919, 102 S. Ct. 1273, 71 L. Ed. 2d 459 (1982), which presents an analogous situation under the Federal Tort Claims Act. The plaintiff in *Davis* was the recipient of an oral polio vaccine who suffered paralysis as a result. The court held that the 2-year limitations period began to run when the plaintiff knew that the vaccine was the likely cause of injury. The court placed the burden on the "plaintiff to ascertain the existence *and source* of fault within the statutory period." (Emphasis supplied.) 642 F.2d at 331.

The court in *Davis* drew heavily upon the *Kubrick, supra*, opinion. *Kubrick* involved an action under the Federal Tort Claims Act wherein a patient was treated with an antibiotic at a Veterans' Administration hospital. The petitioner had argued that the negligence question was technically complex, but, as with this malpractice case, the Court noted that in most negligence cases "determining negligence or not is often complicated and hotly disputed." 444 U.S. at 124. The Court refused to hold that " 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted." 444 U.S. at 123.

A plaintiff may be advised or may be wrongfully advised by both the medical and legal fields, but "the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make." 444 U.S. at 124. Again, the Court would not hold that "the statute is not to run until the plaintiff is led to suspect negligence . . . ." *Id.* Ward claims that he did not know the cause of his injury, but because causation is an element of negligence, the *Kubrick* holding should be dispositive of Ward's claim.

On policy grounds, the *Kubrick* Court noted the statute of limitations' obvious purpose—to encourage prompt presentation of claims. It referred to the plea of limitations as a " 'meritorious defense, in itself serving a public interest.' *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938)." *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

In the present case, plaintiff was aware in January 1982 that

he had been injured and that PCB toxins in the transformer oil were the likely cause of his injury. These facts were so stated in an accident report filed for workers' compensation purposes at that time. At the very latest, in March 1982, plaintiff was certainly aware that PCB was the cause, when he disclosed the details of his illness and claim to a public magazine. In the magazine interview plaintiff remembered having spent 2 days shortly before Thanksgiving with his arms immersed to his elbows in transformer oil while at work. Plaintiff listed his injuries in detail. The interview continued that one day between January and March of 1982, while plaintiff was home resting, he recalled having it occur to him that the oil could have contained PCBs. The results of this interview, coupled with the fact that plaintiff had gathered enough information to claim workers' compensation benefits, charge plaintiff with the ability to have filed a notice of claim and suit against defendant at that time. Plaintiff knew the cause. Plaintiff knew PCB was the culprit.

If anything, medical advice incited plaintiff's suspicions regarding PCB in the oil. It is true, however, that there are always numerous possible causes when it comes to medical problems and that plaintiff received some mixed signals, e.g., "undiagnosed disease," "poisoning unlikely," no answer as to illness, and normal medical profiles on other coworkers. Plaintiff still cannot possibly claim that he did not know about his case until November 11, 1982, which is the latest discovery date for plaintiff's filing and suit to be timely. The workers' compensation claim and the magazine interview are proof enough for this court to effectuate the rationale behind the limitations rule—prompt presentation of claims.

Although not cited in either brief, the applicable law on discovery is perhaps best summarized in *Dawson v. Eli Lilly and Co.*, 543 F. Supp. 1330 (D.D.C. 1982), a case involving diethylstilbestrol (DES) and its effects on daughters of women who took the drug during pregnancy. The statute of limitations runs when plaintiff (1) knows or should have known of both the injury and the cause of harm or (2) has some awareness or imputed awareness that his injuries were the result of some wrongdoing on the part of the defendant. This does not mean

that plaintiff has to (1) be aware of all the elements of a legal cause of action, (2) be aware of the probability of success in such a lawsuit, or (3) have his knowledge of wrongdoing rise to the level of certainty.

Without deciding whether the "discovery" rule in fact applies to § 23-2416, there is ample evidence in the record to suggest that plaintiff knew or should have known on or before March 9, 1982, that PCB in the oil was the cause of his injuries. Because it cannot be said that the district court was clearly wrong in its factual finding that the defendant met its affirmative defense of the statute of limitations, the judgment of the district court should be affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

This court's majority has concluded that Ward "knew or should have known that PCB in the oil was the cause of his injuries on or before March 9, 1982," and, therefore, the statute of limitations began to run from that time and eventually barred Ward's claim filed against the City of Alliance on November 11, 1983. However, a careful analysis of the facts, especially information available to Ward concerning the cause-and-effect relationship between PCB and his injuries, compels a contrary conclusion. Ward's complete medical history, disregarded by the majority, and the status of medical knowledge about PCB are important factors in determining whether Ward knew, or should have known, about the cause of his injury, and are crucial components in the accrual of Ward's cause of action. A principle or rule of law has vitality and validity of application only when placed in the proper perspective of a particular factual context. Therefore, facts in addition to those recounted by the majority are necessary to demonstrate the majority's erroneous conclusion resulting from an incorrect application of law.

Since the early 1970s, Ward has suffered from hypertension and chronic hepatitis. One suffering from hepatitis will frequently display "classic" symptoms such as vomiting, fatigue, or feeling "wiped out." Sometime in July 1981, Ward began his encounters with a transformer later discovered to contain PCB. Early in August 1981, Ward contacted his family

physicians, general medical practitioners who comprised the Mitchell Medical Center in Mitchell, Nebraska. Ward complained of his fatigue and a cold sweat with slight nausea. One of Ward's attending physicians expressed "[f]ear that PT [Ward] may have deep vein thrombophlebitis and/or a collagen disease of unknown cause." A venogram, performed on August 5, was negative. However, Ward manifested swelling, pain, and erythema in his left leg. Erythema is abnormal redness or inflammation of the skin. On August 13, Ward's physician noted: "Inflammatory disease of unknown origin." Medications prescribed for Ward included prednisone, which is an anti-inflammatory steroid more potent than cortisone, and Catapres, a drug which lowers blood pressure but produces the side effect of fatigue. For the balance of 1981, Ward was tested for hypertension and his persistent swelling. On December 31, Ward's attending physician included among his professional impressions: "Illness of undetermined origin."

At the date of January 4, 1982, the attending physician's impression was still "[d]isease of unknown cause." After extensive testing regarding Ward's liver and gall bladder and his physician's consultation with an internist, Ward was admitted to a local hospital. On discharge from the hospital, according to Ward's attending physician: "[W]e didn't have a diagnosis." Later, on January 16, one of Ward's physicians, Dr. Lowell A. Stratton, asked Ward whether he had ever been around any toxic chemicals. Prompted by the physician's inquiry, Ward then recalled that in November 1981, he had immersed his arm in a transformer's transmission oil, and later informed his physician, on January 23, that a very recently received report, requested by Ward, reflected the presence of PCB in the analyzed transmission oil. At this chronological point, without any basis in the form of a physician's diagnosis, Ward gave an interview published on March 8 in the Public Power Weekly. On March 11, according to Dr. Stratton, Ward exhibited "[m]ultiple physical complaints, etiology unknown" and had a history of "exposure to toxic materials, etiology unknown at this time." On March 27 Ward's physicians noted: "We still cannot really definitively make the dx [diagnosis] . . . ." The Armed Forces Institute of Pathology rendered a report on

April 7, 1982, concerning a biopsy of Ward's liver, and stated:

> Chronic liver disease, type undetermined (?chronic active hepatitis) . . . .
>
> . . . .
>
> . . . PCB, to which the patient may have been exposed, can cause hepatic dysfunction during acute toxicity, can accumulate in the liver, and has been shown to cause chronic toxicity in animals. . . .
>
> Some additional history might be helpful in providing better clinical-pathologic correlation. . . . Thank you for sharing this interesting case with us.

When Ward continued to experience fatigue and muscle aches, his physicians, on April 13, had the further impression: "Appears to be a chronic active hepatitis according to the [Armed Forces] Institute of Pathology tho cannot r/o the toxic exposure . . . . If it is chronic active disease, the Prednisone should give him good results." When Ward was hospitalized in June, the admitting physician, Dr. Stratton of the Mitchell Medical Center, felt there was a "possibility of multiple causes for [Ward's] hospitalization and symptoms . . . ." Later in 1982, Dr. Stratton suggested that Ward seek sources of additional information about the "toxicology problem," because, "Possibly there is a different disease coming on than the toxicology." As the result of another biopsy of Ward's liver, a local pathologist rendered the diagnosis that Ward's condition was "chronic active hepatitis." During Ward's hospitalization in September 1982, an examining physician's "assessment" of Ward's condition recited: "Consider exacerbation of chronic active hepatitis . . . . Unlikely PCV [sic] poisoning . . . . Hepatitis, etiology unknown, past history of." On October 18, Dr. Stratton told Ward that his diagnosis was "chronic active hepatitis, probably triggered by his previous hepatitis and probably not made any better by his exposures to, at least historically, toxic materials . . . ." Ward's fever, aching, severe fatigue, and nausea continued.

From clinical "evidence" or Ward's manifestations in February 1983, Dr. Stratton felt that there was a "direct toxic effect from chemicals that [Ward] got involved with in regard to the transformers," but in August 1983, Dr. Stratton still "was

not sure that the PCB was the cause and effect of [Ward's] disease. He had been exposed to PCB but [I] was not sure that — at that point it was causing his illness." Dr. Stratton decided, on September 12, that he should make a "[r]echeck of chronic disease felt to be toxic exposure to transmission oil." The majority places some emphasis on Dr. Stratton's letter of October 11 to a workers' compensation insurance adjuster, namely, the doctor's comment about a "possibility of PCB poisoning" in 1981. However, the majority has apparently overlooked the balance of that October 11 letter in which Dr. Stratton stated that he had written for medical literature on PCB relative to Ward's illness, expected to receive those publications within 2 weeks, and hoped the requested material "will help . . . make a . . . concise diagnosis." Dr. Stratton acknowledged that on December 13, 1983, he was "still searching for causation of Mr. Ward's problems."

In February 1984, Dr. Stratton stated that his "diagnosis is still at large" concerning Ward. Dr. Stratton later consulted with a toxicologist in Denver, Colorado, who examined Ward in March 1985, a specialist who felt that Ward had experienced an exposure to PCB. As far as the record reflects, medical expertise regarding PCB was unavailable in Mitchell, Nebraska, and was unavailable in the State of Nebraska itself.

Concerning PCB as a carcinogen, Ward offered the testimony of Dr. Janette D. Sherman, a Michigan internist with a subspecialty in toxicology, who worked with occupational environmental questions. Regarding general medical knowledge about PCB as a carcinogen, according to Dr. Sherman, "Not many physicians are cognizant . . . are not well read in the field of toxicology" and the number of physicians who would have been familiar with PCB poisoning was "very few," especially in 1982. In view of the previous diagnosis of hepatitis in Ward, Dr. Sherman distinguished the types of hepatitis and then described the symptoms of PCB poisoning: muscular pain, weakness, profound fatigue, vomiting, headache, and fever—the same clinical evidence or symptoms used for the hepatitis diagnosis of Ward. To diagnose PCB poisoning, an internist-toxicologist utilizes a patient's history, toxicological samples, and medical studies, but, as noted by Dr.

Sherman, test studies of PCB related only to laboratory animals "because it's unethical to experiment on human beings . . . ." Based on such medical data, a specialist can then extrapolate backward to arrive at a diagnosis of PCB poisoning.

In response to the question whether a diagnosis of Ward's PCB poisoning was possible in 1981, Dr. Sherman expressed her view that if she, an internist-toxicologist, would have had all the data concerning the occurrences in Ward's situation, including medical events before and after 1981, such a diagnosis would have been possible, but as Dr. Sherman expressed about a 1981 diagnosis:

> Well, if all the data had been available to me, if the assay of the transformer and the capicitor [sic] had been available to me, if the assay of the tissue had been available and the glove, and if the biopsy report had been available to me, and the course of his clinical history had been available to me I could have. But, unfortunately, it took a long time to put it all together.

Therefore, the hypothetical 1981 diagnosis, as pointed out by Dr. Sherman, was dependent on much information which was nonexistent in 1981 or which became available much later in Ward's treatment; for example, the analytical determination in 1982 that transformer oils contained PCB, the various 1982 reports by pathologists, a well-established medical history for Ward, and corroborative clinical manifestation of Ward's condition, which, in 1981, was incipient and medically undefined. Much of that dearth of diagnostic data existed when Ward gave his interview to the Public Power Weekly. While the majority describes Dr. Sherman's testimony as "a trifle vague" regarding a possible diagnosis of Ward's condition in 1981, a more fair characterization of Dr. Sherman's testimony is astonishment, even disbelief, that a physician would be asked and, moreover, could be reasonably expected to render a sensible and medically acceptable diagnosis in the absence of information necessary to determine the cause of a patient's condition.

The majority believes Ward's interview, appearing in the March 8, 1982, issue of Public Power Weekly, is evidence that

Ward knew that PCB was the cause of his condition. In the correct chronological and medical sequence, Ward's statements are mere suspicion without reference to a medically acceptable cause-and-effect relationship between PCB and his illness. Although stated as a principle applicable in a workers' compensation case, a fundamental principle regarding a claim for bodily injury has been previously announced by this court, but is now overlooked:

> " 'Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries.' The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability." [Citing and quoting from *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981).]
>
> An award of compensation may not be based on possibilities or speculative evidence. [Citation omitted.] Thus, the mere possibility that a disability arose out of and in the course of employment does not satisfy the claimant's burden of proof.
>
> The claimant, Caradori, having only proved that the disability could have been caused by an accident arising out of and in the course of employment has not sustained her burden of proof.

Caradori v. Frontier Airlines, 213 Neb. 513, 516-17, 329 N.W.2d 865, 867 (1983). Disregarding the basic tenet of *Caradori*, the majority has now elevated a layman's imagination without proof to the dignity of an expert witness' opinion which would otherwise be acceptable only with an adequate basis of scientific information or specialized knowledge.

In *Vispisiano v. Ashland Chemical Co.*, 107 N.J. 416, 527 A.2d 66 (1987), the New Jersey Supreme Court considered the discovery rule relative to a tort claim for bodily injury caused

by toxic chemicals. Vispisiano was exposed to the toxic chemicals in 1977 and was treated in 1978 for exposure to those chemicals. Vispisiano filed a suit in 1982 for personal injuries resulting from exposure to the toxic chemicals, some 2 years after expiration of the 2-year statute of limitations on negligence claims under New Jersey law. Evidence disclosed that approximately 2 years before he filed his suit, Vispisiano had visited with a coemployee who was experiencing a similar condition which may have been attributable to the same toxic chemicals to which Vispisiano had been exposed. Vispisiano informed his attending physician about such suspected causation in view of the coemployee's similar condition and symptoms. After a series of medical examinations were initiated in 1978, but failed to produce an etiology for Vispisiano's illness, in 1982 a physician diagnosed exposure to toxic chemicals as the cause of Vispisiano's condition. The New Jersey Supreme Court acknowledged that Vispisiano " 'expressed his suspicions that his own symptoms were caused by chemical contamination in his system' " and concluded that, more than 2 years before filing his suit, Vispisiano clearly knew that exposure to chemicals might have caused his injuries. 107 N.J. at 424-25, 527 A.2d at 70. In reversing a summary judgment granted to the defendants on the basis of the statute of limitations, the New Jersey court observed and held:

> [T]he critical question in this case is when Vispisiano discovered or should have discovered, by exercise of reasonable diligence and intelligence, that the physical condition of which he complains was causally related to his exposure to chemicals at Chemical Control. . . .
>
> Among the factors to which courts look in deciding whether a plaintiff is equitably entitled to the benefit of the "discovery rule" are the nature of the injury and the difficulty inherent in discovering certain types of injuries. [Citations omitted.] In the typical toxic tort situation those obviously interrelated factors may radically alter the balance of interests.

107 N.J. at 427-28, 527 A.2d at 72.

> "[M]any diseases which are induced by or aggravated by exposure to toxic substances are similar to diseases which

> are not related to that particular toxic exposure." *Id.*, § 4.01 at 105. "These diseases tend to express themselves in the same manner regardless of the precipitating agent, and it is rare that diagnosis of the disease in a particular individual will unequivocally indicate either the causative agent or the source of that agent.
>
> . . . .
>
> In a standard accident tort action, the injury, its cause, and its origin are easy to identify. In the toxic tort arena, the medically diagnosed injury is the first in a series of difficult facts to discover and allege. The latency period associated with many toxic substance diseases is a major hurdle in the causation chain." [Citing and quoting from G. Nothstein, Toxic Torts: Litigation of Hazardous Substance Cases §§ 4.01 and 13.04 (1984).]

107 N.J. at 429, 527 A.2d at 73.

> The obvious argument is that when the proofs demonstrate an "arousal" of a plaintiff's "suspicion"—here, that Vispisiano's symptoms were caused by chemical exposure—the cause of action accrues and the statute of limitations begins to run.
>
> . . . .
>
> . . . "[S]uspicion" should not be taken as the touchstone for determining whether a plaintiff's cause of action accrues.
>
> . . . We are unwilling to [formulate a proposition] that "suspicion"—in the sense of an uninformed guess or of speculation without some reasonable medical support—of a causal connection between a physical condition and chemical exposure starts the running of the statute of limitations in a toxic tort case.

107 N.J. at 433-34, 527 A.2d at 75.

> If, as we have concluded, the appropriate time for accrual of a cause of action for "discovery rule" purposes is when "the injured party discovers, or by the exercise of reasonable diligence and intelligence should have discovered[,] that he may have a basis for an actionable claim," [citation omitted] then the nature of the information necessary and the quality of the requisite

> state of mind will of course vary from case to case, and more than that, from type of case to type of case.

107 N.J. at 434, 527 A.2d at 75-76.

The New Jersey Supreme Court in *Vispisiano v. Ashland Chemical Co.*, 107 N.J. 416, 527 A.2d 66 (1987), concluded that a claimant's specialized knowledge, to trigger the statute of limitations as a bar to an action for personal injury without perceptible trauma, requires "medical information before a plaintiff may be deemed to have the requisite knowledge for accrual of a toxic tort cause of action." 107 N.J. at 435, 527 A.2d at 76.

In a similar manner, the court in *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026 (5th Cir. 1984), recognized that the discovery doctrine applied to a plaintiff's negligence claim against the defendant railroad for exposure to noxious material. In *Dubose*, the court stated:

> [T]he discovery rule [is] to be applied in differing fact situations to effectuate the rationale behind the rule. In most cases a plaintiff will have actual knowledge of his injury no later than the time when he should have known he was injured. The discrepancy may be greater, however, between actual knowledge and constructive knowledge of the fact of causation. When a plaintiff may be charged with awareness that his injury is connected to some cause should depend on factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury.

729 F.2d at 1031.

Without a physician's diagnosis predicated on diagnostic data, Ward did not know that PCB was the cause of his injury and condition. Ward's self-diagnosis is quintessential conjecture and speculation by one without any medical training. To say Ward should have known that PCB was the cause of his condition charges Ward with a degree of scientific information and specialized knowledge absent throughout the general medical community, that is, esoteric understanding possessed by a relatively few internists with a subspecialty in toxicology.

The district court's judgment was clearly incorrect and should have been reversed with remand to the district court for a trial on the merits.

WHITE, J., joins in this dissent.

JOSEPH A. HOUSKA, ALSO KNOWN AS JOE HOUSKA, JR., AND BERNICE C. HOUSKA, HUSBAND AND WIFE, APPELLANTS, V. CITY OF WAHOO, A MUNICIPAL CORPORATION, APPELLEE.

417 N.W.2d 337

Filed January 8, 1988. No. 85-958.

1. **Pleadings: Demurrer.** The merits of a general demurrer to a petition must be determined from the allegations of the petition alone.
2. _____: _____. A demurrer admits the truth of all facts well pleaded, but not conclusions of law drawn therefrom by the pleader.
3. **Pleadings.** Where the alleged defect does not appear on the face of the petition, it becomes an affirmative matter which must be raised by the party seeking the benefit of the defect.
4. **Eminent Domain: Jurisdiction: Time: Appeal and Error.** The filing of a notice of appeal from an appraisers' award in condemnation proceedings within the timeframe provided by statute is mandatory and therefore jurisdictional.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Reversed and remanded for further proceedings.

James M. Egr of Egr and Birkel, for appellants.

Loren L. Lindahl of Edstrom, Bromm, Lindahl & Wagner, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

Plaintiffs have appealed the order of the district court which dismissed their petition in condemnation. The court had earlier sustained defendant's demurrer, and the plaintiffs elected to stand on their petition. Although four errors are alleged, plaintiffs simply state that the court was wrong in failing to

recognize that it had subject matter jurisdiction because the failure of the plaintiffs to receive notice of the report of appraisers extended the time within which they had to perfect their appeal.

The defendant, City of Wahoo, filed a petition in county court to condemn certain of plaintiffs' property located in and upon Section 26 in Saunders County. Appraisers were appointed, and, following a hearing, they filed a return on August 16, 1985, awarding certain damages to plaintiffs.

The transcript discloses that on October 9, 1985, plaintiffs filed a notice of appeal and bond in the county court. On October 15, 1985, plaintiffs filed a petition in the district court alleging the taking, and praying for damages in a specific amount. In that petition the plaintiffs alleged the amount of the award by the appraisers; the filing of the report of appraisers on August 16, 1985; the fact that the plaintiffs did not receive a copy of the report of appraisers until September 19, 1985; and, because of the failure of the plaintiffs to receive a copy of the award, they were denied the right to appeal within the statutory time limits provided for in Neb. Rev. Stat. § 76-715 (Reissue 1986). The petition itself disclosed a filing stamp by the clerk of the district court dated October 15, 1985.

The defendant filed a demurrer

> for the reason that the Petition and Transcript show that the Court has no subject matter jurisdiction over this action as the Return of Appraisers filed with the Saunders County Court on August 16, 1985, was mailed by the Saunders County Court to the Plaintiffs/Condemnees on August 16, 1985, and the Notice of Appeal by Condemnees was not filed with the Saunders County Court until October 9, 1985, said date being more than thirty days after the Return of Appraisers, contrary to Neb. R.R.S. §76-715.

The return of appraisers found in the transcript from county court discloses a certificate by the associate county judge that a copy of the report was mailed to plaintiffs on August 16, 1985.

The district court held a hearing on the demurrer, at which it received evidence. As a part of the testimony received at that hearing, plaintiffs testified that they did not in fact receive any

notice of the filing of the report of appraisers until September 19, 1985.

The demurrer was sustained, and the plaintiffs elected to stand on their petition, following which the court entered an order dismissing plaintiffs' petition.

Neb. Rev. Stat. § 76-710 (Reissue 1986) provides in part:

> A copy of the appraisers' report shall be transmitted to the condemnee.
>
> The transmission shall be made by the county judge within ten days of the return of appraisers and shall be by personal delivery or the sending by ordinary mail of such copy to the condemnee . . . . Failure of transmission shall not be jurisdictional, but shall extend the condemnee's time of appeal to twenty days after such transmittal is finally made.

The method of appeal from a condemnation award is found in § 76-715:

> Either condemnor or condemnee may appeal from the assessment of damages . . . to the district court . . . . Such appeal shall be taken by filing a notice of appeal with the county judge within thirty days from the date of filing of the report of appraisers as provided in section 76-710.

We must first determine whether the claimed lack of jurisdiction is properly raised by demurrer. Neb. Rev. Stat. § 25-806 (Reissue 1985) provides in part: "The defendant may demur to the petition *only* when it appears on its face (1) that the court has no jurisdiction of . . . the subject of the action . . . ." (Emphasis supplied.)

We should state at the outset that there is no provision in our practice procedure for taking evidence on the submission of a demurrer. " 'The merits of a general demurrer to a petition must be determined from the allegations of the petition alone.' " *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 121, 5 N.W.2d 202, 206 (1942). A demurrer admits the truth of all facts well pleaded, but not conclusions of law drawn therefrom by the pleader. *Campus Lt. Hse. Min. v. Buffalo Cty. Bd. of Equal.*, 225 Neb. 271, 404 N.W.2d 46 (1987). Where the alleged defect does not appear on the face of the petition, it becomes an affirmative matter which

must be raised by the party seeking the benefit of the defect. *Smick v. Langvardt*, 216 Neb. 778, 345 N.W.2d 830 (1984).

The jurisdictional defect argued by the City of Wahoo is that the notice of appeal was not filed within 30 days of the date of the filing of the report of appraisers. The filing of a notice of appeal within that timeframe is mandatory and therefore jurisdictional. *Kracman v. Nebraska P.P. Dist.*, 197 Neb. 301, 248 N.W.2d 751 (1976). See, also, *McCorison v. City of Lincoln*, 218 Neb. 827, 359 N.W.2d 775 (1984). However, in the petition in the instant case there is no allegation regarding the date upon which the notice of appeal was filed. Consequently, it would be necessary to go beyond the allegations of the petition to reach the alleged jurisdictional defect, and the demurrer should not have been sustained.

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

EARL JAMES BRANDT, APPELLANT, V. MARILYN PATRICIA BRANDT, APPELLEE.

417 N.W.2d 339

Filed January 8, 1988. No. 86-001.

1. **Divorce: Appeal and Error.** In an appeal in a dissolution of marriage action, this court's review of the trial court's action is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion.
2. **Judgments.** A judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed as modified.

Chris M. Arps, for appellant.

Larry F. Fugit, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

GRANT, J.

The marriage of petitioner-appellant, Earl James Brandt, and respondent-appellee, Marilyn Patricia Brandt, was dissolved on December 5, 1985, after trial in the district court. The court's decree disposed of the property of the parties, ordered alimony, and ordered petitioner to pay $163 per month child support for each of the two children of the parties beginning December 1, 1985, with periodic increases thereafter. The court further ordered that "the Respondent shall, with regard to any child care expenses, pay 32% of those child care expenses and the Petitioner shall pay 68%" and that petitioner should secure health insurance and pay 68 percent of "any unpaid medical or dental expenses . . . ." Petitioner timely appealed to this court and assigns as error that the trial court "abused its discretion . . . in ordering the Appellant to pay support in the sum of $326 plus 68% of child care expenses and 68% of medical expenses" and "in ordering unknown future expenses which cannot be ascertained with [sic] future litigation . . . ." We modify the court's order and affirm the decree as modified.

The record shows that the parties were married in 1973. Two children were born of the marriage, one in 1975 and one in 1977. At the time of trial, the petitioner was employed at an electric company, earning a net income of $246 per week, or $1,066 per month computed on a basis of 4 1/3 weeks per month. In 1983 and 1984, the petitioner was employed at a lawnmower store owned by his father. In 1983, petitioner earned $1,630, and in 1984, $16,144, from this employment. Additionally, at that time, petitioner supplemented his income as a schoolbus driver. The financial condition of the lawnmower company deteriorated in 1985, and the petitioner began work at his present job in October of 1985. Although petitioner was not covered by health insurance at the time of trial, he testified that he would soon be able to obtain insurance for the children without any expense to himself.

Both parties have high school educations. Respondent is a beautician licensed in the State of Nebraska. During the marriage, respondent was employed periodically, but because of the expense of child care, the parties determined that she should quit her job. After the parties were separated in 1984, respondent began working as a prekindergarten teacher. At the time of trial, respondent earned $120 per week, or $520 per month. Respondent testified that monthly expenses for both herself and the children are approximately $530 per month, including $200 per month in child care expenses.

In an appeal in a dissolution of marriage action, this court's review of the trial court's action is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); Neb. Rev. Stat. § 25-1925 (Reissue 1985).

This court has adopted child support guidelines effective October 1, 1987. See *Fooks v. Fooks*, 226 Neb. 525, 412 N.W.2d 469 (1987). These guidelines, applied to this case, suggest that the total amount necessary for support for two children is $455 per month, where the parties have a combined monthly net income of $1,586, as in this case. The guidelines further provide that each party's monthly share of child support expenses is to be calculated according to the percentage contributed by each parent to the parties' combined monthly net income. The evidence shows that petitioner contributes approximately two-thirds to the parties' combined monthly net income. The guidelines, applied to this case, suggest that petitioner's support obligation is a total of approximately $300 per month for two children. In performing these mathematical gymnastics, we do not suggest that an appropriate child support and expense order may be found to be accurate to the penny by applying the suggested guidelines. Other evidence in a particular case may call for an amount different (either more or less) than the amount calculated by the court through use of the guidelines. A judge may not satisfy his duty to act equitably toward all concerned, i.e., the parties and the children, by blindly following suggested guidelines.

The district court ordered petitioner to pay $326 per month in child support plus 68 percent of the child care and medical expenses. Neither the guidelines nor the evidence suggests the support payments should be at that level. We hold the child support should be set at $300 per month, or $150 per child per month.

The guidelines also provide that child care expenses are to be computed independently of the child support amount. *Fooks, supra*. We have held that

> a judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law. It must be in such a form that a clerk is able to issue an execution upon it which an officer will be able to execute without requiring external proof and another hearing.

Lenz v. Lenz, 222 Neb. 85, 89, 382 N.W.2d 323, 327 (1986).

The trial court's order that petitioner pay 68 percent of the child care and other expenses is unenforceable due to lack of definiteness. The evidence shows, without dispute, that child care expenses are $200 per month, as testified to by respondent. As these expenses were capable of ascertainment at the trial of this case, we modify the decree with respect to child care expenses and order petitioner to pay his share of these expenses, or an additional $130 per month for child care expenses, an amount calculated on the same basis as child support expenses.

Insofar as the order required petitioner to pay 68 percent of the medical and dental expenses, there is nothing in the record which would show the amount of these unknown future expenses. That part of the order is not enforceable and is set aside. Petitioner should pay to respondent $150 per month per child as child support plus $130 per month as child care expenses, or a total of $430 per month.

The order of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

LLOYD BOERSMA AND PHYLLIS BOERSMA, APPELLANTS, V. DONNA KARNES, NEBRASKA TAX COMMISSIONER, AND NEBRASKA DEPARTMENT OF REVENUE, APPELLEES.

417 N.W.2d 341

Filed January 8, 1988. No. 86-196.

1. **Actions: Taxation: Parties.** An action cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed.
2. _____: _____: _____. Neb. Rev. Stat. § 77-2793 (Reissue 1986), which provides a procedure by which a taxpayer may obtain a refund of overpayment of income taxes, is exclusive and does not provide for class actions.
3. **Statutes: Taxation.** As a general rule of statutory construction, exemptions from taxation are to be narrowly construed.
4. **Taxation: Social Security.** Neither the provisions of 42 U.S.C. § 407 (Supp. III 1985) nor those of I.R.C. § 86 (Supp. III 1985) preclude the State of Nebraska from taxing the portion of Social Security benefits reported as federal taxable income.
5. _____: _____. The provisions of 31 U.S.C. § 3124 (1982) do not preclude the State of Nebraska from taxing the portion of Social Security benefits reported as federal taxable income.

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

Michael L. Johnson of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellants.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Plaintiffs-appellants, Lloyd and Phyllis Boersma, filed a U.S. income tax return for 1984 on form 1040 and included one-half of their total Social Security benefits as income for federal tax purposes. Plaintiffs also filed a Nebraska individual income tax return for 1984 on form 1040N. Pursuant to Neb. Rev. Stat. § 77-2795 (Reissue 1986), plaintiffs filed a claim for refund with defendant-appellee Donna Karnes, Nebraska Tax Commissioner. Plaintiffs contended that since one-half of their Social Security benefits had been indirectly taxed by the State of

Nebraska, they were entitled to a refund in the amount of $766. In addition, plaintiffs claimed a refund on behalf of all other taxpayers similarly situated.

The claim was denied by the Tax Commissioner on August 13, 1985. Pursuant to Neb. Rev. Stat. § 77-2798 (Reissue 1986), plaintiffs then filed a petition in district court, for themselves and all taxpayers similarly situated, seeking review of defendant Tax Commissioner's denial of the refund claim. Defendants answered and then moved for summary judgment. The district court granted defendants' motion, holding that there were no issues of material fact and that, as a matter of law, the State of Nebraska was allowed to base the income tax due Nebraska on a portion of Social Security benefits reported on plaintiffs' federal income tax return and that defendant Tax Commissioner was correct in denying plaintiffs' refund claim. The district court did not decide the question of whether a class action was allowable in this type of action. Plaintiffs timely appealed.

The issue in this case arises as a result of certain changes made by Congress in the federal Internal Revenue Code. Until January 1, 1984, Social Security benefits and tier 1 railroad retirement benefits were not included in gross income and therefore were not subject to federal income tax. Before that time, the Internal Revenue Service held that insurance benefit payments to individuals under the provisions of the Social Security Act were not includable in the gross income of the recipients.

Congress modified this general exclusion effective on January 1, 1984, by a change in the law, which is codified at I.R.C. § 86 (Supp. III 1985). This change results in a portion of Social Security benefits being includable in gross income. Generally, the new law results in including one-half of Social Security benefits in gross income if the taxpayer's gross income plus Social Security benefits is over $25,000 ($32,000 for married, jointly filing taxpayers). For example, in the instant case, plaintiffs' gross income (including Social Security benefits) was over $88,000. As a result, one-half of their total Social Security benefits of $20,798 was includable in their gross income. The applicable federal tax rate was applied to this gross

income figure, which generated plaintiffs' federal tax liability.

When this return was filed in 1985 for the 1984 tax year, the Nebraska income tax liability was computed by applying the appropriate state income tax rate to the federal tax liability. See Neb. Rev. Stat. § 77-2715(1) (Supp. 1983). This computation resulted in a state tax liability for plaintiffs of $3,114. This figure included $766 which was attributable to state taxation of Social Security benefits.

In their appeal plaintiffs set out two assignments of error: (1) that the district court erred when it refused to allow plaintiffs to maintain a class action under Neb. Rev. Stat. § 25-319 (Reissue 1985) for a refund of state income taxes on behalf of all persons similarly situated, and (2) that the district court erred when it granted defendants' motion for summary judgment, holding, in effect, that as a matter of law a portion of plaintiffs' Social Security benefits is subject to state income tax. We affirm.

Plaintiffs allege that the seeking of refunds of state income taxes is a proper matter for a class action pursuant to § 25-319. Such an assertion is contrary to the established rule in this state that an action "cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf." *Hansen v. County of Lincoln*, 188 Neb. 461, 465, 197 N.W.2d 651, 655 (1972), *supp. op.* 188 Neb. 798, 197 N.W.2d 655; *State ex rel. Sampson v. Kenny*, 185 Neb. 230, 175 N.W.2d 5 (1970); *Willms v. Nebraska City Airport Authority*, 193 Neb. 567, 228 N.W.2d 276 (1975).

In *State ex rel. Sampson v. Kenny, supra* at 232-33, 175 N.W.2d at 7, we stated:

> It is clearly the policy of the Legislature in setting up a refund statute to require individual action. Taxes ordinarily paid under a mistake of law are not recoverable, and the refund statute gives special relief in this situation. The county treasurer's duty arises only on a taxpayer's individual application. The Legislature is authorized and may properly, on considerations of public policy, require individual applications and it is not mere speculation to suggest that this requirement is related to the security of the public treasury.

Neb. Rev. Stat. § 77-2793 (Reissue 1986) provides a procedure by which a taxpayer may obtain a refund of an overpayment of income taxes. This statutory procedure is exclusive and does not provide for class actions. In the absence of specific statutory authority waiving governmental immunity to permit representative suits, class actions cannot be maintained to recover taxes paid. Neb. Rev. Stat. §§ 77-2793 through 77-27,101 (Reissue 1986), the sections which pertain to income tax refunds, refer to actions brought by the taxpayer, with no mention of class actions.

Although *Sampson, supra*, and *Hansen, supra*, both involved property tax assessments rather than income tax, this court finds these cases controlling. We are not persuaded by plaintiffs' attempt to distinguish class actions in property tax cases from those involving, as in the instant case, income taxes. This court has repeatedly recognized the rule requiring individual actions in obtaining tax refunds. Plaintiffs' action in this case should not be treated as a class action.

With regard to plaintiffs' other assignment of error, plaintiffs do not contend that there is any fact question presented, but that the court erred as a matter of law. Plaintiffs first contend that the Nebraska tax on plaintiffs' Social Security benefits results in an unconstitutional burden on the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the "supremacy clause." Plaintiffs state that "[t]he determining question is whether the income tax imposed by the State of Nebraska on Social Security benefits operates to 'retard, impede, burden, or in any manner control' the constitutional power of Congress to provide for the general welfare under the Social Security Act." Brief for Appellants at 6. Plaintiffs then assert that "[i]f the State of Nebraska has the power to tax Social Security benefits, it has the power to destroy the purposes of the Social Security Act." *Id.* That assertion is not correct.

We recognize that should Congress forbid the various states to tax federal Social Security benefits, in whole or in part, even though the federal government itself chose to tax such benefits, the federal law would control. Indeed, that is what has happened in this case, and the State of Nebraska has recognized

the supremacy of federal law. See the later discussion herein comparing the effect of 45 U.S.C. § 231m (Supp. III 1985) (concerning the nontaxability of tier 1 railroad retirement benefits) and 42 U.S.C. § 407 (Supp. III 1985) (concerning the taxability of Social Security benefits). Until 1984, the Congress did not permit any taxation of Social Security benefits, and no taxing authority, federal or state, taxed such benefits.

Congress, with the passage in 1983 of the law codified at I.R.C. § 86, granted the federal government the power to tax Social Security benefits to a defined, limited extent by, in effect, dividing Social Security benefits into two categories—benefits going to persons with a gross income greater than $25,000 for single taxpayers (or $32,000 for married, jointly filing taxpayers) and benefits going to those receiving less than those amounts. Section 86 requires only those individuals who are higher income taxpayers (as distinguished from "lower-income individuals" mentioned in the legislative history below) to include a portion of their Social Security benefits in gross income. Other taxpayers do not include any portion of their Social Security benefits in gross income.

We agree with plaintiffs' depiction of Congress' rationale for passing the Social Security Act. Plaintiffs cite *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, 81 L. Ed. 1307 (1937), where the U.S. Supreme Court discussed the authority of Congress to enact the Social Security Act and the purpose of the act:

> Congress may spend money in aid of the "general welfare." Constitution, Art. I, section 8 . . . .
>
> . . . .
>
> . . . The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

301 U.S. at 640-41.

Plaintiffs assert that *any* state taxation of these benefits burdens the act's operation. We disagree. When Congress modified the act in 1983, it in no way departed from the above-stated purpose. The legislative history of this modification explains the congressional policies and purposes behind the extension of federal taxation to a portion of these

benefits.

> Your Committee believes that the present policy of excluding all social security benefits from a recipient's gross income is inappropriate. Your Committee believes that social security benefits are in the nature of benefits received under other retirement systems, which are subject to taxation to the extent they exceed a worker's after-tax contributions and that taxing a portion of social sercurity [sic] benefits will improve tax equity by treating more nearly equally all forms of retirement and other income that are designed to replace lost wages (for example, unemployment compensation and sick pay). . . .
>
> . . . .
>
> By taxing only a portion of social security and railroad retirement benefits (that is, up to one-half of benefits in excess of a certain base amount). Your Committee's bill assures that lower-income individuals, many of whom rely upon their benefits to afford basic necessities, will not be taxed on their benefits. The maximum proportion of benefits taxed is one-half in recognition of the fact that social security benefits are partially financed by after-tax employee contributions. The bill's method for taxing benefits assures that only those taxpayers who have substantial taxable income from other sources will be taxed on a portion of the benefits they receive.

H.R. Rep. No. 25, 98th Cong., 1st Sess. 24, *reprinted in* 1983 U.S. Code Cong. & Admin. News 219, 242.

It is clear, in light of the above-enunciated rationale, that Congress determined that federal taxation of higher income taxpayer's benefits did not adversely affect the purposes of the Social Security Act. The Congress deliberately lifted a defined portion of Social Security benefits into a category subject to federal tax. A state's indirect recognition of this taxable category does not, in any degree, give the state "the power to destroy the purposes of the Social Security Act," as alleged by plaintiffs. Taxation of these Social Security benefits by states is always subject to disallowance by federal act, but that disallowance has not yet been enacted.

That the power of taxation is one of vital importance;

> that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied.

M'Culloch v. State of Maryland, 17 U.S. 415, 432, 4 Wheat. 316, 4 L. Ed. 579 (1819). Plaintiffs seem to imply that only the federal government is concerned about the care of people in financial difficulty because of age or other reasons and that only the federal government is concerned about retirement benefits in general. The State of Nebraska is vitally, and more immediately, concerned in those same areas. See, e.g., Neb. Rev. Stat. §§ 43-501 to 43-515 (Reissue 1984), 43-601 to 43-680 (Reissue 1984), 68-104 to 68-1521 (Reissue 1986), 71-516 to 71-518 (Reissue 1986), and 71-1401 to 71-1554 (Reissue 1986).

Plaintiffs then contend that 42 U.S.C. § 407 precludes Nebraska from taxing these benefits. Section 407 states, in pertinent part:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Plaintiffs contend that the word "levy" as used in § 407 refers to a tax levy and, therefore, that § 407 prohibits Nebraska from taxing Social Security benefits. If the word "levy," as used within the context of § 407, does mean "tax," the statute would act to preclude state taxation of these benefits. The thrust of plaintiffs' argument on this point rests on plaintiffs' contention as to the meaning of "levy" in § 407.

"Levy" is a term which is susceptible to divergent meanings, depending on how the word is used. When "levy" is used as a noun, Black's Law Dictionary provides two conceptually different definitions. "Levy" is initially defined in Black's as follows: "A seizure. The obtaining of money by legal process through seizure and sale of property; the raising of money for which an execution has been issued." Black's Law Dictionary 816 (5th ed. 1979). Black's further defines "levy" as:

> In reference to taxation, the word may mean the legislative function and declaration of the subject and rate or amount of taxation . . . . "Levy," when used in connection with authority to tax, denotes exercise of legislative function, whether state or local, determining that a tax shall be imposed and fixing amount, purpose and subject of the exaction.

Id.

In order to ascertain which of these two definitions should be adopted for purposes of construing § 407, it is appropriate to examine the word "levy" within the context of the statutory language which surrounds it.

The word must be read in context with the remainder of the statute. Section 407 states that Social Security benefits shall not be "subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." The words surrounding "levy" in this statute operate to protect the Social Security benefits, which may be paid to persons such as plaintiffs, from judicial proceedings against persons such as plaintiffs. Judgment creditors in legal proceedings may not use the proceeds of the Social Security system to satisfy private obligations. Viewing the provision of § 407 in its entirety, we hold that plaintiffs' argument that the word "levy" is the equivalent of "tax" is without merit. In context with the remainder of the statute, the word "levy" refers to the enforcement of a judgment or other legal process involving the collection of debts through execution, attachment, garnishment, or levy.

Other courts have reached the same general conclusion. See *Matter of Neavear*, 674 F.2d 1201, 1205 (7th Cir. 1982), where the court stated:

> By its terms section 207 [42 U.S.C. § 407] is concerned with the protection of social security benefits from the reach of creditors. . . .
>
> . . . Section 207 speaks throughout in terms of the rights of social security *recipients* . . . and the protection of their *benefits* from the reach of creditors (through "execution, levy, attachment, garnishment, or other legal process").

(Emphasis in original.) Without more, § 407 clearly does not

exclude state taxation of Social Security benefits.

Plaintiffs then argue that I.R.C. § 86 provides an additional indication of congressional intent with regard to the taxation of these benefits. This statute, which results in a portion of Social Security benefits becoming subject to federal taxation, states in relevant part: "(a) In general. Gross income for the taxable year of any taxpayer described in subsection (b) (notwithstanding section 207 of the Social Security Act [42 U.S.C. § 407]) includes social security benefits in an amount equal to the lesser of . . . ."

Plaintiffs point to the parenthetical clause in subsection (a) "(notwithstanding section 207 of the Social Security Act [42 U.S.C. § 407])," and argue that if § 407 is not interpreted as prohibiting a tax on Social Security benefits, Congress would not have bothered to modify § 407 in I.R.C. § 86. The relevant portion of § 407 is set out above. Plaintiffs contend that the inclusion of this parenthetical statement is a clear indication that Congress interprets § 407 as a prohibition against a tax on these benefits. We do not agree, and hold that § 407 is not a specific indication of congressional intent to prohibit state taxation of Social Security benefits. As stated above, § 407 is concerned only with the protection of Social Security benefits from legal proceedings by creditors.

As a general rule of statutory construction, exemptions from taxation are to be narrowly construed. *Bingler v. Johnson*, 394 U.S. 741, 89 S. Ct. 1439, 22 L. Ed. 2d 695 (1969). A section from the Railroad Retirement Act, 45 U.S.C. § 231m, provides us with an example of expressed congressional intent to exclude benefits from state taxation. Tier 1 benefits are those portions of railroad retirement benefits which are analogous to the Social Security benefits in this case. Tier 1 benefits were specifically excluded from state taxation in § 231m, which states in part:

> (a) Except as provided in . . . the Internal Revenue Code of 1954 [26 U.S.C. § 1 et seq.], notwithstanding any other law of the United States, *or of any State*, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process . . . .

(Emphasis supplied.)

Use of the word "tax" in § 231m indicates that Congress clearly recognizes the distinction between the words "tax" and "levy" in the context of exclusionary statutes, and clearly sets out how to exclude federal benefits from state taxation. We hold that neither the provisions of 42 U.S.C. § 407 nor those of I.R.C. § 86 preclude the State of Nebraska from taxing the portion of plaintiffs' Social Security benefits reported as federal taxable income.

Nebraska's recognition of the federal supremacy rights is further shown in the terms of Nebraska income tax form 1040N. That form, on line 25 of schedule II, specifically authorizes "adjustments decreasing federal taxable income, such as interest or dividend income from U.S. government bonds, other U.S. obligations, or Tier I or II benefits paid by Railroad Retirement Board." As set out above, § 231m expressly forbids state taxation of railroad retirement benefits. Nebraska does not tax those benefits. Also, as set out above, there is no such comparable federal statute prohibiting a state tax on Social Security benefits. Nebraska, therefore, taxes such benefits. The actions of the state have recognized the "supremacy clause."

We note that plaintiffs pled in paragraph 18 of their petition in the district court that the

> reduction for Tier I or II benefits paid by the Railroad Retirement Board with no reduction for Social Security benefits is discriminatory and constitutes unequal treatment of persons similarly situated, without a rational basis for distinction, thereby violating the equal protection clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 25 of the Nebraska Constitution.

Plaintiffs have not mentioned or discussed this issue in their brief. It is not properly before this court. We do not, therefore, discuss this issue.

Plaintiffs then contend that 31 U.S.C. § 3124 (1982) results in Social Security benefits being exempt from state taxation. Section 3124 states in relevant part: "(a) Stocks and obligations of the United States Government are exempt from taxation by a

State or political subdivision of a State."

Plaintiffs make two arguments in support of their position. They first contend that payment of Social Security benefits is an obligation of the U.S. government and is thus exempt from state taxation by the terms of § 3124. In the same manner they choose to construe the word "levy" as set out above, plaintiffs attribute a different meaning to the word "obligation" than is warranted by the statute.

"Obligation" may be a "duty" or "the act of obligating oneself to a course of action"; that is, in this case, the United States has recognized its duty to support its citizens in their later years or in emergencies. "Obligation" may also be "an investment security (corporate bonds and other obligations)." Webster's Third New International Dictionary, Unabridged 1556 (1981).

In § 3124, the meaning of "obligation" is that of an investment security, a financial instrument. A state may not tax the interest on such an obligation. In *State ex rel. Douglas v. Karnes*, 216 Neb. 750, 760, 346 N.W.2d 231, 236 (1984), this court held that *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 103 S. Ct. 692, 74 L. Ed. 2d 562 (1983), "was the death knell for state franchise taxes discriminating against federal obligations . . . ." The Nebraska opinion discussed the adverse effects of Nebraska's attempting to levy a tax on income from federal obligations while at the same time exempting interest income from state securities. It is clear the *Karnes* case was concerned with state taxation of interest being earned on federal "obligations" in the sense obligations are investment securities. We are not concerned with such "obligations" in this case.

This conclusion is buttressed when the source of § 3124 is examined. That source was 31 U.S.C. § 742 (1976), effective in 1959, which provided, in pertinent part: "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." The explanatory note following § 3124 states that the words: "Except as otherwise provided by law, all . . . bonds, Treasury notes, and other" contained in former § 742 were "omitted as

surplus." The Congress recognized that "stocks and obligations" as expressed in § 3124 means "stocks, bonds, Treasury notes, and other obligations of the United States," as stated in former § 742.

Regarding the statutory exemption provided under § 742, the U.S. Supreme Court, in *Smith v. Davis*, 323 U.S. 111, 116-17, 65 S. Ct. 157, 89 L. Ed. 107 (1944), stated:

> [Section 742] on its face applies only to written interest-bearing obligations issued pursuant to Congressional authorization. Stocks, bonds and Treasury notes are obviously of that nature. And, under the rule of *ejusdem generis*, it is reasonable to construe the general words "other obligations," which allegedly cover open accounts, as referring only to obligations or securities of the same type as those specifically enumerated. . . . This interpretation is in accord with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit. It is unnecessary to extend such tax exemption, at least through statutory interpretation, to non-interest-bearing claims or obligations which the United States does not use or need for credit purposes.

Plaintiffs then argue that Social Security benefits are obligations of the U.S. government by virtue of the fact that the Federal Old-Age and Survivors Insurance Trust Fund invests in securities held by the Secretary of the Treasury. Plaintiffs state in their brief that the Social Security tax revenues which will ultimately be paid out to recipients are placed in this trust fund and that the portion of the trust fund not required to meet current benefit payments is invested in interest-bearing obligations of the United States under 42 U.S.C. § 401(d) (Supp. III 1985). Plaintiffs then contend that "[t]he Social Security benefits paid by the federal government represent the proceeds of United States obligations . . . ." Brief for Appellants at 10. It is not possible for this court to know if plaintiffs' statement is an accurate reflection of how the laws of the United States operate, but we do determine that the

Nebraska income tax in this case does not operate as a tax on the interest generated by any U.S. financial security or obligation, but operates on moneys received, in the nature of retirement annuities, by a Nebraska resident. Section 3124 does not prohibit the tax in question.

The arguments of plaintiffs are not persuasive. The order of the district court granting defendants' motion for summary judgment was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID E. BROOMHALL, APPELLANT.

417 N.W.2d 349

Filed January 8, 1988. No. 87-045.

1. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel.
2. **Postconviction: Appeal and Error.** The findings of the trial court in a proceeding for postconviction relief will be upheld on appeal unless clearly erroneous.
3. **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.
4. _____: _____: _____. A defendant seeking reversal of a conviction on the basis that counsel's assistance was deficient must establish a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different; a reasonable probability consists of a probability sufficient to undermine confidence in the outcome.
5. **Motions for Continuance: Appeal and Error.** In the absence of a showing of due diligence by the moving party, a ruling by the trial court in overruling a motion for a continuance in order to obtain additional evidence will not be disturbed.

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

Donald W. Kleine of Kleine Law Office, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

Defendant has appealed from an order of the district court which denied his motion for postconviction relief. Errors assigned include denial of defendant's claims of ineffective assistance of counsel due to failure to call a key witness and failure to fully investigate and present all possible defenses during the course of his trial.

The trial judge drafted a comprehensive and analytical order which systematically answered each of the defendant's contentions set out in his motion. As to defendant's claims of ineffective assistance of counsel relating to the investigation and presentation of facts and defenses, suffice it to say that we agree with the trial court that they are wholly without merit. We find it unnecessary to set forth repetitiously, for approval, those specific findings. Those claims of deficiency are swallowed up either because they did not exist or because they were the result of justifiable trial strategy.

"The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel." *State v. Fries*, 224 Neb. 482, 485, 398 N.W.2d 702, 704 (1987). The findings of the trial court in a proceeding for postconviction relief will be upheld on appeal unless clearly erroneous. *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987).

Accordingly, we will discuss in any detail only the claim that counsel was ineffective in failing to call as a witness Dr. Charles Golden, a professor of medical psychology at the University of Nebraska Medical Center. In analyzing that contention, we are

bound by the following rule, among others:

> 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.

State v. Rubek, supra at 479, 406 N.W.2d at 132. Also, a defendant seeking reversal of a conviction on the basis that counsel's assistance was deficient must establish a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different; a reasonable probability consists of a probability sufficient to undermine confidence in the outcome. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986).

The basic facts in this case may be found in *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985). The description and identification of the defendant as the victim's attacker was a critical element of this case. Her memory was strenuously challenged at trial, and her recall ability was undoubtedly an essential element in satisfying the requirement of guilt beyond a reasonable doubt.

The testimony of Dr. Golden, which was considered to be of such significance, was produced by testimony at the motion for a new trial. It was set out in substance in our opinion.

> Based on that information [Dr. McKinney's deposition] and his own training and experience, Dr. Golden gave as his opinion that the type of injuries suffered by the victim would have resulted in memory impairment, a memory loss, and interference from the date of the accident to the time of trial in March and that it was likely that the victim was not working—testifying—from a true memory but on the basis of things that had happened after the accident. He further testified that it would have been difficult, if not impossible, for her to recall observations made by her on

the day of the attack as to a description of the attacker. *Id.* at 30, 374 N.W.2d at 847.

In denying defendant's claim of error because of the failure of the trial court to grant a continuance at the time of trial so as to allow defendant to obtain Dr. Golden's testimony, we concluded that in the absence of a showing of due diligence by the moving party, a ruling by the trial court in overruling a motion for a continuance in order to obtain additional evidence will not be disturbed. In reaching our conclusion, we conceded in our opinion that Dr. Golden's testimony would have been relevant to defendant's defense. The substance of defendant's argument is that if this court agreed that the missing evidence was relevant, but had suggested lack of diligence of counsel to obtain that evidence in a timely manner, that must constitute misconduct.

Defense counsel stated at the hearing on the motion for a new trial that he did not talk to Dr. Golden before trial. He said that he had never heard of him before he talked to his witness, Dr. Emmet Kenney, who told him there was not anything Dr. Kenney, as a psychiatrist, could do for the defendant; that counsel should go to Dr. Golden; and that Dr. Golden was the expert in this field in the whole nation.

This was further amplified during defense counsel's testimony on the motion for postconviction relief. Counsel stated that he never did have the victim evaluated as to her possible loss of memory. He suggested that this was due to the fact that he first needed to take the deposition of Dr. McKinney, who was the neurosurgeon who had treated the victim, and he was not able to do that until the Saturday prior to the Monday of the first day of the trial. He stated that he had asked the prosecuting attorney for Dr. McKinney's deposition at least a month prior to trial. A motion or request to take the deposition was never filed with the court.

In opposition to this testimony of defense counsel, the prosecuting attorney testified that a month or a month and a half before trial he had told defense counsel to let him know when counsel wanted to take Dr. McKinney's deposition, and he would set it up. The prosecutor further stated that no request was ever made to take that deposition until February 29, 5 days

before the trial began on March 5, 1984.

It appears from the record that defense counsel had been in touch with Dr. Kenney, who was to be the expert witness for the defense, sometime before the deposition of Dr. McKinney was taken, because he "wanted him to review it and give us any input that he could relative to the victim's injuries and her ability and power to recollect, her ability and power to recall, her ability to — or the possibility of her being subject to the power of suggestion." According to defense counsel, when the deposition of Dr. McKinney was finally taken, it was discovered that the witness believed that the victim did have the power to recall on her own and that the injury would not inhibit her power to recollect and relate accurately.

It was apparent from the beginning that the victim had sustained severe head injuries and had difficulty in communicating or verbalizing the facts describing the events that had caused her injuries. The police officer, James Wilson, testified that in his investigation he would have to interview the victim by a series of leading questions. Defense counsel stated that he had talked to most of the police officers long before the trial. Therefore, he should have known of the results of their investigation regarding the condition of the victim. As a matter of fact, he testified at the postconviction hearing that at the time he received the police reports, early on in his representation of the defendant, he also received some medical reports and knew that the victim had sustained a severe head injury. He was also aware that one or more of the police officers believed at one time, at least, that someone was suggesting information to the victim that her injuries were caused by something other than a traffic accident, and that they believed that statements made by the victim for about the first 10 days after this incident were subject to doubt.

Defense counsel was aware of the fact that the main basis of the State's case was the victim's eyewitness identification of her attacker. Counsel had represented the defendant since September or October of 1983. Counsel's first contact with the victim appears to have been on November 9, 1983, when she testified at a hearing on defendant's motion to transfer the case to juvenile court. The victim testified at some length about the

attack on her and identified the defendant as her attacker. Defense counsel chose not to cross-examine her.

The second opportunity which counsel had to hear the victim's testimony occurred on December 28, 1983, at a hearing on defendant's oral motion to suppress the victim's identification of the defendant, and other related matters. During that hearing, Marilou Lawson, a police officer of the City of Omaha, testified and was cross-examined at some length by defense counsel relative to the use of a composite drawing to learn the identity of the victim's attacker from witnesses who had seen the drawing. The witness related how the victim had described her attacker for the artist, and after the composite was completed, that the victim stated that it fairly and accurately described her attacker.

At this same hearing, the victim testified and stated her recollection of the identifying characteristics of her attacker. Her memory of the events, her description of the attacker, and other items of recall such as what the various police officials were wearing during different interviews with her were tested by quite extensive cross-examination by defense counsel.

Defense counsel's next appearance in court seems to have been on February 29, 1984, to argue a motion to continue the trial of the case, which had been set to begin on March 5. The record discloses that the court had informed defense counsel "prior to the last jury panel" that the case would be tried at the panel starting March 5. This apparently was confirmed by a letter from the court dated February 15. It is not known from the record when counsel received that letter. Counsel's reason for requiring a continuance was to obtain Dr. McKinney's deposition. Counsel appeared again in court on March 1, 1984, to argue a written motion for continuance because, among other reasons, he had not been able to get a doctor to review "this thing" or to give him any defense help on the lack of memory proposition.

In spite of the last-minute efforts to obtain medical support for a defense of lack of memory, it must have been apparent at least as early as November 9, 1983, that evidence of the victim's ability to remember and relate accurately her recollection of the events of the brutal attack on her would be of immense

importance in this case.

Although the record does not disclose when defense counsel settled on the use of Dr. Kenney as his expert witness, it had to have been some time before he started to make arrangements to take the deposition of Dr. McKinney. Dr. Kenney was never called as a witness, but, according to the testimony of defense counsel on the postconviction hearing, Dr. Kenney, without reservation, stated that he could be of no help in the field of memory but, as previously stated, Dr. Golden was the recognized expert in that field. There appears no logical reason why the search for Dr. Golden, who had been located in Omaha for the past 7 years, could not have begun and proven fruitful long in advance of the March 5 trial date. Another defense lawyer knew of and had used Dr. Golden as a defense witness. It would seem that ordinary diligence on the part of defense counsel would have required as much.

Although the court is entirely sympathetic with the pressures and deadlines that ordinarily competent and active lawyers are subjected to, we must find in this instance that counsel did not perform as a lawyer possessing ordinary training and skill in the criminal law should have done.

It is then necessary to determine whether defendant was prejudiced by that failure. Is there a reasonable probability that but for counsel's deficiency in this instance the result of defendant's trial would have been different; i.e., was there such a probability as to undermine confidence in the guilty verdict rendered by the jury in this case?

At the risk of redundancy, we say that the guilt of the defendant rested upon and resulted from the believability of the testimony of the victim. Without her testimony, there was no evidence upon which he could have been convicted.

The jury chose to believe that defendant was the attacker in this case because the artist's sketch based on her description was identified by many witnesses as a portrait of the defendant and the victim identified the defendant in open court as her attacker. However, there was a period of time following this savage attack when the victim could only speak as the result of suggestions and leading questions. One or more of the police officers were of the belief that her recollection of the events was

induced by the pressures of other people.

Dr. McKinney, the victim's neurosurgeon, testified at trial that the victim's injury would have affected her capacity for instant recall. However, he testified that he would not expect the victim's injury to have interfered with her distant memory. Although the witness stated that he could not give an expert opinion as to whether one with such an injury would be subject to the power of suggestion, he stated that in his experience it had not. Dr. McKinney made no effort during his treatment of the victim to determine whether she suffered from amnesia.

On the other hand, the testimony of Dr. Golden, given at the hearing on the motion for a new trial, was strongly supportive of a finding of amnesia and the possibility of confabulation. He stated that, based on the injury, he would expect to find "disruption of memories right around the event . . . for at least several days on either side of the event . . . ." He also noted the possibility of "confabulation" on the part of the victim in trying to fill in "lapses" in her memory. He stated that "[t]he power of suggestion plays a very big role in the patients" and that at the time of the victim's testimony "[i]t is likely at that late a date that the person is not working from a true memory but from some — on the basis of things that have happened subsequent to the event." At the time that she testified, he agreed, "her memory [would] be suspect to inaccuracy in her power to recall."

The testimony of Dr. Golden, had it been presented to the jury, would in our opinion have been a powerful influence on the thinking of the jury as to the accuracy and reliability of the victim's testimony, at least to the extent that its absence undermines our confidence in the guilty verdict rendered by the jury.

The trial court found that defense counsel had talked to Dr. Golden by the evening of the opening day of trial, March 5, and had until March 9, the day the defense rested, to have conferred with Dr. Golden and to present his testimony "if counsel had desired to present it during the trial rather than saving it for the Motion for New Trial if he lost."

The State argues that such a decision, if made by defense counsel, was a matter of trial strategy which does not sustain a

finding of ineffectiveness of counsel. It is difficult, if not impossible, to understand how the failure to call a highly qualified and apparently credible witness to refute the most important ingredient of the State's case—witness credibility—could by any stretch of the imagination amount to reasonable trial strategy. Certainly defense counsel did not advance such reason during his testimony.

We have previously determined that the trial court did not err in failing to grant defendant a continuance to obtain and present the testimony of Dr. Golden; we have no alternative but to determine now that counsel should have done so, and his failure in that respect amounts to a denial of a fair trial to the defendant.

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., dissenting.

I respectfully dissent. In *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985), we affirmed defendant's conviction, holding, among other things, that the trial court did not abuse its discretion in refusing defendant a continuance for the purpose of seeking additional expert medical testimony. Now, we hold that defendant should be granted postconviction relief because an additional expert witness was not called by defendant's counsel. It appears we are now furnishing relief that we earlier denied, on the basis of counsel's conduct rather than the system's decisions.

We have held, as set out in the majority opinion, that the findings of the trial court in a proceeding for postconviction relief will be upheld on appeal unless clearly erroneous. *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987). In its order denying postconviction relief, the trial court found:

> Trial counsel testified that he was not prepared for trial prior to February 29, 1984, however, by March 5, 1984 he was prepared. The record in this case reflects that he performed at least as well as any other criminal defense attorney in the Omaha area and was prepared with Dr.

> McKinney's deposition and had talked to Dr. Golden by the evening of March 5, 1984, the opening day of trial. Defendant did not have to present evidence until 1:30 p.m. on March 8, 1984 and did not rest until the morning of March 9, 1984. Therefore, there was sufficient time to have conferred with Golden as to his testimony and presented same if counsel had desired to present it during the trial rather than saving it for the Motion for New Trial if he lost.
>
> Effectiveness of counsel is not to be judged by hindsight. The record indicates a conscientious effort on trial counsel's part to protect the interests of the defendant.

(Emphasis in original.)

The victim in this case was severely injured. In reviewing trial counsel's actions, we must not lose sight of defense counsel's thoughts in choosing to call, or not call, a particular witness. Counsel must have been concerned about a possible adverse effect on the jury if the victim were subjected to further attacks on her credibility by producing a medical witness whose testimony, in effect, says the victim is not testifying from her memory but from subsequent suggestion. Earlier testimony was received which indicated the victim originally thought she had been struck by a hit-and-run car. The point was before the jury, although not buttressed directly by medical testimony. At some point, a jury will say "enough," and such additional testimony becomes counterproductive to the purposes for which it is offered.

Defense counsel had seen the victim testify at the motion to transfer the case to juvenile court and at a suppression hearing, both courtroom settings, so to speak. Additionally, counsel had interviewed the victim. Apparently, counsel was convinced of the effective way in which the victim presented her testimony, as evidenced by the fact counsel did not cross-examine the victim during the trial (after he explained the matter to defendant and his parents and received their permission to so act). The gist of the trial court's finding is that defense counsel could have called Dr. Golden, if he wished.

Our "Monday-morning quarterbacking" of defense counsel

may result in the victim's again being put through a very difficult procedure. I believe the record supports the trial court's finding that defendant's counsel "performed at least as well as any other criminal defense attorney in the Omaha area . . . ." I would affirm.

SHANAHAN, J., and COLWELL, D.J., Retired, join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. LARON E. BURNETT, APPELLANT.
417 N.W.2d 355

Filed January 8, 1988. Nos. 87-344, 87-345.

1. **Statutes: Legislature: Intent.** One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give it effect.
2. _____: _____: _____. In construing a statute, the Nebraska Supreme Court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
3. _____: _____: _____. To ascertain the intent of the Legislature, the Nebraska Supreme Court may examine the legislative history and the record of floor explanations or debate of the act in question.
4. **Criminal Law: Sentences.** Neb. Rev. Stat. § 29-2278 (Cum. Supp. 1986) does not permit the requirement of community service in addition to a period of incarceration.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and ROWLANDS, D.J., and COLWELL, D.J., Retired.

ROWLANDS, D.J.

This case presents an issue of first impression and requires us to determine whether a court is authorized under Neb. Rev. Stat. § 29-2278 (Cum. Supp. 1986) to enter a sentence of community service in addition to incarceration. We have determined that the Nebraska Legislature did not so intend unless imposed as a condition of probation under Neb. Rev. Stat. § 29-2262 (Cum. Supp. 1986). Accordingly, we reverse and direct that the invalid portion of the defendant's sentences be vacated.

On November 7, 1986, LaRon E. Burnett, defendant, entered pleas of guilty to theft by unlawful taking and to possession of burglary tools. Both offenses are Class IV felonies, punishable by up to 5 years' imprisonment, a $10,000 fine, or both.

On December 4, 1986, the defendant was sentenced to 1 year's imprisonment and a period of community service on each count. The sentences were to run concurrently, and the defendant was given credit for time already served.

Following Burnett's release from incarceration after serving his concurrent 1 year sentences, it was reported to the district court that Burnett was not carrying out the community service requirement of his sentences. Burnett appeared before District Judge Stephen A. Davis on February 20, 1987, and stipulated to his failure to perform the community service portion of his sentences. The defendant objected, however, to the jurisdiction of the district court and asserted that a combined sentence of incarceration and community service under § 29-2278 was invalid. The district judge nonetheless sentenced defendant to 125 days on each count, to run concurrently. The defendant appeals, asserting in his sole assignment of error that the district judge erred in resentencing the defendant.

In 1986 the Nebraska Legislature passed L.B. 528. This law has been codified in Neb. Rev. Stat. §§ 29-2277 to 29-2279 (Cum. Supp. 1986). The pertinent statute involved in this case is § 29-2278, which reads:

> An offender may be sentenced to community service (1) as an alternative to a fine, incarceration, or supervised probation, or in lieu of incarceration if he or she fails to

> pay a fine as ordered, except when the violation of a misdemeanor or felony requires mandatory incarceration or imposition of a fine, (2) as a condition of probation, or (3) in addition to any other sanction. The court shall establish the terms and conditions of community service including, but not limited to, a reasonable time limit for completion. If an offender fails to perform community service as ordered by the court, he or she may be arrested and after a hearing may be resentenced on the original charge, have probation revoked, or be found in contempt of court. No person convicted of an offense involving serious bodily injury or sexual assault shall be eligible for community service.

The State asserts that subsection (3) of the statute authorizes a judge to impose incarceration in addition to community service. We have examined the statute and reviewed the legislative history surrounding the adoption of L.B. 528 and have determined that such reasoning is misplaced.

One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give it effect. *Mitchell v. County of Douglas*, 213 Neb. 355, 329 N.W.2d 112 (1983). Also, in construing a statute, this court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). To further ascertain the intent of the Legislature, the Supreme Court may examine the legislative history and the record of floor explanations or debate of the act in question. *Spence v. Terry*, 215 Neb. 810, 340 N.W.2d 884 (1983).

The introducer's statement of intent shows that the intention of the Nebraska Legislature in enacting L.B. 528 was to develop new types of punishments because of increasing incarceration costs and disappointing recidivism rates. See Introducer's Statement of Intent, L.B. 528, Judiciary Committee, 89th Leg., 1st Sess. (Mar. 6, 1985). The floor explanation by Senator Hoagland is particularly illuminating:

> This is a simple but an important bill, ladies and gentlemen. It codifies the authority judges have to sentence individuals to community service rather than having to keep them confined in facilities. It is particularly important that Douglas and Lancaster County, which are currently undergoing considerable overcrowding, and you may have heard of representatives from those counties. Community service has been endorsed by many important organizations concerned with criminal justice. The American Bar Association, Uniform Commissioners on State Laws, League of Women Voters, are only some of the groups that have advocated community sentencing as a sentencing alternative. It can save funds for the state and for the counties. Jails are very expensive to construct and maintain. Use of community service can divert nonviolent offenders out of the jail population and relieve pressures for new construction. It is often beneficial to the offenders. Few things are more degrading and debilitating than lack of activity. Several studies have indicated that community service has a strong rehabilitative effect upon offenders who perform community service. There is a growing trend in the nation to allow it. California has more than a hundred thousand people participating in community service. And many of you, I am sure, can recall Judge Urbom's sentence a few years ago to community service in some bid rigging cases which received national attention and praise. This would authorize district judges to do that. Many of them are doing it already. I ask for the advancement of the bill. Thank you, Mr. President.

Floor Debate, 89th Leg., 2d Sess. 8951-52 (Feb. 21, 1986).

From the legislative history of § 29-2278, it is apparent that subsection (3) refers to an alternative sanction to incarceration, such as restitution. It would thwart the express purpose of § 29-2278 to allow judges to sentence a defendant to a substantial period of confinement and then require the defendant to perform community service upon release.

A sentence of incarceration in the Nebraska Penal and Correctional Complex for a term of 1 year for a Class IV felony

is clearly authorized by statute. Likewise, an alternative sentence of reasonable community service for a Class IV felony is permissible under § 29-2278. When the two sentences are combined, however, the result is an erroneous sentence which cannot stand. As this court stated in *State v. McDermott*, 200 Neb. 337, 339, 263 N.W.2d 482, 484 (1978): "Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence."

Accordingly, the community service portion of the sentences which was converted into 125 days of incarceration at resentencing must be set aside and vacated.

REVERSED AND REMANDED WITH DIRECTIONS.

THE CHICAGO LUMBER COMPANY OF OMAHA, A NEBRASKA CORPORATION, DOING BUSINESS AS FRIEND LUMBER COMPANY, FRIEND, NEBRASKA, APPELLANT, V. SCHOOL DISTRICT NO. 71 OF MILLIGAN, FILLMORE COUNTY, NEBRASKA, APPELLEE.

417 N.W.2d 757

Filed January 15, 1988. No. 85-888.

1. **Political Subdivisions Tort Claims Act: Negligence.** Regarding a tort claim for a political subdivision's negligent act or omission, the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), govern a claim and suit concerning alleged governmental negligence and provide an exclusive remedy for tort claims against a political subdivision.
2. **Political Subdivisions Tort Claims Act: Limitations of Actions.** Subject to the exception pertaining to actions by persons under a legal disability described in Neb. Rev. Stat. § 25-213 (Reissue 1985), the statute of limitations on filing a claim or suit for a political subdivision's tortious conduct is exclusively prescribed by Neb. Rev. Stat. § 23-2416 (Reissue 1983) of the Political Subdivisions Tort Claims Act.
3. **Jurisdiction: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case.

4. **Courts: Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm. A correct result will not be reversed merely because a trial court reached that correct result for an incorrect reason.
5. **Political Subdivisions Tort Claims Act: Notice.** As a condition precedent to commencement of a suit brought under the Political Subdivisions Tort Claims Act, one must timely file a proper claim with the appropriate political subdivision.
6. _____: _____. The notice required by Neb. Rev. Stat. § 23-2404 (Reissue 1983) does not have to state the indicated information, circumstances, or facts with the fullness or precision required in a pleading.
7. _____: _____. The purpose of Neb. Rev. Stat. § 23-2404 (Reissue 1983) is not to require a statement of fact to the extent that the governmental subdivision's absolute liability is verbally demonstrated in the documentary or written claim. Rather, the written claim required by § 23-2404 notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made.
8. _____: _____. The notice requirements for a claim filed pursuant to the Political Subdivisions Tort Claims Act are liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act.
9. _____: _____. Substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with Neb. Rev. Stat. § 23-2404 (Reissue 1983), when the lack of compliance has caused no prejudice to the political subdivision.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded for further proceedings.

Robert H. Berkshire, Richard N. Berkshire, and Robert E. Zielinski, for appellant.

Kelley Baker and Jerry L. Pigsley of Nelson & Harding, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

The Chicago Lumber Company of Omaha (Chicago) appeals the judgment for school district No. 71 of Milligan,

Fillmore County, Nebraska (district), in a negligence action brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). We reverse and remand for further proceedings.

During the summer of 1982, the district got in touch with Melvin Stejskal, a contractor in Milligan, concerning renovation of certain windows at the district's Milligan school. Stejskal, a carpenter for about 15 years, had an open account at Chicago's local lumberyard and contacted Harold Brown, Chicago's manager, regarding the cost of material for the district's proposed window project. Based on the information from Chicago, Stejskal submitted his project bid to the district, which accepted Stejskal's bid in late July or early August 1982.

The Nebraska Construction Lien Act, Neb. Rev. Stat. §§ 52-125 et seq. (Reissue 1984), does not apply to real estate owned by a governmental agency or political subdivision, and, hence, did not apply to the district's real estate which was the subject of the renovation project. However, regarding a contract for repairing a school district's building, structure, or improvement, Neb. Rev. Stat. § 52-118 (Reissue 1984) in part provides that the school district shall

> take from the person, persons, firm, or corporation to whom the contract is awarded a bond, in a sum not less than the contract price, with a corporate surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material and equipment rental which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract.

The district did not require that Stejskal file the bond specified in § 52-118. Without inquiry whether a contractor's bond had been filed concerning the window renovation project, Chicago supplied Stejskal with material used in the district's project.

On August 2, 1982, the district's board authorized payment of the contract price, $4,280, to Stejskal for the renovation project, although some minor work remained undone. The board directed Marshall Tonnies, school superintendent, to inspect the project and pay Stejskal when the work was

completed. After an inspection on August 20 and notwithstanding incompletion of the work, Tonnies gave Stejskal the district's check for $4,280, with Stejskal as the only named payee. According to Chicago's invoices or "tickets," the last material was delivered to Stejskal on September 7 and Stejskal completed the window project on that date or shortly thereafter. The total cost of Chicago's material delivered to Stejskal for the project was $4,005.17.

Chicago contacted Superintendent Tonnies on September 30, inquired whether Stejskal had been paid for the renovation project, and was told that the district had paid Stejskal. Subsequently, Brown visited with Superintendent Tonnies and members of the district's board in attempts to "figure a way to get [Stejskal] to pay," but Chicago received no payment on the district's renovation project.

On March 23, 1983, Superintendent Tonnies received a letter from Chicago's attorney, which was addressed to "School District # 71 of Milligan, Fillmore County, Nebraska." The attorney's letter referred to the "building materials and supplies which were provided to Stejskal Building Services in connection with the recent renovation and improvement of your school." The letter then continued:

> As you may be aware, Nebraska Revised Statutes Section 52-118 provides that all school boards within the State of Nebraska must require any contractors who perform construction work relating to the erection, furnishing or repair of any public building or other structure to take out a corporate surety bond in a sum not less than the contract price, which shall be conditioned upon the full payment of all laborers, mechanics and materialmen who become connected with the project.
>
> The Section further provides that the bond shall be filed with and approved by the school board and that no contract may be entered into until the bond has been so filed and approved.
>
> As I am sure you are aware, there was no bond in the present case, which means that my client has suffered damage as a result of the school board's failure to follow the statutes properly. We have been directed to institute a

> lawsuit against the school as a result of the failure to collect the full amount owing and will do so unless we hear from you within ten (10) days from the date of this letter.

The attorney's letter of March 23 did not specify the exact date or dates on which Chicago's material was delivered to Stejskal, although Superintendent Tonnies realized that the material indicated in the attorney's letter related to the window project, which, as far as the record discloses, was the only renovation, construction, or repair undertaken for the school in August and September of 1982. Superintendent Tonnies' capacity with the district was characterized as "the chief executive officer of the district," responsible for "financing of the school district," the "management of the personnel and the property of the school district," and "maintaining the office records of the school district," including minutes of meetings held by the district's board. The district's attorney received a letter from Chicago's attorney on August 26, 1983, and sent that correspondence to Superintendent Tonnies, who received the forwarded correspondence on August 29. This second letter specifically stated that the demand against the district was made under the Political Subdivisions Tort Claims Act.

PLEADINGS

When the district did not pay in response to Chicago's demand, Chicago filed suit on April 5, 1984. In an amended petition pursuant to the Political Subdivisions Tort Claims Act, Chicago alleged delivery of the materials to Stejskal for the construction at the district's school, the district's payment to Stejskal and Stejskal's failure to pay Chicago, the district's negligent failure to require and obtain a bond specified by § 52-118, Chicago's filing a written claim as required by the Political Subdivisions Tort Claims Act, and an elapsed 6 months without the district's payment for the material delivered to Stejskal concerning the construction project at the school.

In its answer, the district generally denied Chicago's petition, but admitted that the district did not obtain a construction bond for the window project. As a "FIRST AFFIRMATIVE DEFENSE," the district claimed that the trial court lacked subject matter jurisdiction "because [Chicago] failed to inquire of [the district] about the existence of a construction bond

before relying upon said bond." In its "SECOND AFFIRMATIVE DEFENSE," the district asserted that Chicago had failed to file its claim within the time prescribed by the Political Subdivisions Tort Claims Act. As a "THIRD AFFIRMATIVE DEFENSE," the district alleged: "This court lacks jurisdiction because [Chicago's] Petition was not filed within one year of the completion of the contract at issue, pursuant to the requirements of Nebraska law."

POLITICAL SUBDIVISIONS TORT CLAIMS ACT

As a declaration of purpose for the Political Subdivisions Tort Claims Act, § 23-2401 states:

> The Legislature hereby declares that no political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and that no suit shall be maintained against such political subdivision on any tort claim except to the extent, and only to the extent, provided by this act. The Legislature further declares that it is its intent and purpose through this enactment to provide uniform procedures for the bringing of tort claims against all political subdivisions, whether engaging in governmental or proprietary functions, and that the procedures provided by this act shall be used to the exclusion of all others.

There is no doubt that the district's board is a "governing body" within § 23-2402(2). Subsection (4) of § 23-2402 states:

> Tort claim shall mean any claim against a political subdivision for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his office or employment, under circumstances where the political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death . . . .

Section 23-2404 provides in part:

> All tort claims under this act shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision . . . . It shall be the duty of the official with whom the claim is

filed to present the claim to the governing body. All such claims shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant.

As a part of the Political Subdivisions Tort Claims Act, § 23-2416 specifies time limits for filing a claim and suit, which in pertinent part includes:

> (1) Every claim against a political subdivision permitted under this act shall be forever barred, unless within one year after such claim accrued, the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by this act shall be forever barred unless begun within two years after such claim accrued.
>
> . . . .
>
> (4) This section and section 25-213 [actions by persons under a legal disability] shall be the only statutes of limitations applicable to tort claims as defined in this act.

Section 23-2417 dictates:

> From and after January 1, 1970, the authority of any political subdivision to sue or be sued in its own name shall not be construed to authorize suits against such political subdivision on tort claims except as authorized in this act. The remedies provided by this act in such cases shall be exclusive.

BOND STATUTE

Neb. Rev. Stat. § 52-118.01 (Reissue 1984) provides that one who has furnished material in accordance with § 52-118, after nonpayment for 90 days, "shall have the right to sue on such bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit . . . ."

Neb. Rev. Stat. § 52-118.02 (Reissue 1984) contains a statute of limitation regarding an action on the construction bond required by § 52-118, namely: "Every suit instituted under the provisions of sections 52-118 to 52-118.02 shall be brought by any person entitled to the benefit of this action, but no such suit shall be commenced after the expiration of one year after the date of final settlement of the principal contract."

DISPOSITION BY TRIAL COURT

At the conclusion of the evidence, the district's counsel moved for dismissal of Chicago's action or a "directed verdict" on two bases. First, the district claimed that the 1-year statute of limitations on a bond action, prescribed by § 52-118.02, barred Chicago's action because Chicago's suit, filed in 1984, was not commenced within 1 year after August 20, 1982, the date of final settlement on the district's contract with Stejskal. Second, as a claim form, the March 23, 1983, letter from Chicago's attorney did not comply with the formal requirements of § 23-2404.

The court found that "it is without jurisdiction in this matter" and "even if it had jurisdiction the holdings in *Paxton & Vierling Iron Works v. Village of Naponee*, 107 Neb. 784 are controlling and [Chicago's] action must be dismissed." The court then dismissed Chicago's petition.

In view of the district court's reference to *Paxton & Vierling Iron Works v. Village of Naponee*, 107 Neb. 784, 186 N.W. 976 (1922), an examination of that case is helpful in considering the trial court's dismissal of Chicago's action. Paxton & Vierling supplied material to a contractor employed by the village to construct a footbridge. The village did not obtain a bond from its contractor for payment of material used in the bridge construction, notwithstanding a statute which imposed on the village board the duty to require a construction bond. When the contractor failed to pay for the bridge material, Paxton & Vierling sued the village and alleged that, as a result of the village's "failure and neglect . . . to exact a bond," *id.* at 785, 186 N.W. at 976, Paxton & Vierling sustained damages on account of the contractor's nonpayment, but did not allege that Paxton & Vierling furnished the material in reliance or belief that the village had obtained a bond from the contractor. The village demurred, claiming that Paxton & Vierling's petition failed to state a cause of action. The trial court sustained the village's demurrer and dismissed the action. In affirming judgment for the village, this court stated:

> The statute required the bond to be filed, and plaintiff knew, or by exercise of ordinary diligence could have known, that no bond had been taken and filed. Plaintiff

> was chargeable with notice that no bond had been taken, and had no right to impose liability on the village or the members of the village board. When it knew, or could by the exercise of ordinary care have known, that no bond was given, and voluntarily furnished the material, it will be presumed that it furnished the material solely upon the credit of the contractor. . . . Because there is no averment in the petition of nonpayment of the material, and because it is not alleged that plaintiff furnished the material relying upon the belief that a bond had been given and had no knowledge that no bond had been given, we hold that the petition failed to state a cause of action, and that the demurrer was properly sustained.

107 Neb. at 787-88, 186 N.W. at 977.

ASSIGNMENTS OF ERROR AND ARGUMENTS

Chicago contends that prosecution of its claim is governed by the Political Subdivisions Tort Claims Act rather than the provisions of §§ 52-118.01 and 52-118.02 concerning an action on a contractor's bond. Chicago argues that, on compliance with the provisions of the Political Subdivisions Tort Claims Act, the district court was empowered to adjudicate Chicago's claim against the district. Chicago suggests that the trial court misapplied *Paxton & Vierling Iron Works v. Village of Naponee, supra*, in disposing of Chicago's claim.

The district counters that the Political Subdivisions Tort Claims Act is inapplicable to Chicago's claim, which was not brought within the 1-year limitation prescribed by § 52-118.02 and is, therefore, barred. Also, the district, assuming for the sake of argument that the Political Subdivisions Tort Claims Act does govern prosecution of Chicago's claim, contends that Chicago did not file its claim in the form prescribed by the act and further contends that Chicago cannot recover in any event, because Chicago did not rely on a contractor's bond in supplying the material and was contributorily negligent to a degree more than slight by its failure to inquire about existence of a bond before deliveries to Stejskal.

Thus, in the case under review, the district court made no finding on the merits of Chicago's claim, but disposed of the action on the basis of "jurisdiction," which aspect of the

proceedings, as presented by the parties, is distilled into the question: If *Paxton & Vierling Iron Works v. Village of Naponee, supra*, is inapplicable in this case, did Chicago timely file a claim in compliance with the Political Subdivisions Tort Claims Act? Contributory negligence, as an affirmative defense to Chicago's claim, was not pleaded and, therefore, was not decided by the district court. "The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried." *Holden v. Urban*, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987). See, also, *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985).

APPLICABILITY OF POLITICAL SUBDIVISIONS TORT CLAIMS ACT

Sections 52-118.01 and 52-118.02 do not govern prosecution of Chicago's claim. Given the governmental duty to require and obtain a bond from a contractor (§ 52-118), § 52-118.01 refers to "the right to sue on such bond" and clearly relates to a suit based on an existing contractor's bond filed with a school district, a contract action. However, Chicago's suit is not based on an existing contractor's bond; rather, Chicago's suit is based on the absence of a bond as the result of the district's alleged negligence in failing to require and obtain a contractor's bond to protect a supplier of material for the district's window project. Concerning a "tort claim" for the negligent omission of a contractor's bond, see § 23-2402(4), the procedures provided by the Political Subdivisions Tort Claims Act "shall be used to the exclusion of all others." § 23-2401. See, also, § 23-2417 (the Political Subdivisions Tort Claims Act is the "exclusive" remedy concerning "tort claims" against political subdivisions). Consequently, Chicago's action for the district's negligence is governed by the Political Subdivisions Tort Claims Act, not by the statutes governing a contract action on a contractor's bond filed in accordance with § 52-118. Correspondingly, subject to the exception pertaining to actions by persons under a legal disability described in Neb. Rev. Stat. § 25-213 (Reissue 1985), the statute of limitations on filing a claim or suit for a political subdivision's tortious conduct is exclusively prescribed by § 23-2416 of the Political

Subdivisions Tort Claims Act.

JURISDICTION REGARDING CHICAGO'S TORT CLAIM

Jurisdiction is the inherent power or authority to decide a case. *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 340 N.W.2d 431 (1983); *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987).

In a suit to recover on a claim made under the Political Subdivisions Tort Claims Act, "Jurisdiction . . . shall be determined in the same manner as if the suits involved private individuals, except that such suits shall be heard and determined by the apppropriate [sic] court without a jury." § 23-2406. Whether a claimant may maintain an action brought under the Political Subdivisions Tort Claims Act or, ultimately, whether a claimant may prevail in such action is a matter for adjudication by a court exercising jurisdiction in accordance with the Political Subdivisions Tort Claims Act. It is beyond question that the district court had the power to determine whether Chicago was entitled to maintain its action brought under the Political Subdivisions Tort Claims Act. As a matter of law, the district court incorrectly determined that it had no jurisdiction regarding the suit brought by Chicago.

Although lack of jurisdiction was assigned by the district court as the ground or reason for the district court's dismissal of Chicago's action, notwithstanding that the district court actually had jurisdiction to decide the case, the fact remains that the district court dismissed Chicago's action. We must, therefore, determine whether the district court properly dismissed Chicago's action because the suit was barred as the result of an untimely claim. "Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm." *Sommerfeld v. City of Seward*, 221 Neb. 76, 80, 375 N.W.2d 129, 132 (1985). "A correct result will not be reversed merely because a trial court reached that correct result for an incorrect reason." *Travelers Indemnity Co. v. Heim*, 223 Neb. 75, 80, 388 N.W.2d 106, 110 (1986). See, also, *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d

366 (1987); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985).

NECESSITY AND NATURE OF NOTICE

The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision. See §§ 23-2401 and 23-2409 (conduct and claims excluded from the act). As a condition precedent to commencement of a suit brought under the Political Subdivisions Tort Claims Act, one must timely file a proper claim with the appropriate political subdivision. See, *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976).

A claim against a political subdivision must be filed within 1 year after such claim has accrued or shall be forever barred. § 23-2416(1). Chicago maintains that its claim against the district accrued when, on September 30, 1982, it discovered the district's payment to Stejskal. In that event, Chicago's claim, by its attorney's letter on March 23 or August 26, 1983, was timely made against the district. The district believes that Chicago's claim matured on August 20, 1982, when the district paid Stejskal. The district asserts that Chicago's claim, that is, the March 23, 1983, letter from Chicago's attorney, is fatally defective, because the claim does not state the exact date and the precisely specified location of the occurrence which is the basis of Chicago's claim. If Chicago's claim reflected in the letter of March 23 does not meet the requirements of the Political Subdivisions Tort Claims Act and, consequently, is actually no claim at all, then the claim indicated in the attorney's August 26 letter to the district was not timely made. However, if the March 23 letter from Chicago's attorney satisfies the formal requirements of a claim under the Political Subdivisions Tort Claims Act, then Chicago's claim was timely made, inasmuch as any of the dates for accrual of Chicago's claim, suggested by the parties, lie within the year immediately before Superintendent Tonnies' receipt of the March 23 letter. Before we answer the question whether Chicago timely made its claim against the district, there are some preliminary and more fundamental questions to be answered.

A claim must be filed with the "clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision." § 23-2404. Is Supt. Marshall Tonnies a person designated by the Political Subdivisions Tort Claims Act with whom a claim must be filed? Neither Chicago nor the district questioned the characterization of Tonnies as the district's chief executive officer "responsible for maintaining the office records of the school district," including the minutes as the district's official records reflecting action taken by the district's board at its meetings. Under the circumstances, there is no question that Superintendent Tonnies was the person charged with the responsibility of maintaining the official records of the district and, therefore, was one with whom a claim may be filed in accordance with the Political Subdivisions Tort Claims Act. See *Grams v. Independent School Dist. No. 742*, 286 Minn. 481, 176 N.W.2d 536 (1970) (filing requirement under Minnesota's governmental tort claims act satisfied by delivering notice to superintendent of the defendant school district).

The next question is: Did the attorney's letter of March 23, 1983, meet the characteristics of a "claim" under the Political Subdivisions Tort Claims Act, that is, "set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant"? See § 23-2404.

Before enactment of the Political Subdivisions Tort Claims Act in 1969, this court examined the notice requirement in a statute governing a tort claim against a municipality for liability on account of a negligently defective sidewalk. In *City of Lincoln v. Pirner*, 59 Neb. 634, 81 N.W. 846 (1900), the plaintiff's notice incorrectly designated the accident site as Block 45 instead of the correct location, Block 34, although the written claim included other specific data identifying the location of the site where the plaintiff fell through a coalhole in a city sidewalk on P Street. The statute pertaining to a claim against a city for a defective sidewalk required that the claim include "a statement giving full name and the time, place, nature, circumstance, and cause of the injury or damage complained of." Comp. Stat. ch. 13a, art. 1, § 36 (1899). In

holding that plaintiff's claim was sufficient notice to the city, this court stated:

> Although the notice was ambiguous, it conveyed to the city authorities, with reasonable definiteness, a description of the place where the accident happened, and was, therefore, sufficient. It was said, in *City of Lincoln v. O'Brien, supra*, that the statute is a harsh one and should be liberally construed by the courts. The rule of construction to be deduced from the adjudged cases is that if the description given and the inquiries suggested by it will enable the agents and servants of the city to find the place where the accident occurred, there is a substantial compliance with the law. [Citations omitted.] The Carr block, according to the evidence, is a well known building on P street in the city of Lincoln, and the coal-hole described in the notice was near the west side of it. This being so, we can not believe that any person possessed of ordinary powers of perception could have failed to locate the place of the accident, if he had made an honest effort so to do. It would be a singularly heavy-witted and purblind official who, with the plaintiff's notice in his hand, could not go out and readily find the *locus in quo*.

59 Neb. at 640, 81 N.W. at 847.

Reaching a conclusion similar to that in *City of Lincoln v. Pirner, supra*, this court, in *Ruth v. City of Omaha*, 82 Neb. 846, 849, 118 N.W. 1084, 1085-86 (1908), stated: "The statutory requirements of notice to municipalities like the one at bar should be liberally construed, to the end that persons having meritorious claims may not be cut off by technicalities as to the form of notice."

In the light of decisions antedating the Political Subdivisions Tort Claims Act, it is evident that the notice required by § 23-2404 does not have to state the indicated information, circumstances, or facts with the fullness or precision required in a pleading. See *Anderson v. City of Minneapolis*, 138 Minn. 350, 165 N.W. 134 (1917). The purpose of § 23-2404 is not to require a statement of fact to the extent that the governmental subdivision's absolute liability is verbally demonstrated in the documentary or written claim. Rather, the written claim

required by § 23-2404 notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made. *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976).

We hold, therefore, that the notice requirements for a claim filed pursuant to the Political Subdivisions Tort Claims Act are liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act. Cf. *Ruth v. City of Omaha, supra*. See *Vermeer v. Sneller*, 190 N.W.2d 389 (Iowa 1971). Therefore, substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice to a political subdivision in accordance with § 23-2404, when the lack of compliance has caused no prejudice to the political subdivision. See, *Orr v. City of Knoxville*, 346 N.W.2d 507 (Iowa 1984); *Reirdon v. Wilburton Bd. of Ed.*, 611 P.2d 239 (Okla. 1980); *Seifert v. City of Minneapolis*, 298 Minn. 35, 213 N.W.2d 605 (1973); *Galbreath v. City of Indpls.*, 253 Ind. 472, 255 N.E.2d 225 (1970); *Meredith v. City of Melvindale*, 381 Mich. 572, 165 N.W.2d 7 (1969); *Knight v. City of Los Angeles*, 26 Cal. 2d 764, 160 P.2d 779 (1945).

The attorney's letter of March 23 unequivocally referred to Stejskal as the contractor to whom Chicago had delivered materials for the "recent renovation and improvement" of the district's school at Milligan and the absence of a contractor's bond required by § 52-118. The record does not indicate that the district was involved with any contractor other than Stejskal or involved in any construction other than the window renovation at the Milligan school during August and September of 1982. The district acknowledged that Stejskal's had worked on the project, when it authorized payment for the construction and subsequently delivered its check to Stejskal on August 20, 1982. While the district suggests that Chicago's claim lacks particularity, the very acts and omission acknowledged by the

district and Superintendent Tonnies fixed and supplied any specificity of time and place regarding Chicago's claim based on the district's negligence, namely, the district's failure to obtain the statutory contractor's bond and the ensuing delivery of unpaid materials to Stejskal for the contracted window project at the school. In view of the purpose and function of the notice requirement in § 23-2404, Chicago's claim, embodied in the letter from its attorney on March 23, 1983, fulfilled the notice requirement of § 23-2404 of the Political Subdivisions Tort Claims Act and was made within 1 year after Chicago's claim had accrued. Chicago's claim was timely filed with the district, and any decision by the district court to the contrary is clearly erroneous. Also, we underscore the fact that Chicago filed its written claim against the district. Thus, we do not reach, or imply any answer to, the question whether actual knowledge of a governing body dispenses a claimant from filing a claim in compliance with the Political Subdivisions Tort Claims Act.

Concerning the district court's view that *Paxton & Vierling Iron Works v. Village of Naponee*, 107 Neb. 784, 186 N.W. 976 (1922), disposes of Chicago's claim, we have pointed out that the provisions of the Political Subdivisions Tort Claims Act apply to Chicago's negligence claim against the district. To prevail on a cause of action for negligence, a plaintiff must prove the four elements of negligence—duty, breach of duty, proximate causation, and damages. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). Although *Paxton & Vierling Iron Works v. Village of Naponee, supra*, indicates in dicta that a plaintiff must allege and, therefore, correspondingly prove that the plaintiff relied on a contractor's bond actually filed or on the belief that a contractor's bond had been filed, nonetheless, to recover under the Political Subdivisions Tort Claims Act a claimant must prove the four basic elements of negligence. See *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986).

The district court's finding that it lacked "jurisdiction" because Chicago had not timely filed its claim under the Political Subdivisions Tort Claims Act or failed to commence its action within the time prescribed by the appropriate statute of limitations is clearly erroneous. Therefore, the judgment of

the district court is reversed. Inasmuch as the district court made no finding which disposed of Chicago's claim on its merits, this matter is remanded to the district court for a disposition on the merits of Chicago's claim.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PAMELA K. LANCASTER, APPELLEE, V. LARRY L. BRENNEIS, APPELLANT.

417 N.W.2d 767

Filed January 15, 1988. No. 85-999.

1. **Paternity: Child Custody: Visitation.** In filiation proceedings, questions concerning custody and visitation of a child are resolved on the basis of the best interests of the child.
2. **Paternity: Child Support.** Child support in a filiation proceeding is initially left to the sound discretion of the trial judge.
3. **Paternity: Child Custody: Visitation: Child Support: Appeal and Error.** Concerning questions about custody and visitation of a child as well as child support in filiation proceedings, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Paternity: Names.** Under Neb. Rev. Stat. § 71-640.01(3) (Reissue 1986), a court, exercising jurisdiction in a filiation proceeding, has the discretionary power to decide whether a child's surname shall be changed from the legal surname of the child's mother to the surname of the child's father. In a filiation proceeding, a court, in deciding whether a child's surname should be changed from the mother's surname to the father's surname, must consider the best interests of the child regarding a change of name.
5. **Paternity: Names: Proof.** To obtain a change in the surname of a child involved in a filiation proceeding, the proponent of the change in surname has the burden to prove that the change in surname is in the child's best interests.

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

Paul Korslund of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellant.

Dennis A. Winkle, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Pamela K. Lancaster, formerly Pamela Zimmerman, commenced a filiation proceeding against Larry L. Brenneis, pursuant to the provisions of Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 1984). The district court for Gage County entered judgment that Brenneis is the father of Pamela's child, ordered child support and visitation by Brenneis, and denied Brenneis' request that the child's surname be changed to "Brenneis."

Pamela Zimmerman gave birth to her daughter, Heather Michele Zimmerman, on August 19, 1983, and was unmarried at the time of Heather's birth. On November 7, 1984, Pamela filed a complaint, seeking adjudication that Brenneis was the father of her child Heather and a judgment for Brenneis' payment of maternity expenses and child support pertaining to Heather. In his response to Pamela's complaint, Brenneis admitted that he was Heather's father, sought visitation rights concerning Heather, and requested that Heather's surname be changed from "Zimmerman" to "Brenneis."

Pamela and Brenneis were engaged, but their marriage plans failed. As a result of this relationship, Pamela became pregnant. Brenneis' only financial support to Pamela during her pregnancy and after Heather's birth was $200 sent anonymously to Pamela. On March 11, 1984, Pamela married Ronald G. Lancaster, with whom Pamela and Heather were living at the time of trial. Brenneis testified that, in the 2 years since Heather's birth, none of his visits with the child had lasted a day or been overnight visitation. Brenneis categorically admitted that he has "never" even held Heather. Brenneis asked the court to change Heather's surname from "Zimmerman" to "Brenneis," but, outside the admission of paternity, offered nothing to support his request for the name change. Pamela

opposed the change of Heather's surname.

Extensive evidence related to the incomes of the parties, Brenneis' property situation, expenses on account of Pamela's pregnancy with Heather, postnatal expenses, insurance coverage, and specific living expenses in raising Heather. After evidence was concluded and this matter was taken under advisement, the district court entered its judgment that Brenneis is Heather's father and ordered that Brenneis pay Pamela's maternity expenses, provide medical insurance for Heather, pay monthly child support, and have specifically scheduled visitation regarding Heather, whose custody was placed with Pamela. The district court then denied the change in Heather's surname requested by Brenneis.

Brenneis contends that the district court has ordered excessive child support, unduly restricted visitation of Heather, and improperly refused Brenneis' request for the change of Heather's surname.

In filiation proceedings, questions concerning custody and visitation of a child are resolved on the basis of the best interests of the child. See, *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981); *State ex rel. Ross v. Jacobs*, 222 Neb. 380, 383 N.W.2d 791 (1986).

Section 43-1402 in part provides: "The father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided shall be liable for its support." A request for child support in a filiation proceeding is characterized as "an equitable proceeding for the support of the child" with trial "the same as in actions formerly cognizable in equity." § 43-1406.

In proceedings to dissolve a marriage involving a question about child support, the amount of child support is initially left to the sound discretion of the trial judge. *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985). This court has considered a proceeding to dissolve a marriage as an analog in formulating some principles applicable to a filiation proceeding. See, *Cox v. Hendricks, supra; State ex rel. Ross v. Jacobs, supra.* As a result of § 43-1402, child support in a filiation proceeding is initially left to the sound discretion of the trial judge. Cf. *Riederer v. Siciunas*, 193 Neb. 580, 228 N.W.2d 283 (1975)

(construing Neb. Rev. Stat. § 13-102 (Reissue 1974), the statutory predecessor of § 43-1402). Consequently, concerning questions about custody and visitation of a child as well as child support in filiation proceedings, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. Cf. *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987).

A lengthy factual narrative is unnecessary in the present appeal. While the parties have presented evidence relative to their respective claims and positions regarding child support for and visitation of Heather, our review of the record discloses no peculiar question of fact or novel point of law establishing precedential value in this case. From our review de novo on the record in these proceedings, we find no abuse of discretion by the trial court in its order concerning child support for and Brenneis' visitation of Heather, and, therefore, we affirm the district court's judgment for child support and visitation.

Next, Brenneis contends that the district court improperly denied his request that Heather's surname be changed from "Zimmerman" to "Brenneis." While a birth certificate is the somewhat basic documentary designation of a person's surname, the record brought to this court does not contain an appropriate copy of the certificate of birth for Heather Michele Zimmerman. No one suggests that the name "Heather Michele Zimmerman" is not the name entered on the birth certificate for the child involved in these proceedings under review. Therefore, on the appellate assumption that the name "Heather Michele Zimmerman" has been entered on the child's birth certificate, we proceed to dispose of Brenneis' final assignment of error.

Although the statutes authorizing a filiation proceeding (§§ 43-1401 to 43-1418) do not contain a provision for change of a child's surname on determination of paternity, judicial power to change a child's surname in a filiation proceeding is

expressed in Neb. Rev. Stat. § 71-640.01 (Reissue 1986), which provides:

> (3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father shall be entered on the certificate in accordance with the finding of the court and the surname of the child may be entered on the certificate the same as the surname of the father;
>
> (4) In all other cases, the surname of the child shall be the legal surname of the mother.

The first part of subsection (3) of § 71-640.01 directs that, when an empowered court has determined the paternity of a child, the child's birth certificate must correspondingly reflect the name of the child's father. However, the second part or remainder of subsection (3) contains no statutory mandate for designation or specification of the surname of a child for whom paternity has been established by judicial proceedings. Rather, subsection (3) of § 71-640.01 states that the surname of a child for whom paternity has been established in a judicial proceeding "may" be entered the same as the surname of the child's father. Thus, we hold that, under § 71-640.01(3), a court, exercising jurisdiction in a filiation proceeding, has the discretionary power to decide whether a child's surname shall be changed from the legal surname of the child's mother to the surname of the child's father. In a filiation proceeding, a court, in deciding whether a child's surname should be changed from the mother's surname to the father's surname, must consider the best interests of the child regarding a change of name. *Beyah v. Shelton*, 231 Va. 432, 344 S.E.2d 909 (1986); *Daves v. Nastos*, 105 Wash. 2d 24, 711 P.2d 314 (1985); *Collinsworth v. O'Connell*, 508 So. 2d 744 (Fla. App. 1987).

Although designation of a child's surname arose out of a proceeding to dissolve a marriage, this court, in *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982), adopted the "best interests of the child" as the correct criterion or standard applicable to a parental dispute concerning the surname of a child affected by the dissolution. In *Cohee*, the court noted the provisions of § 71-640.01 (Cum. Supp. 1980), which remains unchanged in the form of § 71-640.01 (Reissue 1986). The

Cohee court recognized that designation of a child's surname was a part of the powers conferred on a court exercising "equity jurisdiction in dissolution cases." 210 Neb. at 860, 317 N.W.2d at 384. Whereas the power to designate a child's surname was an incident of equity jurisdiction recognized in *Cohee*, in the present case § 71-640.01(3) expressly authorizes a court, in its discretion, to change a child's surname during a filiation proceeding.

To obtain a change in the surname of a child involved in a filiation proceeding, the proponent of the change in surname has the burden to prove that the change in surname is in the child's best interests. See *Matter of G.L.A.*, 430 N.E.2d 433 (Ind. App. 1982). Although Brenneis requested a change in Heather's surname, he failed to adduce any evidence that a change of surname would be in Heather's best interests. Brenneis' mere paternal request does not satisfy the burden of proof required for change in the surname of a child involved in a filiation proceeding. Given only a father's request for a change in the surname of his child, we will not speculate regarding various factual situations, considerations, or circumstances which might justify changing the surname of a child involved in a filiation proceeding. Brenneis failed to meet his burden of proof regarding the change of Heather's surname, and the district court correctly denied Brenneis' request for the change of Heather's surname.

AFFIRMED.

VIOLA MEIER, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

417 N.W.2d 771

Filed January 15, 1988. No. 86-018.

1. **Administrative Law: Appeal and Error.** In an appeal from an administrative agency taken under Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984) of the Administrative Procedures Act, the district court's review is limited to determining whether the agency's action is (1) in violation of constitutional

provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other errors of law, (5) unsupported by competent, material, and substantial evidence in view of the entire record as made on review, or (6) arbitrary or capricious; however, the Nebraska Supreme Court reviews the district court's decision de novo on the record made before the agency.

2. _____: _____. A proceeding in error removes the record from an inferior to a superior tribunal in order that the latter may determine whether the judgment or other final order of the inferior tribunal is in accordance with law.
3. _____: _____. In an error proceeding both the district court and the Nebraska Supreme Court review an administrative agency's decision to determine whether the agency acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
4. _____: _____. In conducting its de novo review under the provisions of Neb. Rev. Stat. § 84-918 (Reissue 1981), the Nebraska Supreme Court is required to make independent findings of fact without reference to those made by the tribunal from which the appeal was taken.
5. **Public Assistance: Intent.** Under the language of Neb. Rev. Stat. § 68-1002 (Reissue 1986), depriving oneself of resources is not, in and of itself, the disqualifying act; disqualification results from doing so with the intention and for the purpose of becoming eligible for public assistance.
6. **Public Assistance: Presumptions: Rules of Evidence.** The regulatory presumption contained in Neb. Admin. Code tit. 469, ch. 2, § 2-009.07B4 (1985), that the gratuitous transfer of an applicant's home within 2 years before moving into a different facility is presumed to be the transfer of a resource to qualify for public assistance, does not come within the ambit of Neb. Rev. Stat. § 27-301 (Reissue 1985) of the Nebraska Evidence Rules.
7. **Public Assistance: Presumptions: Evidence: Intent.** The regulatory presumption contained in Neb. Admin. Code tit. 469, ch. 2, § 2-009.07B4 (1985) is not evidence, and merely establishes the burden of going forward with the evidence; it does no more than take the place of evidence unless and until evidence is adduced to overcome or rebut it. In other words, in the absence of any evidence on the point, § 2-009.07B4 operates to establish that an applicant's conveyance of real estate for less than market value within 2 years before moving into a different facility was made with the intention and for the purpose of qualifying for public assistance; however, once evidence to the contrary is adduced, the presumption disappears.
8. **Public Assistance: Proof.** One seeking public assistance has the burden of proving entitlement thereto.
9. **Attorney Fees: Proof.** The unsuccessful pursuit of a position by the State does not, in and of itself, establish that the position was not "substantially justified" so as to entitle the prevailing party to the award of fees and other expenses under the provisions of Neb. Rev. Stat. § 25-1803 (Reissue 1985).
10. _____: _____. The establishment of "substantial justification" for a position under the provisions of Neb. Rev. Stat. § 25-1803 (Reissue 1985) is dependent upon the circumstances of each case.
11. **Attorney Fees: Proof: Words and Phrases.** For the purposes of Neb. Rev. Stat.

§ 25-1803 (Reissue 1985), a position has substantial justification if it has a reasonable basis both in law and in fact.

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

Robert M. Spire, Attorney General, and Royce N. Harper, for appellant.

Daniel W. Ryberg, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The Nebraska Department of Social Services appeals the judgment of the district court reversing the department's determination that the applicant, Viola Meier, rendered herself ineligible for assistance to the aged because she gave away her real estate and otherwise reduced her assets with the intention and for the purpose of qualifying for public assistance. The department asserts the district court erred in finding that the department's decision was not supported by "competent, material and substantial evidence and was arbitrary and capricious." We affirm, and deny Meier's request for an attorney fee in this court.

Our first task is to settle upon the scope of our review, a matter which is controlled by the nature of the proceeding filed in the district court. It is clear that a decision of the department may be reviewed by the district court either by a proceeding in error pursuant to the provisions of Neb. Rev. Stat. §§ 25-1901 et seq. (Reissue 1985) or by an appeal pursuant to the terms of Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984), a part of what is sometimes informally called the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981 & Cum. Supp. 1984). *Downer v. Ihms*, 192 Neb. 594, 223 N.W.2d 148 (1974); § 84-917(1); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). In an appeal taken under the act, the district court's review is limited to determining whether an agency's action is (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other errors

of law, (5) unsupported by competent, material, and substantial evidence in view of the entire record as made on review, or (6) arbitrary or capricious; however, this court reviews the district court's decision de novo on the record made before the agency. *Department of Health v. Lutheran Hosp. & Homes Soc., ante* p. 116, 416 N.W.2d 222 (1987); *Zybach v. State*, 226 Neb. 396, 411 N.W.2d 627 (1987); *Haeffner v. State, supra*; § 84-917(6); § 84-918 (Reissue 1981). A proceeding in error, on the other hand, removes the record from an inferior to a superior tribunal in order that the latter may determine whether the judgment or other final order of the inferior tribunal is in accordance with law. *Hammann v. City of Omaha, ante* p. 285, 417 N.W.2d 323 (1987); *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985); *Dlouhy v. City of Fremont*, 175 Neb. 115, 120 N.W.2d 590 (1963). Thus, in an error proceeding both the district court and this court review an administrative agency's decision to determine whether the agency acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. See, *Nuzum v. Board of Ed. of Sch. Dist. of Arnold, post* p. 387, 417 N.W.2d 779 (1988); *Eshom v. Board of Ed. of Sch. Dist. No. 54, supra.*

While Meier's initial pleading in the district court is entitled "Petition in Error," she borrowed language from § 84-917(6) by alleging that the department's "decision was made upon unlawful procedures, considered evidence not before the parties during the hearing, is unsupported by competent material and substantial evidence in view of the entire record as made on review, and was arbitrary and capricious." The record establishes the department's decision was made on July 2, 1985. Meier filed her petition on July 31, 1985, and thus met the 30-day deadline within which she might appeal the department's decision under the Administrative Procedures Act, § 84-917(2), and the 1 calendar month within which she could then seek a review by a petition in error, § 25-1931. However, in order to obtain a review by proceedings in error, Meier would have had to present to the district court within that same calendar month a duly authenticated transcript containing the department's order. *Moell v. Mennonite*

Deaconess Home & Hosp., 221 Neb. 168, 375 N.W.2d 618 (1985); § 25-1931. Such a transcript was filed with the district court on August 15, 1985, more than 1 calendar month after the department's decision. Therefore, if Meier in fact intended to seek a review by a proceeding in error, she failed to perfect her intention.

On the other hand, § 84-917(4) of the act provides that a certified transcript must be filed within "fifteen days after *service* of the petition or within such further time as the court for good cause shown may allow . . . ." (Emphasis supplied.) The record does not contain the information we need to determine whether Meier met the time requirement of § 84-917(4); however, since the department raised no jurisdictional question in the district court and poses none to this court, we treat the matter as an appeal properly perfected under the provisions of the act. Thus, we review the district court's decision de novo on the record made before the department.

The relevant chronology of events begins with a letter Dr. Ronald Cooper wrote to Meier's family physician on October 4, 1983. Cooper stated therein that Meier

> most likely does suffer from a primary dementia which is most likely of the Alzheimer's type. She certainly does have some evidence of parkinsonian signs at this time, though they are mild and mainly manifest by a resting tremor of the left upper and, to a lesser extent, the right upper extremity. I do not feel that her Parkinson's disease in and of itself is causing her memory difficulties and I would not treat her at the present time in view of the fact that her signs are so minimal. . . . It does not appear that this woman has a treatable cause of her dementia. I have discussed this with both the patient and her daughter. . . .
>
> This is a 72 year old woman brought into the office today by her daughter because of memory difficulties that have been occurring probably for several years, but worse in the recent past. She seems to get somewhat confused and mixed up at times. There are no specific complaints, other than the fact that her eyes itch and burn a lot. The patient truly did not know why she was in the office today

> and denied any specific problems other than the eyes. The patient's general health apparently in the past has been excellent. . . . There has been no family history of progressive dementia.

On April 6, 1984, Meier, for a nominal consideration of $1, deeded a one-half interest in the real estate constituting her home to her daughter, Lillian Nelson, and the other half interest to her son and his wife. Another daughter in Texas was to receive a third of the value of the real estate, "about [$]13,000." At the same time, Meier executed a power of attorney, authorizing her son and Nelson to serve as Meier's attorneys in fact.

Meier appears to have functioned well until July 25, 1984, when she collapsed and was hospitalized. The hospitalization continued through August 1, 1984, when Meier was transferred to a nursing home.

The subject application for assistance was presented to the department on August 22, 1984, and initially denied by the department on August 23.

At the administrative hearing resulting in the order from which this appeal arises, Nelson testified, contrary to the statement contained in the Cooper letter, that neither she nor Meier was made aware of the diagnosis which had been made, until after Meier collapsed. A new mattress, box springs, chair, and ottoman were purchased for Meier at a cost of "[$]600 or more" a week before her collapse. After April of 1984, at least $5,000 of Meier's money was spent, including $2,000 which was placed in a burial fund a few days before she was dismissed from the hospital. Nelson further testified the real estate was transferred to her because Meier wanted to be free of the responsibilities of ownership and because she wanted someone to live with her. As Nelson was single, she agreed to move into the house and live in the basement, to which improvements were made, where she lived so she and her mother could each have some privacy. Meier did her own cooking and housekeeping. According to Nelson, no thought was given at that time to requesting or qualifying for public assistance, and no discussion had been had concerning Meier's need for future medical care. Nelson pointed out that, in the past, relatives had

provided for her great-grandmother and grandmother when they needed care, without resort to nursing homes or public assistance. Meier took care of her husband at home when he became ill.

Meier's son also testified that before July of 1984 no thought had been given to applying for "social services," and generally corroborated Nelson's testimony.

Meier's lawyer at the time the power of attorney and deed conveying the real estate were executed wrote that as he recalled the situation, the power of attorney was executed to avoid a conservatorship and the deed to avoid probate. He had no recollection regarding Meier's frame of mind concerning future care and medical costs.

Neb. Rev. Stat. § 68-1002 (Reissue 1986) reads in relevant part: "In order to qualify for assistance to the aged . . . an individual: . . . (3) Has not deprived himself directly or indirectly of any property whatsoever for the purpose of qualifying for assistance to the aged . . . ."

Neb. Admin. Code tit. 469, ch. 2, § 2-009.07B4 (1985) stipulates:

> The transfer of a home is considered gratuitous when the individual does not receive fair market value for the property. . . . The gratuitous transfer of a client's home at any time within two years before his/her moving into a different facility is presumed to be a transfer of a resource to qualify for assistance (see 469 NAC 2-009.10). . . .

Neb. Admin. Code tit. 469, ch. 2, § 2-009.10 (1985) provides:

> An individual is ineligible if s/he deprives himself/herself of resources by giving them away or by disposing of them for less than fair market value for the purpose of qualifying for assistance. . . .
>
> . . . .
>
> The worker may also allow the client to produce evidence that may indicate the resource was disposed of for reasons other than to qualify for assistance (e.g., to repay debts) and, therefore, does not affect eligibility. . . .

While in conducting our de novo review we do not ignore the findings made by the department and the fact that it saw and

heard witnesses who appeared before it, *Department of Health v. Lutheran Hosp. & Homes Soc., ante* p. 116, 416 N.W.2d 222 (1987), we are nonetheless required to make independent findings of act without reference to those made by the department. *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986).

The department found that "from January to August, 1984, almost $8,000 was withdrawn from [Meier's] checking and savings accounts . . . ." However, the record does not provide a basis for such a finding. It is true that a caseworker's memorandum to the file recites, "We also noted that in the past seven months, almost $8,000.00 (above monthly income of $337.00) has been withdrawn from the checking and savings accounts." But we are unable to place any reliance upon that document, for the record does not tell us how that determination was made nor what disposition was made of the funds. As noted earlier in this opinion, the record does establish, through Nelson's testimony, that within 3 or 4 months of the application for assistance, $5,000 of the applicant's money was spent. Once again, that proof alone does not support the department's finding, for the record does not tell us the disposition of the funds, except that $2,000 was set aside in a burial fund.

Zybach v. State, 226 Neb. 396, 411 N.W.2d 627 (1987), makes clear that under the language of § 68-1002, depriving oneself of resources is not, in and of itself, the disqualifying act; the disqualification results from doing so with the intention and for the purpose of becoming eligible for public assistance. The record does not convince us that the requisite intention existed when the money was spent.

This brings us to the matter of the gratuitous transfer of Meier's real estate, which the department found was done with the intention and for the purpose of qualifying for public assistance. In coming to that conclusion, the department placed heavy reliance upon Cooper's controverted statement that he had discussed with both Meier and Nelson the applicant's untreatable dementia. Whether the conversation took place is not controlling, for the Cooper letter also reveals that although Meier suffered from intermittent confusion and memory loss,

her general health had been excellent, and there was no family history of progressive dementia. Thus, even if Cooper advised Meier and Nelson that Meier suffered from an untreatable dementia, nothing was said which would require Meier to conclude that her condition would soon progress to the point she could no longer care for herself and would need to invade her assets to maintain herself. There had been no family history of progressive dementia to serve as a harbinger of Meier's future. In addition, the family had a history of taking care of its own without outside help. Moreover, the facts that the basement of Meier's former home was modified to provide separate living quarters for Nelson and that expenditures were made to provide for Meier's comfort in her former home strongly suggest that at all relevant times, Meier and her family thought things would continue as in the past.

The regulatory presumption contained in § 2-009.07B4 does not come within the ambit of Neb. Rev. Stat. § 27-301 (Reissue 1985) of the Nebraska Evidence Rules, which provides that, unless within some exception, a presumption imposes upon a party upon whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The regulatory presumption is not evidence, and merely establishes the burden of going forward with the evidence. It does no more than take the place of evidence unless and until evidence is adduced to overcome or rebut it. In other words, in the absence of any evidence on the point, § 2-009.07B4 operates to establish that a conveyance of real estate for less than market value made within 2 years before moving into a different facility was made with the intention and for the purpose of qualifying for public assistance. However, once evidence to the contrary is adduced, the presumption disappears. See, *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977); *First Nat. Bank in Kearney v. Bunn*, 195 Neb. 829, 241 N.W.2d 127 (1976). See, also, § 2-009.10, which itself provides for explanatory information. The question then becomes whether the evidence received on the point satisfies an applicant's burden of proving entitlement to public assistance. *Dobrovolny v. Dunning*, 221 Neb. 67, 375 N.W.2d 123 (1985).

We conclude that Meier has met that burden. The evidence

preponderates in favor of a finding that she conveyed her real estate not to become eligible for public assistance but to avoid probate. Accordingly, we affirm the decision of the district court.

Meier asks that we award her an attorney fee under the provisions of Neb. Rev. Stat. § 25-1803 (Reissue 1985), which provides, inter alia, that the court having jurisdiction of "an action for judicial review brought against the state pursuant to sections 84-917 to 84-919 shall award fees and other expenses" to the nonstate prevailing party, unless the court finds "that the position of the state was substantially justified."

The mere fact that the State has not been successful in this court does not mean its position was not "substantially justified." See *Broad Ave. Laundry and Tailoring v. United States*, 693 F.2d 1387 (Fed. Cir. 1982), which interprets a like phrase under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982). The existence of substantial justification depends upon the circumstances of each case. See *Lothspeich v. Sam Fong*, 6 Haw. App. ____, 711 P.2d 1310 (1985), which interprets a like phrase under rule imposing discovery sanctions. Such justification exists where the position has a reasonable basis both in law and in fact. See *Timms v. United States*, 742 F.2d 489 (9th Cir. 1984), which also interprets a like phrase under the Equal Access to Justice Act.

While we have concluded that the evidence preponderates in favor of Meier, we cannot say there is little or no evidence in support of the State's position and, thus, that there exists no reasonable factual basis therefor. See *Hornal v. Schweiker*, 551 F. Supp. 612 (M.D. Tenn. 1982), which interprets the Equal Access to Justice Act. Since the matter of Meier's disqualification under § 68-1002 depends upon an evaluation of the evidence, neither can we say there was no reasonable basis in law for the State's position. Accordingly, we deny Meier's request for an attorney fee.

AFFIRMED.

CAPORALE, J., dissenting.

I agree with the majority's legal analyses in every respect; however, I evaluate the evidence differently and must therefore respectfully dissent.

While I agree that the record is far too sketchy to conclude that $8,000 of the applicant Viola Meier's money disappeared in the 7 months preceding the application, there is no doubt that $3,000 is unaccounted for. Inasmuch as Meier has the burden of proving her entitlement to assistance, *Dobrovolny v. Dunning*, 221 Neb. 67, 375 N.W.2d 123 (1985), it was incumbent upon her to explain what she had done with that money; she did not.

Because the Department of Social Services is itself a party to this proceeding, I do not place much reliance on the fact that it chose not to believe Lillian Nelson's denial of Dr. Ronald Cooper's statement that he told Meier and Nelson that Meier suffered from an incurable dementia. I do, however, place great credence in that statement. Cooper had no interest in the outcome and had no reason to intentionally say he did something he did not in fact do. Moreover, Meier did not call him to testify that he was or might be mistaken in that regard. One would expect that if Cooper would have so testified, he would have been called as a witness. *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981).

If the true purpose of conveying the real estate were to avoid probate, why was it not placed in trust for the use and benefit of Meier during her life with the power of sale in the event she required funds for her care, the remainder, if any, to be distributed to her children upon her death? If there in fact were no concern for Meier's future condition, why was it thought that a conservatorship might be needed?

Irrespective of the past history of caring for relatives, the evidence convinces me that in this instance the applicant deprived herself of assets with the intention and for the purpose of qualifying for public assistance, to thereby enrich her children at the expense of the taxpayers.

Coming to that conclusion does not mean, however, that the decision of the department was entirely correct. Neb. Admin. Code tit. 469, ch. 2, § 2-009.10 (1985) provides in part:

> The worker determines the period of ineligibility based upon the period of time the countable value of the resource disposed of might reasonably be expected to meet the need of the client. The worker may consider the actual need of the client at the time of disposal in determining the

period of ineligibility. The period of ineligibility begins with the date of the resource disposal. In determining the period of ineligibility the worker shall consider any available income.

If the countable value disposed of is $12,000 or less, the period of ineligibility may not exceed 24 months. If the countable value disposed of exceeds $12,000, the period of ineligibility may be longer than 24 months. In either case, the period of ineligibility must bear a reasonable relationship to the amount disposed of and the client's need.

The department should therefore have determined the period of Meier's ineligibility. Accordingly, I would reverse the decision of the district court and direct that the cause be remanded to the department for determination of the period of Meier's ineligibility in accordance with this dissenting opinion. Neb. Rev. Stat. § 84-917(6) (Cum. Supp. 1984).

HERSHEL NUZUM, APPELLEE, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF ARNOLD, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

417 N.W.2d 779

Filed January 15, 1988. No. 86-053.

1. **Schools and School Districts: Teacher Contracts.** The tender of a resignation by a teacher or administrator, being nothing more than an offer to terminate the contract of employment, may be withdrawn before acceptance.
2. _____: _____. A resignation tendered by a teacher or administrator to his or her superintendent is subject to withdrawal until accepted by the board of education with which the contract of employment exists.
3. _____: _____. Neb. Rev. Stat. § 79-12,111 (Cum. Supp. 1984) applies to a principal employed as a probationary certificated employee.
4. **Statutes: Legislature: Intent.** In determining legislative intent it is necessary to examine the statute as a whole, in light of its objectives and purposes.

5. **Appeal and Error.** In an error proceeding both the district court and the Nebraska Supreme Court review the decision of the tribunal from which the proceeding is taken to determine whether the tribunal acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
6. **Evidence: Appeal and Error.** Evidence is sufficient as a matter of law if the tribunal making the decision could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed.

Philip M. Martin, Jr., of Paine, Huston, Higgins & Martin, for appellant.

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

Neal E. Stenberg, for amicus curiae Nebraska Association of School Boards.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Defendant in error, Board of Education of the School District of Arnold, appeals the judgment of the district court reversing the board's decision not to renew its probationary contract of employment with plaintiff in error, Hershel Nuzum. The board's five assignments of error present two issues: (1) whether Nuzum resigned his position and, if not, (2) whether the board's decision was reached in accordance with law. We reverse the judgment of the district court.

The state issued a "Nebraska Teaching Certificate," attesting that Nuzum met the requirements for an "Administrative & Supervisory Certificate" and was prepared to serve as a principal and to teach history and physical education in all districts at grade levels 7 through 12. Nuzum was first hired by the board at the beginning of the 1983-84 school year as a high school principal with some teaching duties.

Nuzum completed his first year of service with no significant complaints from the board or Supt. Robert Reed. Indeed, a

written evaluation form submitted by Reed after the first year of Nuzum's employment rated the latter's performance as outstanding in 3, good in 13, and satisfactory in 4 of the 20 items considered; no item of performance was rated as being marginal or unsatisfactory.

Nonetheless, it became apparent to Reed by at least the beginning of Nuzum's second semester of his second year of employment that Nuzum did not work well with some of the high school teachers on the staff. According to Reed, the problem was the topic of "ongoing evaluation" because Reed wanted Nuzum to "[b]e more firm" and "call those individuals and talk to them," but so far as Reed knew, this had not been done. It was also Reed's judgment that Nuzum did not properly control teacher meetings. However, during the hearing before the board, when asked, "And, during the course of the year, did you discuss the specific things, what you are saying, you know, this a, b, c and d are things that I think are deficient and you should work toward improving those things I guess is what I'm saying —," Reed interrupted and replied, "No, I felt that when teachers should make comments about Mr. Nuzum, Mr. Nuzum should confront those people about the comments, and clarify them. . . . I felt that he should stand up to them."

Nuzum testified that although he received comments and suggestions made by Reed from time to time, he was given little verbal notice concerning any performance deficiencies. Nuzum was unaware there were problems of sufficient severity as to warrant his dismissal until March of 1985 when, after a meeting of the board, Reed told Nuzum that his contract would most likely not be renewed and it would be best if he resigned. Reed then submitted another written evaluation on April 10, 1985, for the 1984-85 school year, in which he states he felt Nuzum took attendance and performed hall duty and class assignments "relatively well," but felt that "[i]n the area of working with teachers" Nuzum "lacks confidence" and "is easily intimidated by certain individuals when they don't agree with him." According to Reed, he had instructed Nuzum to become "more firm in his association with these teachers." Reed then describes Nuzum as "a fine gentlemen [sic]" but opines that if Nuzum "is to become successful as a Principal he needs to build confidence

in himself" and "work hard in building confidence between himself and the faculty he works with."

Nuzum tendered his resignation in a March 15, 1985, letter submitted to Reed. However, on March 27 and again on April 3, Nuzum wrote letters to both Reed and the board in which he withdrew his tendered resignation. The board met on April 8 and adopted a resolution reciting that the resignation Nuzum had tendered became effective when it was received by Reed, that the board had placed an advertisement seeking a replacement for Nuzum, that the resignation was accepted by the board, and that Nuzum's effort to rescind his earlier resignation be denied.

Thereafter, on April 12, 1985, the superintendent wrote a letter advising Nuzum that "if necessary," the board would again consider the nonrenewal of Nuzum's "teaching contract for the ensuing school year." Pursuant to Nuzum's request, the board then conducted a hearing under the provisions of Neb. Rev. Stat. §§ 79-12,107 et seq. (Cum. Supp. 1984).

At that hearing the board's attorney stated that the matter of Nuzum's resignation "would not be even discussed, that we would instead of looking at it as a resignation and [rescission] to go ahead with the hearing, as if the resignation dispute had never taken place." Thus, there is considerable question as to whether the board waived any right it might otherwise have had to rely on Nuzum's letter of resignation. However, because of the analysis which follows, we find it unnecessary to resolve that question.

In determining whether Nuzum effectively resigned, it must be remembered that Neb. Rev. Stat. § 79-1249 (Reissue 1981) reposes in the board, not in a superintendent, the power to contract with teachers and administrators.

It has been said that the tender of a resignation by a teacher, being nothing more than an offer to terminate the contract of employment, may be withdrawn before acceptance. *Cal. Teachers v. Board of Educ. of Paramount*, 163 Cal. App. 3d 808, 209 Cal. Rptr. 655 (1985); *Shade v. Board of Trustees*, 21 Cal. App. 2d 725, 70 P.2d 490 (1937). *Allen v. Lankford*, 170 Ga. App. 605, 317 S.E.2d 645 (1984), held that a resignation tendered by a teacher to her superintendent was subject to

withdrawal until accepted by the board of education with which her contract existed. In *Hart v. School Bd. of Wakulla County*, 340 So. 2d 121 (Fla. App. 1976), a teacher was asked to submit letters of resignation with differing effective dates, but was told that if his performance improved, the letters would be destroyed. The teacher then sought to withdraw the letters before a meeting of the school board, which was scheduled prior to the effective date of either document. The court stated that the teacher's contract was with the school board, not with the superintendent, and, thus, he could withdraw the letters until such time as the board accepted the resignation tendered therein.

We find the foregoing decisions persuasive and conclude that a resignation tendered by a teacher or administrator is subject to being withdrawn until accepted by the board with which the contract of employment exists.

The board argues, however, that it accepted or otherwise relied on Nuzum's letter of resignation to its detriment by placing an advertisement for his replacement. We agree there may be circumstances under which the actions of a board of education taken in reliance upon a tendered resignation may estop a withdrawal of the tender notwithstanding the fact that there was no formal acceptance of the resignation. For example, see *Braught v. Board of Education*, 136 Ill. App. 3d 486, 483 N.E.2d 623 (1985), which prevented withdrawal of a tendered resignation before the school board met because the board had already hired a replacement. However, the case before us does not present such a situation. Not only does the record not tell us whether the advertisement was placed before or after Nuzum withdrew his tendered resignation, but the mere placing of an advertisement is not an action, in and of itself, which precludes the withdrawal of an unaccepted tender of resignation.

Having thus resolved the first issue adversely to the board, we move on to consider the second issue, whether the board reached its decision not to renew Nuzum's contract in accordance with applicable law.

Section 79-12,111 provides in relevant part as follows:

(1) The contract of a probationary certificated

employee shall be deemed renewed and remain in full force and effect unless amended or not renewed in accordance with the provisions of sections 79-12,107 to 79-12,121.

(2) It shall be the purpose of the probationary period to allow the employer an opportunity to evaluate, assess, and assist the employee's professional skills and work performance prior to the employee obtaining permanent status.

All probationary certificated employees employed by Class I, II, III, and VI school districts shall, during each year of probationary employment, be evaluated at least once each semester in accordance with the procedures outlined below:

The probationary employee shall have been observed and evaluation shall have been based upon actual classroom observations for an entire instructional period. Should deficiencies be noted in the work performance of any probationary employee, the evaluator shall provide the teacher or administrator at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and follow up evaluations and assistance when deficiencies remain.

. . . .

(3) In the event that the school board or superintendent or superintendent's designee should determine that it is appropriate to consider whether the contract of a probationary certificated employee or the superintendent should be amended or not renewed for the next school year, such certificated employee shall be given written notice that the school board will consider the amendment or nonrenewal of such certificated employee's contract for the ensuing school year. Upon request of the certificated employee, notice shall be provided which shall contain the written reasons for such proposed amendment or nonrenewal and shall be sufficiently specific so as to provide such employee the opportunity to prepare a response and the reasons set forth in the notice shall be

employment related.

(4) The school board may elect to amend or not renew the contract of a probationary certificated employee for any reason it deems sufficient if such nonrenewal shall not be for constitutionally impermissible reasons and such nonrenewal shall be in accordance with the provisions of sections 79-12,107 to 79-12,121.

By its own terms, the foregoing statute applies to "probationary certificated employees" employed by Class I, II, III, and VI school districts. While we cannot find the class of the school district involved in the record, the board does not claim that the statute is inapplicable because the district is of an exempted class or that the statute suffers from any equal protection or special legislation infirmity, if such it does. Thus, the question is whether Nuzum, as a principal, is within the ambit of the statute.

Section 79-12,107 defines a "certificated" employee as meaning and including all nonsubstitute teachers and administrators, as defined in Neb. Rev. Stat. § 79-101 (Cum. Supp. 1984), who are "employed four-fifths time or more by any class of school district . . . ." No claim is made that Nuzum is employed less than four-fifths of the time. An administrator is defined by § 79-101 as "any certified employee such as superintendent, assistant superintendent, *principal*, assistant principal . . . who does not have as a primary duty the instruction of pupils in the public schools . . . ." (Emphasis supplied.) Section 79-12,107 defines probationary certificated employee as "a teacher or administrator who has served under a contract with the school district for less than three successive school years in any school district . . . ." As noted earlier, Nuzum served the district less than 3 successive school years. Thus, up to this point, the language of § 79-12,111 brings Nuzum within its purview.

However, a difficulty is presented by the requirement that each semester the probationary employee "shall have been observed and evaluation shall have been based upon actual classroom observations for an entire instructional period." While it is true that Nuzum did some teaching, instruction was not his primary responsibility, and the claimed inadequacy of

performance relates not to his instructional abilities but, rather, to his ability to function as a principal. Therefore, we are in effect concerned with determining whether a nonteaching principal comes within the provisions of § 79-12,111.

It is suggested that the statute does not apply to a principal because, as an administrator, a principal cannot be observed for an entire instructional period, and, thus, no evaluation can be based upon such observations. The suggestion is disingenuous, for it overlooks our duty to determine the legislative intent from the statute as a whole, in light of its objectives and purposes. *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985); *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). It is clear from § 79-12,111 as a whole, without the need to resort to other sources, that its purpose is to compel school system managers to engage in a specified process of evaluating all probationary certified employees, identify such skill and performance areas in which the employee needs to improve, provide suggestions for and assistance in making those improvements, and eliminate from the system those who cannot become competent. There is nothing in § 79-12,111 which exempts probationary principals from that process. In point of fact, the language of the statute specifies the evaluation provide "the . . . *administrator* at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and follow up evaluations and assistance when deficiencies remain." (Emphasis supplied.) Thus, the import of the language requiring classroom evaluation for an entire instructional period is only to assure that a probationary *teacher* not be evaluated on the basis of observations conducted during a unit of time less than a full instructional period per semester. Consequently, our inquiry becomes a matter of determining whether the board, through its superintendent, carried out the duties imposed upon it by the provisions of § 79-12,111.

As this is a proceeding in error, the task of the district court was, as is ours, to determine whether the board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *Meier v. State, ante* p. 376, 417 N.W.2d 771 (1988); *Eshom v. Board of Ed. of Sch. Dist.*

No. 54, 219 Neb. 467, 364 N.W.2d 7 (1985). Section 79-12,111 and the statutes referred to therein confer upon the board the power to elect not to renew a probationary certified employee's contract. Thus, the board acted within its jurisdiction. The only question remaining to be decided, therefore, is whether the evidence is sufficient as a matter of law to support its decision. The evidence is sufficient as a matter of law if the board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Eshom v. Board of Ed. of Sch. Dist. No. 54, supra.*

It is clear that Reed provided Nuzum with but two written evaluations, the last of which was not written until after Nuzum had been asked to resign. Although writing certainly facilitates proof, § 79-12,111 does not require that the evaluations be written. What is required is that there be an evaluation at least once each semester. Reed's testimony that there were ongoing evaluations is sufficient to meet that statutory requirement, at least where, as is the situation in the present case, there is no claim that they were less frequent than that. Neither does § 79-12,111 require that the list of deficiencies be in writing. Reed's testimony that the problem was the subject of ongoing evaluations satisfies as well the requirement that Nuzum be made aware of his deficiencies. The statement in Reed's April evaluation that he told Nuzum he needed to become firmer in his associations with his teachers satisfies the request that assistance be given in overcoming the deficiency. Nuzum does not deny that he was told of the problem or deficiency or that he was told he needed to become firmer; he merely explains he did not understand the problem was severe enough to warrant his dismissal. Section 79-12,111 does not require that a probationary certified employee be told specifically that if the deficiency complained of is not removed, dismissal will follow. Perhaps Reed was not himself as firm as others would be or as might be desirable, but one sufficiently educated to hold a teaching certificate, such as Nuzum, should reasonably expect that the failure to remove a deficiency will result in the termination of employment; that, after all, is the very purpose of probationary employment.

The evidence is sufficient to establish that, through its

superintendent, the board met the conditions imposed by § 79-12,111 upon its right to refuse to renew Nuzum's contract. Accordingly, the judgment of the district court must be reversed.

REVERSED.

WHITE, J., dissenting.

I agree with the majority that a nonteaching principal comes within the provisions of Neb. Rev. Stat. § 79-12,111 (Cum. Supp. 1984). However, the majority's conclusion that the observation language applies only to teachers and not to administrators, I believe, contravenes the legislative intent behind § 79-12,111 to provide for a systematic evaluation procedure. The majority's interpretation suggests that there are no guidelines whatsoever for the method by which administrators are to be evaluated. In this case the "ongoing evaluations" were held to be sufficient, and yet there was no indication in the record as to the time, place, and manner in which these evaluations took place or whether Nuzum was even aware that he was being evaluated. At the very least, administrators should be evaluated for a period of time equivalent to an instructional period and the administrator should be aware, as are teachers, that the observation is taking place. The list of deficiencies and suggestions for improvement should be a direct result of this observational period so that if there is a deficiency the administrator is aware that failure to correct it could warrant dismissal. For these reasons I respectfully dissent.

GRANT, J., dissenting.

I join in the dissent of Judge White. I write to add that I believe that, pursuant to Neb. Rev. Stat. § 79-12,111(2) (Cum. Supp. 1984), a written "list of deficiencies" and of "suggestions for improvement" must be furnished to the probationary administrator. Appellant began to comply with that sort of a requirement. The record shows that a printed form, headed "Principal Evaluation," listing 20 categories and providing for 5 rating standards (from "outstanding" to "unsatisfactory" in each category), was filled out by the superintendent and given to appellee after the 1983-84 school term. The form was not used again. The next "evaluation" was the superintendent's

letter dated April 10, 1985, in four general, short paragraphs, including one paragraph, "It is also Mr. Nuzum's responsibility to work in the curriculum area. It is felt by the teachers that he hasn't done this." What the teachers feel does not constitute an evaluation by the superintendent.

Even if a "list" need not be written, I believe any probationary employee is, under the statute, entitled to "assistance in overcoming the deficiencies" noted. No assistance was given or offered to appellee by the superintendent or the board.

In my judgment, the record does not show that appellant complied with the requirements of § 79-12,111(2). I would affirm.

STATE OF NEBRASKA, APPELLEE, V. LARRY PRIBIL, APPELLANT.

417 N.W.2d 786

Filed January 15, 1988. No. 87-070.

1. **Postconviction: Appeal and Error.** In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless clearly erroneous.
2. **Postconviction: Proof.** As a general principle, one seeking postconviction relief bears the burden of establishing the basis for such relief.
3. **Postconviction.** When the motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required. However, a court may entertain and determine such motion whether or not a hearing is held.
4. _____. A motion for postconviction relief cannot be used as a substitute for an appeal or to secure further review of issues already litigated.
5. **Jury Instructions: Lesser-Included Offenses: Indictments and Informations.** A trial judge may not instruct on lesser-included offenses *unless* the language of the charging document be such as to give the defendant notice that he could at the same time face the lesser-included offense charge.
6. **Trial: Effectiveness of Counsel: Witnesses.** A failure of defense counsel to call a witness which is part of trial strategy, even though such strategy proved ineffective, will not sustain a finding of ineffectiveness of counsel.

7. **Trial: Evidence: Appeal and Error.** Even though a trial error exists, the evidence of guilt may be so overwhelming as to result in no prejudice.
8. **Postconviction: Effectiveness of Counsel.** In seeking postconviction relief, the defendant must show that there is a reasonable probability that but for the attorney's error the result would have been different.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

HASTINGS, C.J., WHITE, and GRANT, JJ., and CORRIGAN, D.J., and COLWELL, D.J., Retired.

HASTINGS, C.J.

This is an appeal from a denial of postconviction relief by the district court, pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Assigned as error is the failure of the trial court to grant an evidentiary hearing and the dismissing of the defendant's motion for postconviction relief. We affirm.

Defendant was convicted of the crime of attempt to commit an assault in the first degree, Neb. Rev. Stat. § 28-201 (Reissue 1985), as a lesser-included crime of the charged offense of assault in the first degree, Neb. Rev. Stat. § 28-308 (Reissue 1985), as disclosed in *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). In that case, we held specifically that a trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the principal crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge, and disapproved language to the contrary contained in *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906).

In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless clearly erroneous. *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987). As a general principle, one seeking postconviction relief bears the burden of establishing the basis for such relief. *State v. Tully*, 226 Neb. 651, 413 N.W.2d 910 (1987).

In denying the request to hold an evidentiary hearing, the court stated that the matters raised in defendant's motion were the same questions raised on direct appeal to this court, all of which were decided adversely to the defendant, and the trial court further found that the files and records showed to its satisfaction that the defendant was not entitled to any relief. When the motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required. *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987). Section 29-3001 regarding postconviction motions also allows for determination without a hearing: "A court may entertain and determine such motion . . . whether or not a hearing is held."

Defendant's motion for postconviction relief stated in substance that (1) the offense of assault in the first degree was submitted to the jury when there was no evidence to sustain it; (2) no definition of "substantial risk of" or "protracted loss or impairment of [bodily] function" was given to the jury; (3) the information failed to give the defendant adequate notice that the State intended to prosecute him for two lesser-included offenses; and (4) the trial court gave the jury the two lesser-included offense instructions without giving the defendant's counsel an opportunity to defend against those charges.

Reference to our opinion in *State v. Pribil, supra*, indicates that the two issues raised on direct appeal were:

> (1) whether there was sufficient evidence of serious bodily injury to instruct the jury on first degree assault; and (2) whether it was proper for the district court to instruct the jury on the lesser-included offense of attempted first degree assault and third degree assault when the defendant had objected to the giving of those instructions.

Id. at 30, 395 N.W.2d at 546.

In the trial court, in the original proceedings, the jury was given the statutory description of "serious bodily injury," which includes the complained-of language "substantial risk of" or "protracted loss or impairment of [bodily] function," as contained in Neb. Rev. Stat. § 28-109(20) (Reissue 1985). We believe the language is self-explanatory. In any event, no

request for a more detailed definition was tendered to the court. Additionally, we determined that "[c]learly, from a description of the nature and extent of the injuries inflicted, there was presented to the jury a fact question on that issue [serious bodily injury]." *State v. Pribil*, 224 Neb. 28, 31, 395 N.W.2d 543, 546 (1986). A motion for postconviction relief cannot be used as a substitute for an appeal or to secure further review of issues already litigated. *State v. Rubek, supra.*

As to the claim that the information failed to give the defendant adequate notice of the State's intention to prosecute defendant for two lesser-included offenses, this was one of the two principal issues raised at the original trial, as set forth in *Pribil, supra*. We quoted with approval from *People v Chamblis*, 395 Mich. 408, 236 N.W.2d 473 (1975), that a trial judge may not instruct on lesser-included offenses " '*unless* the language of the charging document "be such as to give the defendant notice that he could at the same time face the lesser included offense charge". . . .' " (Emphasis supplied.) *State v. Pribil, supra* at 35, 395 N.W.2d at 549. We went on to hold in *Pribil, supra*, that it was not error for the trial court to instruct on the lesser-included offenses, over defendant's objection, which offenses were supported by the evidence and the pleadings. The issue of notice cannot again be raised in postconviction proceedings.

Although not specifically assigned as error, defendant seems to argue, under the general proposition that the trial court erred in dismissing his motion for postconviction relief, that his trial counsel was prevented from rendering effective assistance of counsel. Quoting from defendant's brief:

> And even if the law of the State of Nebraska permitted the court to give a lesser included offense over the defendant's objections, it is certain that the defendant's [trial] counsel was justified in believing that it did not. Effective assistance of counsel implies a time to prepare and a time to confer with the client [citations omitted]. The conference on instructions is late, very late, far too late to do either of those in any meaningful fashion.

Brief for Appellant at 15-16.

At the close of the State's case, discussion was had between

the court and counsel as to whether a lesser-included offense instruction would be given. That was around midmorning on October 31, 1985. Following that conference, defendant put on his case and rested, after which a recess was declared at 10:46 a.m., until 1:52 p.m. It was at the instruction conference held that afternoon that the court declared its intention to give the lesser-included offense instructions. Although defense counsel objected, he did not ask for leave to withdraw his rest and adduce further evidence consistent with a defense to attempted assault, which only would have required the defendant himself to testify that no assault occurred. This would not have prejudiced his claimed defense that the victim had not suffered "serious bodily injury."

If the failure to have the defendant testify was a part of trial strategy, the fact that such strategy proved unsuccessful would not sustain a finding of ineffectiveness of counsel. *State v. Fries*, 224 Neb. 482, 398 N.W.2d 702 (1987). Furthermore, the evidence of guilt in this case was so overwhelming as to result in no prejudice. See *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987).

In seeking postconviction relief, the defendant must show that there is a reasonable probability that but for the attorney's error the result would have been different. *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987). Even assuming counsel erred or was prevented by the court from providing effective assistance, neither of which we find, defendant has fallen far short of establishing a reasonable probability that but for either situation, the result would have been different.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY A. KEITHLEY, APPELLANT.

418 N.W.2d 212

Filed January 15, 1988. No. 87-078.

1. **Criminal Law: Rules of Evidence: Witnesses.** Changes in the rules of evidence are not ex post facto laws where the alterations do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses.
2. **Criminal Law: Rules of Evidence: Witnesses: Impeachment: Extrajudicial Statements.** The rule allowing a party to impeach his or her own witness may not be used as an artifice by which inadmissible matter may be revealed to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury a favorable extrajudicial statement previously made by the witness.
3. **Trial: Waiver.** Failure to assert a timely objection at the time of trial constitutes a waiver of the objection.
4. **Homicide: Words and Phrases.** Malice, in the context of second degree murder, denotes a condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse and is any willful or corrupt intention of the mind.
5. **Homicide: Evidence: Proof.** Malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.

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

James Martin Davis of Dolan & Davis, for appellant.

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

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and ROWLANDS, D.J., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The defendant was convicted of second degree murder in the stabbing death of William Weiner in 1959 and was sentenced to imprisonment for 20 years. The defendant has appealed and contends that the trial court erred in allowing the defendant's wife to testify against him and as to privileged communications between them, in allowing the State to call and examine two witnesses solely for the purpose of impeachment, and in that

the evidence is insufficient to support the verdict.

The record shows that at approximately 3 p.m. on December 24, 1959, officers of the Omaha Police Department were called to a pawnshop located at 503 North 16th Street in Omaha. Upon arriving at the scene they discovered the owner of the pawnshop, William Weiner, lying on the floor alongside a display counter. Police observed blood on Weiner's face and on the floor of the shop. Weiner was taken to the hospital, where he died at 5:50 p.m. Prior to his death Weiner described his assailant, to an Omaha police officer, as being a white male in his twenties, approximately 6 feet tall and 155 pounds, with brown hair. An autopsy later showed that Weiner died of stab wounds to the chest and abdomen and severe injury to the head.

On February 25, 1971, Sandra Keithley, wife of the defendant, contacted the Omaha Police Department regarding Weiner's death and spoke with Lt. Foster Burchard. Burchard testified that during their conversation on February 25, Mrs. Keithley told him that the defendant had a gun which he had told her he had taken from Weiner the day Weiner was killed. She described it as a short-barrel, six-shot revolver, possibly a .38 caliber. Following this conversation Burchard checked the file on the Weiner homicide and found that Weiner had a .32-caliber Hopkins and Allen revolver registered to him and that the detectives at the time of the investigation had noted that the gun was not present at the pawnshop or on the body. Burchard also located the registration card which showed the serial number of the revolver to be No. 6698. The following day Mrs. Keithley called back, and met with Burchard in person that evening. Burchard testified that she repeated to him the story she had given during the first phone call, namely, that in December 1959, the defendant, who was not her husband at the time, picked her up at her parents' home in Avoca, Iowa; that the defendant was wearing a T-shirt, black leather jacket, and blue jeans, which had blood on them; and that she washed the blood out. She further told Burchard that the defendant told her that he had stopped by Weiner's pawnshop to get her a roller skate case. He told her that he was looking at some knives when he got into a dispute with the pawnbroker, hit him in the head with some object, and ran out the door.

Burchard next met with Mrs. Keithley at the police station on March 1, 1971. At that time she gave a formal statement in which she gave the same version of the facts as previously told to Burchard. This statement was not allowed into evidence. Burchard obtained a search warrant for the gun described by Mrs. Keithley, which he retrieved from the Keithley home. The gun was a .32-caliber Hopkins and Allen, serial No. 6698, which was the same gun registered to the deceased. On the same day Mrs. Keithley drove with Burchard to the location of Weiner's pawnshop in 1959. She pointed to the building and said the defendant had showed her the building shortly after December 1959.

Mrs. Keithley's next statement to the police was on January 29, 1986, the contents of which are not apparent from the record. This statement was not offered into evidence.

On February 10, 1986, an information was filed charging the defendant with second degree murder in connection with Weiner's death.

Mrs. Keithley testified at the preliminary hearing on February 7, 1986, and again implicated her husband in the murder. This statement was not admitted into evidence. Shortly before trial Mrs. Keithley signed a statement reflecting a conversation with defense counsel in which she told defense counsel that her previous statements had been false. The prosecution was then notified that she had repudiated her earlier statements. This statement was not admitted into evidence. All of the above-mentioned statements were used for impeachment purposes during the trial.

After trial to a jury the defendant was found guilty of second degree murder.

The defendant's first assignment of error alleges that the district court erred in allowing Mrs. Keithley to testify about privileged communications between herself and the defendant and that the court erred in allowing Mrs. Keithley to testify at all. The statutes concerning the testimony of a spouse contain two separate provisions. Neb. Rev. Stat. § 27-505(1) (Reissue 1985) governs privileged communications between spouses and provides in pertinent part:

> Neither husband nor wife can be examined in any case as

> to any confidential communication made by one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication while the marriage subsisted except as otherwise provided by law.

The defendant argues that the privilege statute in effect in 1959 should govern the admissibility of statements made by him to Mrs. Keithley on the day Weiner was killed. The statute in effect in 1959 provided:

> Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted except as otherwise provided by law.

Neb. Rev. Stat. § 25-1204 (Reissue 1956).

Under either statute the defendant's contention that the conversation of December 24, 1959, was privileged must fail. The defendant and Mrs. Keithley were not married on that date. That they later married is irrelevant.

The defendant also argues that Mrs. Keithley should not have been permitted to testify at all. The statute applicable in 1959 and the statute applicable today contain different provisions. In 1959 the statute provided in pertinent part: "A husband or wife can in no case be a witness against the other, except in a criminal proceeding where the crime charged is rape, adultery, bigamy, incest, or any crime committed by the one against the other . . . ." Neb. Rev. Stat. § 25-1203 (Reissue 1956). This statute was repealed in 1975.

Section 27-505(3)(a), as amended in 1984, now permits a spouse to testify against the other spouse in any criminal case where the crime charged is a crime of violence. Thus, prior to 1984, Mrs. Keithley could not testify against her husband where the crime charged was murder. The defendant argues that as to him the 1984 amendment is an ex post facto law.

The defendant cites *In re Estate of Rogers*, 147 Neb. 1, 22 N.W.2d 297 (1946), for authority that "an 'ex post facto' law is one which imposes a punishment for an act which was not punishable when committed, imposes additional punishment,

or changes Rules of Evidence by which less or different testimony is sufficient to convict." (Emphasis supplied by appellant.) Brief for Appellant at 10. The above language is taken from 12 C.J. *Constitutional Law* § 803 (1917), and was used to demonstrate that the prohibition against ex post facto laws applies only to penal or criminal matters, and not to the taxing of decedents' estates which was involved in that case. The case did not contain any ex post facto issues concerning evidentiary rules.

In *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), we discussed and rejected the argument which is made by the defendant in this case. We held in *Palmer* that no one has a vested right in a procedure and that procedural matters can be changed at any time before trial and are binding on the defendant. Changes in the rules of evidence are not ex post facto laws where the alterations

> "do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses . . . ."

Palmer, supra at 292, 399 N.W.2d at 716, quoting from *Hopt v. Utah*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884). It is clear that under *Palmer* it was not error for the district court to allow Mrs. Keithley to testify.

The defendant's second assignment of error is that the district court erred in allowing the State to call as witnesses, solely for the purpose of impeachment, Mrs. Keithley and Lieutenant Burchard, when the only effect of their testimony was to present to the jury inadmissible hearsay evidence which could be considered by the jury only as substantive evidence.

The defendant relies on *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985), to argue that Mrs. Keithley was improperly called as a witness and improperly impeached. In *Marco* this court held that the rule allowing a party to impeach his or her own witness may not be used as an artifice by which inadmissible matter may be revealed to the jury through the

device of offering a witness whose testimony *is or should be known to be adverse* in order, under the name of impeachment, to get before the jury a favorable extrajudicial statement previously made by the witness. The *Marco* case involved a statement given by the daughter of a man accused of attempted first degree murder. In her statement she implicated her father in the shooting. She later gave additional statements contradicting her first statement, including testimony at a previous court proceeding in which she either denied knowledge of the events or denied memory of the events referred to in her first statement. At trial she was ordered to testify, at which time she again denied the validity of her first statement. She was then impeached by use of her first statement, and the incriminating information was placed before the jury. We held that "it would strain credibility to suggest that the prosecutor did not expect [the witness] to repeat her lack of knowledge of the incident, or deny facts recited in her [first] statement." 220 Neb. at 101, 368 N.W.2d at 474.

In the present case, however, we believe it does not strain credibility to expect that Mrs. Keithley might again implicate her husband. From 1971 to 1986 she made a number of statements placing the defendant at the murder scene, describing his bloody clothes, and repeating his statements to her that he had become angry at the pawnbroker and beaten him. Only days before trial did she state that she had been lying since 1971. This recantation of her previous statements does not rise to the certainty of adverse testimony that was involved in the *Marco* case. The witness' prior statements in *Marco* made it clear that the witness would *not* testify favorably for the prosecution. Mrs. Keithley's prior statements, along with her recantation, only made it unclear *how* she would testify. We conclude that the district court properly allowed Mrs. Keithley to be called as a witness.

Lieutenant Burchard was called as a witness for at least two reasons: to testify about his contact with the gun registered to the deceased and found at the defendant's home, and to impeach Mrs. Keithley's testimony at trial regarding the statements she gave in 1971. She testified at trial that she called the Omaha police in 1971 to inquire about registering a gun. She

further testified that she first saw the gun sometime after May 1967 and that the defendant told her he had purchased the gun. She testified that when she called the police regarding registration she was told that they wanted to talk with her about a homicide and that she responded to their request by telling them that she knew nothing about a homicide. When she later met with Burchard, she testified that she told the police whatever they wanted to know so she could get the defendant out of her life.

To impeach her testimony, Burchard was called as a witness to describe the events in 1971. He testified that during their first conversation she told him that her husband had a gun which he had taken from a pawnbroker in 1959. He testified that she told him that the defendant had picked her up at her house in Avoca, Iowa, that he had bloody clothes, that he had been in a dispute with a pawnbroker while looking at some knives, and that he had hit the pawnbroker over the head. He testified that it was not until after she had given him this information that he checked the records and discovered the gun was the same gun registered to Weiner.

The purpose of Burchard's testimony was to discredit Mrs. Keithley's testimony that she had only called the police to register the gun and that the police had informed her of the murder. The district court properly overruled the hearsay objections of the defense for the reason that the statements were used to impeach the credibility of a witness, and not introduced as substantive evidence.

The defendant objects in his brief to the use of the impeachment evidence by the prosecutor during his closing argument as if it were substantive evidence. He argues that this was a tactic designed purposely to mislead the jury. The record shows no objection was made at any time during the closing argument. Failure to assert a timely objection at the time of trial constitutes a waiver of the objection. *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Daniels*, 220 Neb. 480, 370 N.W.2d 179 (1985).

The remaining question is whether, excluding testimony used only to attack credibility and not admitted as substantive evidence of the crime charged, there was sufficient evidence to

support the verdict. The defendant contends in his third assignment of error that there was not. The defendant was charged under the second degree murder statute in effect at the time of the crime, which stated that "[w]hoever shall purposely and maliciously, but without deliberation and premeditation, kill another . . . shall be deemed guilty of murder in the second degree . . . ." Neb. Rev. Stat. § 28-402 (Reissue 1956). Malice, in the context of second degree murder, denotes a condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse and is " ' "any willful or corrupt intention of the mind." ' " *State v. Moniz*, 224 Neb. 198, 204, 397 N.W.2d 37, 41 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). Malice and intent may be inferred from the evidence relating to the circumstances of the criminal act. *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987); *State v. Moniz, supra; State v. Rowe, supra.*

Although Mrs. Keithley's testimony at trial varied as to the events occurring in 1959, she did testify, at one time or another during trial, that the defendant picked her up from her Iowa home midafternoon or evening of December 24, 1959; they drove back to Omaha to his parents' home, where the defendant asked her to wash some stained clothes; the defendant told her they were bloodstains; the defendant told her the bloodstains on his clothing were from a fight; the defendant told her the fight had occurred at a pawnshop; the defendant told her that he had gotten into a fight at the pawnshop because the man accused him of stealing, that they struggled, and that he (the defendant) hit the man in the back of the head; she had heard on the radio or the news that the pawnbroker was in critical condition; and the defendant told her it was the same pawnshop.

In addition, Burchard testified that the gun registered to the deceased was found in the defendant's home. Finally, the defendant matched the description of the assailant given by Weiner before he died. This evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant purposely and maliciously killed Weiner. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROSS KNOEFLER, APPELLANT.

418 N.W.2d 217

Filed January 15, 1988. No. 87-321.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
2. **Corroboration: Controlled Substances.** The corroboration required by Neb. Rev. Stat. § 28-1439.01 (Reissue 1985) may be supplied by observation that the meeting between the subject and the cooperating individual actually took place and by searches of the cooperating individual both before and within a reasonable time after the drug purchase took place.
3. **Corroboration: Testimony.** The testimony of a cooperating individual need not be corroborated on every element of the crime.
4. _____: _____. Corroboration is sufficient if the cooperating individual is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
5. **Probation and Parole: Appeal and Error.** Absent a showing of abuse of discretion, a denial of probation will not be disturbed on appeal.

Appeal from the District Court for Nance County: JOHN M. BROWER, Judge. Affirmed.

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

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

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and ROWLANDS, D.J., and COLWELL, D.J., Retired.

ROWLANDS, D.J.

The defendant, Ross Knoefler, was convicted, following a jury trial, of unlawfully delivering methamphetamine, in violation of Neb. Rev. Stat. § 28-416(1) (Reissue 1985), a Class III felony. Knoefler was sentenced to a term of 1 year in imprisonment.

The defendant assigns the following as error: (1) that his conviction was based solely upon the uncorroborated testimony of a cooperating individual, contrary to Neb. Rev.

Stat. § 28-1439.01 (Reissue 1985), and (2) that the district court abused its discretion by denying probation and incarcerating the defendant.

We have determined that neither assignment of error is meritorious, and affirm.

The principal witness for the State was Thomas Rice. According to Rice, he was approached by the defendant on December 15, 1985, and asked if he would be interested in buying drugs to sell to people at Rice's place of employment. Rice testified he told Knoefler that such a deal was possible.

On the 16th day of December, Rice went to the Nance County sheriff and disclosed the conversation. The sheriff and Rice agreed to set up a buy for the next day.

In the afternoon of December 17, 1985, Rice met with the sheriff and Investigators Tooley and Walton of the Nebraska State Patrol. Rice was taken into the men's room and strip-searched by Investigator Walton to ensure that he had no controlled substances. Not finding any contraband, Walton equipped Rice with a 1-watt transmitter, and Rice put his clothing on to conceal the transmitter.

Rice was followed to his car, and it was thoroughly searched. Again, no controlled substances were present.

Rice then proceeded in his vehicle to a warehouse belonging to the defendant's father. He was followed in an automobile occupied by the sheriff and Investigators Tooley and Walton. Rice had a brief conversation with Knoefler's father. As Rice was leaving, the defendant arrived in a truck, with an individual named Robert Foland.

Rice testified that the defendant asked him to travel to the defendant's trailer. Rice followed Knoefler to the trailer and went inside with the defendant and Foland.

The three officers were nearby and saw Rice make contact with the defendant. They shadowed the parties and parked their vehicle approximately one and one-half blocks from the trailer. Because of a loose wire on the microphone, none of the conversations inside the trailer were audible to the officers, nor were they recorded.

Rice stated at the trial that inside the trailer the defendant delivered a baggie containing the drugs. Rice paid Knoefler

$100. Rice left the trailer and drove back to a prearranged point, where he delivered the baggie to Investigator Tooley. The sheriff paid Rice the sum of $100 for his services as a cooperating individual. The State's chemist later determined that the baggie contained 1.11 grams of methamphetamine.

The defendant, Foland, and the defendant's wife, who says she arrived at the trailer during the meeting, all testified that no drug transaction occurred. The jury obviously disagreed.

The defendant asks us to overturn the jury verdict and find that there was no corroboration of Rice's testimony. He correctly cites § 28-1439.01, which provides: "No conviction for an offense punishable under sections 28-401 to 28-438 shall be based solely upon the uncorroborated testimony of a cooperating individual."

There is no question that Rice was a cooperating individual as defined in Neb. Rev. Stat. § 28-401 (Reissue 1985). He came forward with unsolicited information about a purported sale of controlled substances; he participated with law enforcement officers in setting up the transaction; he obtained evidence; and he was paid for his services. The crucial question is, however, whether Rice's testimony was corroborated by the actions and observations of the three officers. We believe it was.

The defendant advances the case of *State v. Beckner*, 211 Neb. 442, 318 N.W.2d 889 (1982), and asks us to adopt a comprehensive checklist that must be meticulously followed by undercover officers before controlled substances may be received into evidence if a cooperating individual is used. In *Beckner*, this court stated at 446-47, 318 N.W.2d at 892-93:

> "A corroboration requirement does not mean that a commissioned law enforcement agent would have to be physically present at the time a drug purchase is made. Corroboration could be supplied, by instance, through the use of electronic surveillance, observations which indicate simply that the meeting between the subject and the cooperating individual actually took place, searches of the cooperating individuals both before and within a reasonable time after the drug purchase is alleged to have taken place, the use of marked buy money, the use of cooperating individuals in teams, the use of fingerprint

analysis and numerous other investigative techniques."

Such language was illustrative only. *Beckner* expressly rejected the argument that a cooperating individual be corroborated on every element of the crime. In *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985), we found that corroboration could exist based upon the testimony and pictorial evidence supplied by investigators, with or without the admission of a sound recording. We have not at any time implied that corroboration is absent if one or more investigative techniques is not employed, or if a microphone malfunctions. The holding of *Beckner* remains as was clearly set forth therein: "[C]orroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue." 211 Neb. at 447, 318 N.W.2d at 893.

In this case Rice and his automobile were searched before he sought out the defendant. No controlled substances were present. The officers observed Rice meet with the defendant, and the officers followed them to the defendant's trailer. Rice came out of the trailer a short time later and delivered the methamphetamine to the officers. Clearly, corroboration as contemplated by the statute was present. The issue of credibility was for the jury, not this court, to determine. See *State v. Green*, 217 Neb. 70, 75-76, 348 N.W.2d 429, 432 (1984), wherein it was stated:

> In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.

The second issue concerns a claim of excessive sentence. The defendant is 22 years old, married, and has no prior felony record. He does have a number of convictions for traffic offenses, as well as a disturbing the peace conviction, which were considered by the sentencing judge as part of the presentence investigation. The sentence imposed was the

minimum authorized for a Class III felony. Absent a showing of abuse of discretion, a denial of probation will not be disturbed on appeal. *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985). There was no abuse of discretion in this case in the sentence imposed on Knoefler.

AFFIRMED.

JACK A. FROST, APPELLEE, V. JEAN V. FROST, APPELLANT.
418 N.W.2d 220

Filed January 22, 1988. No. 85-959.

1. **Divorce: Appeal and Error.** The review of a judgment relating to the dissolution of a marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
3. _____. Property divisions are not subject to a rigid mathematical formula. The division must, most of all, be reasonable.
4. _____. The division of property owned by the parties, including that owned at marriage or acquired by gift or inheritance, is to be determined by the facts in each case.
5. _____. While the source of funds brought into a marriage is a consideration in the division of property, it is not an absolute.
6. _____. The debts of the parties are facts and circumstances to be considered in the property division.

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

Donald B. Fiedler of Fiedler Law Offices, for appellant.

Steven J. Lustgarten of Lustgarten & Roberts, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage. The petitioner, Jack A. Frost, and the respondent, Jean V. Frost, were married on June 8, 1978. No children were born as a result of the marriage, but both of the parties have children from prior marriages.

The petition for dissolution of the marriage was filed on April 4, 1985. Trial was had on August 5, 1985, and a decree entered on September 12. The trial court found that the marriage should be dissolved, and divided the marital property and the debts of the parties.

The respondent has appealed and contends that the trial court erred in awarding $282,247 as premarital assets to the petitioner and failing to award any premarital assets to the respondent; in making a division of property that was patently unfair and not just or equitable under the circumstances; in failing to consider that the respondent had significantly cared for premarital assets awarded to the petitioner and contributed to their improvement and operation; in assigning a significantly larger share of the debts to the respondent, while awarding her a significantly smaller share of the marital assets; and in failing to award alimony to the respondent.

Our review of a trial court's judgment relating to the dissolution of a marriage is

> de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Gerber v. Gerber, 225 Neb. 611, 617-18, 407 N.W.2d 497, 502 (1987). See, also, *Seemann v. Seemann*, 225 Neb. 116, 402 N.W.2d 883 (1987); *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987).

During the marriage both parties were employed as real

estate agents. The respondent's net income from 1979 through 1984 was $127,182.57; the petitioner's net earnings for the same period were about $85,799.46. The parties apparently contributed $1,350 each per month, from which house payments and other living expenses were paid.

The respondent first complains that the trial court erred when it excluded $282,247 from the marital estate and set off that amount of money to the petitioner as premarital assets. The respondent also claims that the trial court erred in failing to set off to her the value of three parcels of real estate owned by her prior to the marriage.

Neb. Rev. Stat. § 42-365 (Reissue 1984), relating to the division of property, provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities . . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

In *Blaser v. Blaser*, 225 Neb. 104, 107, 402 N.W.2d 875, 877 (1987), we stated that "property divisions are not subject to a rigid mathematical formula. The division must, most of all, be reasonable."

In a number of cases we have discussed the rules applicable to the treatment of property brought into the marriage and property received by gift or inheritance during the marriage.

In *McCollister v. McCollister*, 219 Neb. 711, 715, 365 N.W.2d 825, 828 (1985), we stated:

> In an action for dissolution of marriage, the rules for determining the division of property owned by the parties, including that owned at marriage and acquired by gift or inheritance, provide no mathematical formula by which such awards can be precisely determined. Such awards are to be determined by the facts in each case.

See, also, *Applegate v. Applegate*, 219 Neb. 532, 365 N.W.2d 394 (1985); *Lord v. Lord*, 213 Neb. 557, 330 N.W.2d 492 (1983); *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980).

In *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982), we said:

> While we have not heretofore said in exact words how property acquired by inheritance or gift during the marriage should be considered, an examination of our previous decisions discloses that when awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. . . . An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.

In *Ross v. Ross*, 219 Neb. 528, 531, 364 N.W.2d 508, 509 (1985), we reaffirmed the *Van Newkirk* holding, and added that "if the inheritance can be identified, it should be set off . . . and eliminated from the marital estate to be divided."

However, in *Grace v. Grace*, 221 Neb. 695, 699, 380 N.W.2d 280, 284 (1986), we reflected on the *Van Newkirk* rule and stated that "[t]he *Van Newkirk* rule itself does not purport to be an ironclad, rigid rule for all circumstances." We also cited *Ulmer v. Ulmer*, 205 Neb. 351, 287 N.W.2d 685 (1980), in which we stated that " '[w]hile the source of funds brought into a marriage is a consideration in the division of property, it is not an absolute.' " *Grace* at 701, 380 N.W.2d at 285.

The trial court, in dividing the property and the debts, generally followed the division set out in exhibit 10, a proposal submitted by the petitioner and received in evidence. The following chart, reproduced in part from the appellant's brief, summarizes how the property was divided:

		DECREE EXCLUDES FROM MARITAL ESTATE		DECREE INCLUDES IN MARITAL ESTATE	
ITEM	VALUE	JACK	JEAN	JACK	JEAN
12376 Rose Lane	$169,900	$ 41,048	– – –	$128,852	– – –
12318 Decatur	84,000	84,000	– – –	– – –	– – –
3316 Harrison	50,000	– – –	– – –	– – –	$50,000
6235 Wilson Circle	33,000	– – –	– – –	– – –	33,000
Anchor [Annuity]	16,249	16,249	– – –	– – –	– – –
Money Market	19,700	19,700	– – –	– – –	– – –
Bellevue Queen	64,000	64,000	– – –	– – –	– – –
New Co. Investment	500	500	– – –	– – –	– – –
Dupont	4,250	4,250	– – –	– – –	– – –
Wreco, Inc.	2,500	2,500	– – –	– – –	– – –
Life Ins. Cash Value	2,116	– – –	– – –	2,116	– – –
1968 V.W. Kit Car	7,500	– – –	– – –	7,500	– – –
1985 Chrysler	9,000	– – –	– – –	9,000	– – –
1976 V.W.	1,100				1,100
1983 Audi	9,000				9,000
Stock	10,525	– – –	– – –	10,525	– – –
Household Goods	20,000	– – –	– – –	10,000	10,000
Aloha Club	7,500	– – –	– – –	– – –	7,500
Fur Coats	2,000	– – –	– – –	– – –	2,000
Re-Max	2,500	– – –	– – –	– – –	2,500
Keener Note	50,000	50,000	– – –	– – –	– – –
TOTALS	$520,340	$282,247	– – –	$167,993	$115,100

An exhibit which was attached to exhibit 10 summarizes the division of the debts:

	CREDITOR	BALANCE	DUE DATE	PAYMENT
(1/2)	Occidental Savings & Loan	$84,500.00	monthly	$1,090.00
(R)	Citicorp (2nd mortgage)	28,300.00	monthly	350.00
(P)	Norwest Bank	10,000.00	monthly	297.00
(P)	Omaha National Bank	45,000.00	interest monthly	450.00 +
(1/2)	Nebraska Natl (1984 Taxes for 12376 Rose Lane)	2,507.00	monthly	223.00
(1/2)	J.S. Stite Co. (clean carpets and wash windows to prepare house for sale)	125.00	now	125.00
(1/2)	Keith Phillippi (painting home to prepare for sale)	710.00	now	710.00
(35%P 65%R)	IRS, 1984 (due 8/15/85)	8,886.00	8/15/85	8,886.00
(35%P 65%R)	Nebraska Dept. of Revenue, 1984 (due 8/15/85)	626.00	8/15/85	626.00
(1/2)	Pat Jones, preparation of 1984 income tax)	155.00	now	155.00
(R)	Visa	1,500.00	now	1,500.00
(R)	1st Federal Lincoln (3316 Harrison)	12,000.00	monthly	
(1/2)	IRS and Nebraska Department of Revenue, refiguring of tax in their favor	900.00	now	900.00
(R)	American Charter, 6235 Wilson Circle	21,600.00	monthly	

The first item the respondent claims was erroneously excluded from the marital estate was $41,048, which the petitioner claims were premarital funds he used for 12376 Rose Lane, the residence of the parties during a portion of their marriage.

On cross-examination the petitioner testified that the source of these funds was as follows: $16,070.43 paid for the lot, including $500 from an investment account and the balance from proceeds of the sale of property at 1506 North 123d Street that had been purchased on October 1, 1977; $4,000 from proceeds of the sale of a liquor store bought with funds from the sale of a one-half interest in the Bertram Apartments, purchased in 1959; and $21,048 credit from Bob Cleary Builder, Inc., "based on his memo of August the 8th, 1980."

The petitioner further explained that he had a credit from a joint account with Bob Cleary Builder, Inc., that was closed out for $5,563.29, which predated the marriage, and that Cleary owed the petitioner $10,590.55 on a note which was allowed as a credit against the costs of the home.

Although the petitioner's testimony was uncontradicted, there is nothing in the record to show the source of the funds in the investment account and the transaction represented by the Cleary note. The burden of proof was on the petitioner to show the source of all funds claimed as premarital, and we find the petitioner failed to prove that he was entitled to claim $41,048 from the sale of the Rose Lane property. We find that the amount should be reduced from $41,048 to $25,133.72.

The petitioner owns an annuity policy issued by Anchor National Life Insurance Co. Prior to the marriage he owned a Security Mutual benefit pension, which he valued at $8,166 in a property statement on February 12, 1978. He claims that was rolled into the Anchor policy, which is now worth $16,249. The petitioner claims no additional premiums were paid during the marriage and that the increase in value was the result of appreciation in value. This testimony was uncontradicted.

The petitioner claims that the money market account was funded with the balance of the proceeds from the sale of the liquor store purchased with proceeds from the sale of the Bertram Apartments.

The petitioner was awarded du Pont stock, valued at $4,250, and an interest in the "Bellevue Queen," a restaurant, valued at $64,000. The Bellevue Queen was listed on property statements commencing February 12, 1978, but the du Pont stock was not listed prior to March 1982. The petitioner, however, testified

that he owned the du Pont stock prior to the marriage.

The trial court awarded the balance in New Co. Investment, apparently a money market account, which the petitioner testified was "probably 700," to the petitioner as premarital property. There is nothing in the record to show the source of the funds in this account, and it should be considered to be part of the marital estate.

Based upon the record before us, except as to New Co. Investment account and the Rose Lane property, we find that the trial court's finding as to premarital property awarded to the petitioner was correct.

With respect to the respondent's premarital property, the three items of real estate listed on her exhibit 22 as premarital property were sold during the marriage and the proceeds used "to put into the family and take care of the kids and my expenses at the house."

With respect to the division of debt, the decree ordered the Rose Lane property sold and the proceeds distributed as follows:

> (1) Deduction of costs of sale from proceeds;
>
> (2) Deduction of existing first mortgage in the amount of $85,000.00 from proceeds;
>
> (3) Deduction of second mortgage in approximate amount of $28,000.00 from proceeds;
>
> (4) Deduction of pre-marital assets provided by Petitioner toward purchase of real estate, to-wit, $41,048.84, to be deducted from proceeds and reimbursed to Petitioner;
>
> (5) Deduction of monthly mortgage payments currently in arrears from proceeds;
>
> (6) Deduction of $28,000.00 to be paid to Petitioner representing reimbursement to Petitioner of second mortgage, the proceeds of which were used by Respondent for personal use relating to existing debts. If the $28,000.00 as set forth in this paragraph cannot be paid either fully or partially from said proceeds of sale, Respondent shall be and is personally liable for the payment of said obligation to Petitioner.
>
> (7) Net proceeds thereafter to be divided equally

between Petitioner and Respondent.

The effect of this part of the decree was to make the respondent liable to the petitioner for any deficiency resulting from the sale of the property, in the event the proceeds were not sufficient to discharge the costs of sale and liens against the property.

Although the record establishes that the proceeds from the $28,000 second mortgage were used, at least in part, for the personal benefit of the respondent, in view of the property division which otherwise results in the petitioner's receiving the bulk of the property, we believe this part of the decree was unfair.

We modify the decree to provide that in the event the proceeds from the sale of the Rose Lane property are sufficient to pay the costs of sale, all liens against the property, and the credit of $25,133.72 due the petitioner, the balance shall be divided evenly between the parties. But in the event the proceeds from the sale of the property are insufficient to pay the costs of sale, the liens against the property, and the credit of $25,133.72 due the petitioner, any deficiency shall be paid by the petitioner.

The final assignment of error, relating to the denial of alimony, was not discussed in the respondent's brief. As a result, we do not consider the issue, pursuant to Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). Consideration of a case is limited to errors assigned and *discussed*. See, *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986).

The decree, as modified, is affirmed. The respondent is allowed the sum of $1,000 for the services of her attorney in this court. All costs are taxed to the petitioner.

AFFIRMED AS MODIFIED.

PRIME INC., APPELLANT AND CROSS-APPELLEE, V. YOUNGLOVE CONSTRUCTION COMPANY AND ROBERT WARREN DECKER, APPELLEES AND CROSS-APPELLANTS.

418 N.W.2d 539

Filed January 22, 1988. No. 86-024.

1. **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.
2. _____. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
3. **Directed Verdict.** A court should not decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom. Thus, in a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.
4. **Negligence: Motor Vehicles.** Generally, it is negligence as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop such operator's vehicle or turn that vehicle aside without colliding with an object or obstruction on the street or highway within the operator's range of vision.
5. _____: _____. The "range of vision" rule is applicable, notwithstanding that a motorist's vision is impaired by atmospheric or weather conditions, such as falling or blowing snow, rain, mist, or fog.
6. _____: _____. An exception to or exoneration from the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with that object or obstruction, which is relatively indiscernible on account of its color similar to the street or highway and thereby is rendered indistinguishable from the surface.
7. _____: _____. Smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not intervening causes but are conditions imposing a duty on motorists to assure another's safety by exercising a degree of care commensurate with the surrounding circumstances.
8. _____: _____. It is a motorist's duty to use reasonable care to prevent an accident or injury from operation of a motor vehicle, considering the conditions and circumstances existing on a public street or highway. A motorist must keep a proper lookout in the direction in which the motorist's vehicle is operated and take notice of conditions on the street or highway traveled.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for a new trial.

Eugene P. Welch and Lynn A. Mitchell of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

P. Shawn McCann and Edward Noethe of Sodoro, Daly & Sodoro, for appellees.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

SHANAHAN, J.

Prime Inc. filed its negligence action in the district court for Douglas County and sought a judgment against Younglove Construction Company and Robert Warren Decker for property damage on account of a motor vehicle collision. Decker counterclaimed for his personal injury sustained in the collision. Younglove counterclaimed for its property damage and for Prime's contribution on account of Younglove's settlement of a personal injury claim by the patrolman who was injured in the collision which is the subject of the proceedings under review. The jury returned a general verdict for Younglove and Decker regarding Prime's claim and returned a general verdict for Prime on the counterclaims. We reverse and remand for a new trial.

PRIME'S SEMI AND THE COLLISION

Joe Butchko and Carl Wallace, Prime employees, were the drivers for Prime's semi headed east on Interstate 80 out of North Platte on the morning of January 22, 1982. Snow fell constantly as Wallace drove the semi at 50 to 55 miles per hour toward Kearney. Approximately 50 miles west of Kearney, Prime's semi encountered a snowpacked Interstate, blowing snow, and ice beginning to form on the highway. The visibility had deteriorated to less than a quarter of a mile and was diminishing. Wallace, at the time, did not realize that Prime's semi was passing the Kearney interchange on the Interstate. As he was continuing eastward, shortly after 1 p.m., Wallace dropped the tractor into fourth or fifth gear, the "low side" of the tractor's 10 gears, so that the rig was moving at 20 miles per hour in "[n]ear blizzard conditions" and "poor visibility" 5 miles beyond Kearney. I-80 consisted of four lanes for traffic, that is, a grass median separated the Interstate's two westbound lanes from its two eastbound lanes. While Wallace was driving the semi in the right, or south, lane of eastbound I-80, the rig "jackknifed" on the ice- and snow-covered highway, causing

the semi to move to its left and into the median, where the semi "hit something" and bounced back onto eastbound I-80. The semi slid across the Interstate's eastbound lanes and south shoulder, struck a guardrail adjacent to the highway's shoulder, and finally, in a jackknifed position, came to rest with its tractor headed somewhat northeasterly. The tractor's rear duals were against the guardrail. Wallace and Butchko got out of the tractor to examine the damage. The highway's guardrail was damaged, and the tractor's fuel tank was punctured, allowing diesel fuel to escape onto the highway. Prime's stationary unit was blocking the right lane and partially protruded into the eastbound Interstate's left, or north, lane.

Butchko and Wallace returned to their tractor, where Wallace engaged the tractor's two axles for additional traction, rather than the one axle utilized in normal over-the-road movement of a semi. The semi moved slowly but, as the rig began to jackknife again, Wallace was unable to steer the tractor, which was then moving into the north, or "passing," lane of eastbound I-80. At that location on the Interstate, there was a slight incline ascending toward an overpass east of Prime's semi. Wallace was unaware of the incline and, having straightened the semi in the north lane, continued an attempt to move the unit eastward. After 2 or 3 minutes in such maneuver, Wallace realized "we weren't going to go any farther, so we left it there" in the left, or passing, lane of I-80.

Prime's unit did not have a citizens band radio, but Prime's drivers went to another truck, which had stopped behind the Prime unit against the south guardrail and had a radio which was used to send a call for help. Wallace and Butchko returned to the cab of their unit, where they waited for help to arrive. Prime's unit was not equipped with sand, chains, or flares, but did carry some small plastic reflectors for placement on the road. Wallace and Butchko decided not to use the reflectors, which they believed would blow away in the snowstorm's strong wind. While Wallace and Butchko were waiting for the summoned help, the unit's trailer lights and emergency flashing lights were operating. Although cars passed on the south side of the stationary Prime unit, Butchko and Wallace took no steps to warn motorists about the situation involving Prime's semi.

After 10 or 15 minutes, a cruiser of the Nebraska State Patrol arrived and stopped, according to Wallace, approximately four car lengths, or 32 feet, directly behind Prime's trailer in the north lane.

Trooper Thomas E. Nesbitt of the Nebraska State Patrol had responded to the call for help regarding Prime's semi. When he arrived, Trooper Nesbitt found Prime's unit in a "blizzard" and blocking all the north lane and about one-half of the south lane of eastbound I-80, although there was approximately 14 feet of "passable driving surface" on the south side of the stationary semi. According to Trooper Nesbitt, he stopped and stationed his cruiser at a point in the north lane 25 yards immediately behind Prime's trailer. Trooper Nesbitt activated the cruiser's "emergency flashing equipment," which included the standard emergency flashing lights and a "Visibar, which has alternating flashing lights and rotating lights on it," and then proceeded to contact Wallace and Butchko, whom he met midway between the trailer and the cruiser. Wallace told Trooper Nesbitt that the Prime unit "couldn't make the incline." Because state property, namely, the guardrail, had been damaged, Trooper Nesbitt told Wallace and Butchko that an accident report would have to be filled out, and suggested they return to the cruiser to complete that report. While the three were inside the cruiser, and as Trooper Nesbitt was replacing his radio's microphone after a call for a wrecker, the trooper glanced into the cruiser's rearview mirror and saw Younglove's eastbound semi as it went into a "jackknife" in the passing lane, or, in the trooper's words, "I observed a semi tractor-trailer that was going to run into my—the rear of my vehicle, that it was starting to jackknife and then run into me." The impact from the collision spun the cruiser around "maybe three times" and forced the cruiser into the south railing on the overpass. After colliding with the cruiser, Younglove's semi then struck the right rear of Prime's trailer and propelled that semi to a position alongside the cruiser at the overpass. The weather conditions described by Trooper Nesbitt and Wallace prevailed until photographs were taken by the Nebraska State Patrol shortly after the collision. Those photographs substantiate the storm conditions recounted by Wallace and the trooper.

YOUNGLOVE'S SEMI

Younglove's semi, loaded with construction equipment and steel, was driven by Decker and was traveling east on I-80. Approximately 5 miles west of the eventual collision site, Decker passed a truck driven by Dale Clausen, who unsuccessfully attempted to contact Decker by radio. However, Decker's CB was not in operation, because Decker was listening to a Freddie Fender tape on Decker's stereo. According to Decker, weather conditions consisted of intermittent snow, and visibility on I-80 was 1,000 feet to a quarter of a mile. As Decker passed by Kearney, the weather changed, with increased snow, although such change in weather never resulted in a blizzard. On account of the change in weather, Decker reduced the speed of his semi to 35 miles per hour as he approached the prospective collision site. Under the prevailing conditions, Decker asserted, he could stop his semi, traveling at a speed of 35 miles per hour, within a distance of 100 feet. When Decker observed a condition which he described as the wind "swirling . . . a lot of snow off the ground . . . it was just all white" ahead, at an unknown distance from the point of such observation, Decker let up on the tractor's accelerator but did not "gear down" or apply brakes on his unit, because cars were closely following him and likely would have run into the rear of his rig if it suddenly decelerated. Decker was unable to state the height reached by the swirling snow or the distance his semi traveled in that snowy condition, but, while the rig was "engulfed" in the swirling snow, the speed of Decker's semi decreased to 25 miles per hour. When his semi came out on the east side of the swirling snow, Decker saw Prime's unpainted aluminum trailer, "this big silver thing blocking" both lanes, 125 feet ahead of Decker. Because he believed there was insufficient room to pass Prime's semi on its right side, Decker "cut to the left" on the packed snow covering the Interstate, causing his semi to jackknife and collide with the rear of the patrol cruiser, and then strike the right rear of Prime's trailer. Decker's semi came to rest at the guardrail on the south edge of the median. Before entering the swirling snow, Decker never saw Prime's semi or the patrol cruiser. On leaving the swirling snow, Decker did not see the parked cruiser, with its flashing and rotating lights.

At the scene shortly after the collision, Decker encountered Wallace, whom he asked "what in the hell he'd [Decker] hit." Clausen, the trucker who had attempted to contact Decker by CB, arrived at the scene and observed the damaged cruiser, with its rotating lights still in operation. Clausen described road conditions from Kearney east to the collision as "slick," with snow and ice on the road's surface. According to Clausen, when Decker passed him approximately 5 miles west of the collision scene, visibility was 100 feet or less, a condition which persisted during Clausen's approach to the collision site.

Trooper Nesbitt was injured in the collision, and later settled his personal injury claim against Younglove and Decker for $25,000.

PLEADINGS

In its petition, as specifications of negligence by Younglove and Decker, Prime alleged Decker's failure to keep a proper lookout, reasonably control Younglove's semi, heed the warning signals from Trooper Nesbitt's cruiser, and stop within Decker's range of vision. Prime also alleged that Decker drove at an unreasonable speed under the circumstances.

Among the specifications of Prime's contributory negligence alleged in their answer, Younglove and Decker asserted that Prime had negligently failed to warn motorists about the semi's obstruction of I-80 or use flares, reflectors, and fusees to warn approaching motorists. Additionally, the answer contained allegations that Prime failed to inspect and maintain its semi and allowed its tractor to be driven without chains and without safety equipment to warn motorists.

PRIME'S MOTION FOR A DIRECTED VERDICT

At the conclusion of all the evidence, Prime moved for a directed verdict that it was not negligent and that the negligence of Younglove and Decker caused the collision, so that only the question of damages was submissible to the jury. Alternatively, Prime moved for a directed verdict that Younglove and Decker were negligent as a matter of law, so that the questions for the jury would be whether Prime was contributorily negligent and the effect of any contributory negligence in view of comparative negligence of the parties. See Neb. Rev. Stat. § 25-21,185 (Reissue 1985).

The court overruled Prime's motions and submitted the case to the jury on all questions concerning negligence of the parties. By its general verdict, the jury found in favor of Younglove and Decker on Prime's claim and against Younglove and Decker on their counterclaims. Later, apparently as a matter of law in view of the verdicts, the district court determined that Prime was not obligated to contribute concerning Trooper Nesbitt's personal injury claim and settlement with Younglove and Decker. Prime appeals, and Younglove and Decker cross-appeal.

ASSIGNMENTS OF ERROR

Prime contends that the district court erred in (1) not directing a verdict that Younglove and Decker were negligent as a matter of law and submitting the question of the defendants' negligence for the jury's determination and (2) not directing a verdict in favor of Prime on the issue of liability and thereby rendering the question of damages as the only matter for the jury's determination.

In their cross-appeal, Decker and Younglove's only assignment of error is directed to their claim for contribution from Prime regarding Trooper Nesbitt's personal injury, namely, the district court's judgment that Prime is not obligated to contribute as a joint tort-feasor concerning Nesbitt's claim and settlement.

NEGLIGENCE; DIRECTED VERDICT OR JURY QUESTION

" '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.' " *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 452, 412 N.W.2d 56, 75 (1987) (quoting from *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987)). " 'The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.' " *Saporta v. State*, 220 Neb. 142, 149, 368 N.W.2d 783, 787 (1985) (quoting from Prosser and Keeton on the Law of Torts, *Proximate Cause* § 41 (5th ed. 1984)).

A court should not decide an issue as a matter of law

> unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom. [Citation omitted.] Thus, in a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.

Rahmig v. Mosley Machinery Co., supra at 449, 412 N.W.2d at 74.

RANGE OF VISION RULE AND CONTROL

Generally, it is negligence as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop such operator's vehicle or turn that vehicle aside without colliding with an object or obstruction on the street or highway within the operator's range of vision. See, *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986); *McCauley v. Briggs*, 218 Neb. 403, 355 N.W.2d 508 (1984); *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977); *Vrba v. Kelly*, 198 Neb. 723, 255 N.W.2d 269 (1977); *Roth v. Blomquist*, 117 Neb. 444, 220 N.W. 572 (1928). The "range of vision" rule is applicable, notwithstanding that a motorist's vision is impaired by atmospheric or weather conditions, such as falling or blowing snow, rain, mist, or fog. See, *C. C. Natvig's Sons, Inc. v. Summers, supra; Vrba v. Kelly, supra; Guynan v. Olson*, 178 Neb. 335, 133 N.W.2d 571 (1965).

To avoid application of the range of vision rule, Younglove and Decker argue that Prime's rig was "a white tractor with a silver-colored trailer . . . and therefore was the same or similar color as the roadway and sky on this windy, snowy day . . . ." Brief for Appellees at 5.

An exception to or exoneration from the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with that object or obstruction, which is relatively indiscernible on account of its color similar to the street or highway and thereby is rendered indistinguishable from the surface. See, *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966); *Guynan v. Olson, supra*. See, also, *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559

(1973) (nighttime collision; unlighted truck covered with tar and dirt; parked in roadway); *Monasmith v. Cosden Oil Co.*, 124 Neb. 327, 246 N.W. 623 (1933) (nighttime collision; unlighted car with color similar to gravel surface; parked on road); *Haight v. Nelson*, 157 Neb. 341, 59 N.W.2d 576 (1953) (mud-spattered and unlighted car stalled in dark on a road with an oil mat surface).

In the present case, Decker admitted that he saw the swirling snow on I-80 at an unspecified distance before he entered that condition on the highway. As expressed in *Newkirk v. Kovanda*, 184 Neb. 127, 131, 165 N.W.2d 576, 579 (1969):

> In Kuffel v. Kuncl, 181 Neb. 770, 150 N.W.2d 908, this court said: "At least where the presence of frost, ice, snow, mist, fog, or smoke [was] known, or should have been reasonably anticipated, they have consistently been held (under our cases) to be conditions rather than intervening or proximate causes in the legal sense."

In *Guerin v. Forburger*, 161 Neb. 824, 835, 74 N.W.2d 870, 877 (1956), this court stated:

> "On principle it would appear that the existence or presence of smoke, snow, fog, mist, blinding headlights or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. . . ."

(Quoting from *Fairman v. Cook*, 142 Neb. 893, 8 N.W.2d 315 (1943).) See, also, *Guynan v. Olson, supra* (frost, ice, snow, mist, and fog are conditions requiring drivers to exercise a degree of care commensurate with the circumstances).

In *Hilferty v. Mickels*, 171 Neb. 246, 257-58, 106 N.W.2d 40, 47-48 (1960), this court noted:

> It is the duty of all persons in the operation of an automobile to use due or reasonable care to prevent accident or injury. The user of a highway is required to use reasonable care, considering the existing conditions and circumstances. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving . .

> . . 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 highway, and to know what is in front of him for a reasonable distance.

The blowing snow, as a foreseen condition recognized by Decker, required that Decker stop his semi until visibility was restored or reduce the speed of his vehicle and exercise control which would enable Decker to stop his semi immediately if necessary. See *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1952).

Although Decker saw an object in his path, a "big silver thing," when he was 125 feet from that object, Decker was unable to avoid colliding with Prime's semi. Also, while Decker attempts to exonerate himself from the range of vision rule, we cannot overlook the undisputed fact that Trooper Nesbitt's cruiser was stationed somewhere between 32 and 75 feet directly behind Prime's stationary semi. By its rotating and flashing lights, Trooper Nesbitt's visible cruiser warned an approaching motorist about the obstructed highway, if such motorist were maintaining a lookout forward. However, Decker never saw the cruiser before colliding first with the cruiser and then with Prime's unit, which was ahead of the cruiser. Under the circumstances, nothing relieved Decker from the range of vision rule. While Decker acknowledged that he could stop his semi, traveling at 35 miles per hour, within a distance of 100 feet, which was some 25 feet less than the distance between his vehicle and Prime's semi at Decker's first observation of the obstruction ahead, Decker failed to stop his unit, traveling at 25 miles per hour, before the collisions.

Considering all the evidence adduced concerning Younglove's negligence, we find there is but one reasonable conclusion, namely, that Younglove, through Decker, was negligent as a matter of law and that Prime should have been granted a directed verdict on the issue of the defendants' negligence.

Prime contends that there was no submissible issue regarding its negligence under the circumstances. On the basis of the record presented to this court, whether Prime negligently failed to equip its unit with appropriate safety accessories, such as

suitable reflectors or other appropriate warning devices, to alert eastbound I-80 motorists and whether Prime's drivers negligently failed to utilize available safety equipment were matters for the jury to decide. Therefore, the district court correctly denied Prime's motion for a directed verdict on liability.

CONTRIBUTORY NEGLIGENCE AND COMPARATIVE NEGLIGENCE

Although Younglove was, under the circumstances of this case, guilty of negligence as a matter of law which was a proximate cause of the collision, the amount of damages sustained by Prime was a question to be resolved by the jury. Even though Younglove was guilty of negligence as a matter of law, Prime's claim for damages was subject to the defense of contributory negligence. On submission of the negligence question to the jury and if the jury found Prime guilty of negligence which was slight negligence under the circumstances, § 25-21,185, Nebraska's comparative negligence statute then required the jury to determine whether Younglove's negligence was gross in comparison with Prime's negligence—a factual determination for the jury. See, *Hilferty v. Mickels*, 171 Neb. 246, 106 N.W.2d 40 (1960); *Bezdek v. Patrick*, 170 Neb. 522, 103 N.W.2d 318 (1960).

The district court's failure to grant Prime's motion for a directed verdict on the issue of Younglove's negligence is reversible error. Consequently, we reverse the district court's judgment entered on the verdict against Prime, and we remand this matter to the district court for a new trial.

YOUNGLOVE'S CROSS-APPEAL

The issue raised by Decker and Younglove's cross-appeal depends on Prime's culpability as a negligent tort-feasor concerning the collision in which Trooper Nesbitt was injured. As a consequence of our disposition of Prime's appeal, namely, a new trial, Prime's negligence regarding the collision is yet to be determined. Without a determination that Prime's conduct was negligence and a proximate cause of the collision which injured Trooper Nesbitt, the issue of contribution from Prime cannot be determined. Therefore, the district court's judgment regarding Prime's liability for contribution on the Nesbitt claim

is reversed and remanded for disposition dependent on the new trial ordered on Prime's cause of action.

REVERSED AND REMANDED FOR A NEW TRIAL.

GRANT, J., participating on briefs.

PENTZIEN, INC., A NEBRASKA CORPORATION, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLEE.

418 N.W.2d 546

Filed January 22, 1988. No. 86-048.

1. **Administrative Law: Taxation.** The State Board of Equalization and Assessment is a state agency within the meaning of Neb. Rev. Stat. § 84-901 (Reissue 1981), so as to be subject to the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981).
2. **Administrative Law: Appeal and Error.** Although the decision of a state agency is reviewable by the district court for error only, i.e., whether its action was (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other error of law, (5) unsupported by competent, material, and substantial evidence, or (6) arbitrary or capricious, this court's review of such decision is de novo on the record.
3. **Taxation: Accounting: Statutes: Corporations.** Whether a business qualified under former Neb. Rev. Stat. § 77-2743 (Reissue 1981) (repealed in 1984) for taxation on the basis of separate accounting rather than on a unitary basis is not a question of strict statutory interpretation but, rather, involves an indepth analysis of the factual circumstances of the business operations.
4. **Taxation: Accounting: Corporations.** Separate accounting was not given preference under former Neb. Rev. Stat. § 77-2743 (Reissue 1981), and the fact that a business uses a method of separate accounting was not binding on the State if, in fact, the taxpayer was engaged in a unitary business operation.
5. _____: _____: _____. The overall purpose of apportionment required of a unitary-type business is to permit a fair determination of the portion of business income that is attributable to business activity within the state by the reporting member of the unitary group.
6. **Constitutional Law: Taxation: Accounting: Corporations.** The use of an apportionment formula which is fairly calculated to allocate to a State that portion of the net income reasonably attributable to the business done there is consistent with the requirements of the 14th amendment to the U.S. Constitution.

7. **Administrative Law: Appeal and Error.** Arbitrary and capricious action, in reference to action of an administrative agency, means action taken in disregard of facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.

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

Daniel J. Duffy and Kurt F. Tjaden of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

This is an appeal in a proceeding to review an order of the Tax Commissioner which assessed deficiencies against the appellant, Pentzien, Inc., for its franchise or income tax for the taxable years ending March 31, 1973 through 1975, and 1978 through 1980. The decision was affirmed by the State Board of Equalization and Assessment (Board). The district court for Lancaster County in turn affirmed the decision of the Board, finding that it was not (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) unsupported by competent, material, and substantial evidence, or (5) arbitrary or capricious.

On appeal to this court, appellant assigns as error the above specific findings of the district court, as well as claiming generally that the court erred in affirming the decision of the Board. Appellant neither specifies nor argues the constitutional issue. In the final analysis, the sole issue to be determined is whether the appellant operates a unitary business which requires, for tax purposes, the apportionment of its total income as having been derived from sources within Nebraska, as provided by statute, or whether the portion of its taxable income derived from sources within Nebraska is separate and distinct from that portion derived from sources outside the state.

The Board is a state agency within the meaning of Neb. Rev. Stat. § 84-901 (Reissue 1981), so as to be subject to the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 178 N.W.2d 759 (1970). Accordingly, although its decision is reviewable by the district court for error on the bases set forth above, § 84-917, this court's review of an agency's decision is de novo on the record. *In re Complaint of Federal Land Bank of Omaha*, 223 Neb. 897, 395 N.W.2d 488 (1986).

Pentzien, Inc., is a Nebraska corporation, with its executive office located in Omaha. It specializes in the pipeline construction business, with 90 percent of its work involving installation of pipelines across bodies of water in several states. Additionally, Pentzien contracts for dredging jobs and maintains a horse farm located on the western edge of Omaha.

An equipment storage and repair facility is also located in Omaha, separate and apart from the corporate office. Because the corporation undertakes construction jobs in various states, Pentzien leases property for a second storage and repair facility in Little Rock, Arkansas. During the summer construction season, the Omaha facility has 8 to 10 permanent employees, while the Little Rock facility has 5. During the winter months, this number may be increased to 20 or 25 per facility.

The Omaha office permanently employs eight people, while the horse farm employs six or seven. The eight members at the Omaha office include the president, the vice president, the secretary-treasurer, an engineer, an accountant, and three secretaries. The vice president and the engineer are based in Omaha but periodically travel from job to job to review progress.

At each jobsite, Pentzien has 25 regular employees, consisting of supervisors, 2 field office people, engineers, truckdrivers, equipment operators, and mechanics. The remainder are union employees hired from job to job. These union employees include locally available laborers and migrant welders. Each jobsite maintains a field office, with a field office manager. Onsite, the supervisor runs the job. Several times a day, the supervisor has telephone conversations with the

president, who tells the supervisor what is to be done.

Bids are prepared by the vice president and the engineer at the Omaha office. The president is very active in participating in the bidding process, promoting work, and reviewing all jobs.

Although time records are kept onsite, the Omaha office prepares the payroll for each job—computing deductions and printing the checks. Books and payroll are also kept for the farm at the Omaha office. The greatest number of payroll employees is estimated at 200 to 225. A hospital-medical insurance plan for employees of the pipeline company and the farm is available through the home office on a cost-share basis.

A small checking account is maintained at each jobsite for incidentals, but major bills incurred on the job are forwarded to Omaha for payment. The general bank accounts for all expenses of the corporation are maintained by the Omaha office, either in Omaha or in Council Bluffs. An accounting system is maintained at the home office by the secretary-treasurer. Each job is assigned a number, and separate ledgers are kept to show income received for each given job. This system also allocates expenses at year's end, for present salaries, Omaha office salaries, and repair yards, to each individual job.

Finally, the Omaha office prepares tax returns for the corporation, with the exception of income tax returns, which are prepared by an accounting firm.

In 1968, plaintiff had petitioned the State Tax Commissioner to use separate accounting in accord with Reg-24-14 of the Nebraska Corporate Income Tax Regulations. Floyd Kent Kalb, chief of the income tax division, in a letter dated June 14, 1968, responded that the petition to separately account was not necessary if the Nebraska portion of a corporation's income is separate and distinct from the portion derived from sources outside of Nebraska. Pentzien has used the separate accounting system for over 30 years.

For the tax years ending March 31, 1973 through 1975, and 1978 through 1980, Pentzien reported Nebraska corporate income on a separate accounting basis. The Nebraska Department of Revenue issued deficiency assessments for these years. The findings and order of the State Tax Commissioner

sustained the assessments. The Board affirmed the order. The Board's decision was then upheld by the district court for Lancaster County.

It should be noted that Pentzien filed returns on an apportionment basis in Missouri, Kansas, and Mississippi. In Kansas, however, there appears to be no provision for any kind of accounting other than apportionment.

As appellant asserts, the wording of former Neb. Rev. Stat. § 77-2743 (Reissue 1981) (repealed in 1984) is clear and unambiguous. The statute provides:

> All business income shall be apportioned to this state as follows:
>
> (1) If the portion of taxable income derived from sources within Nebraska is separate and distinct from the portion derived from sources without Nebraska, it shall be separately determined and reported without the use of the apportionment factors provided in sections 77-2744 to 77-2752; or
>
> (2) If the portion of taxable income derived from sources within Nebraska cannot be readily separated from the portion derived from sources without Nebraska, it shall be determined by multiplying the taxpayer's entire taxable income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

The statute, however, must be read in connection with Reg-24-15 of the Nebraska Corporate Income Tax Regulations to ascertain its meaning. The regulation provides:

> If a taxpayer is engaged in a multistate business and the income derived from within Nebraska is separate and distinct from the income derived without Nebraska pursuant to the requirements stated below, the taxpayer shall separately account taxable income to Nebraska.
>
> Before a taxpayer engaged in a multistate business may separately account taxable income to Nebraska, the following requirements shall be satisfied:
>
> (1) The books and records are kept by recognized accounting standards to accurately reflect the amount of income of the multistate business which was realized in

Nebraska during the taxable period,

(2) The management functions of the business operations within Nebraska are separate and distinct so that in conducting the Nebraska business operations the management within Nebraska did not utilize or incur centralized management services consisting of operation supervision, advertising, accounting, insurance, financing, personnel, physical facilities, technical and research, sales and servicing, or purchasing during the taxable period,

(3) The business operations are separate and distinct and do not contribute to the overall operations of the company, and there are no interstate, intercompany, or interdivisional purchases, sales, or transfers during the taxable period.

If the taxpayer does not satisfy all three requirements stated above, then the taxpayer shall determine Nebraska taxable income by use of the apportionment formula.

As the Board has indicated, whether the appellant qualifies under (1) of the statute is not a question of strict statutory interpretation but, rather, involves an indepth analysis of the factual circumstances of appellant's activities. Such was the conclusion of the Supreme Court of Alaska with regard to a statute resembling § 77-2743. *State, Dept. of Revenue v. Amoco Prod. Co.*, 676 P.2d 595 (Alaska 1984).

In essence, appellant argues that separate accounting should be given preference over the apportionment method. Separate accounting is *not* given preference under the Nebraska statutes. Reg-24-15 clearly states that separate accounting may be used if, and only if, all three prongs of its test are satisfied.

Nebraska's method of determination is wholly consistent with the actions of the U.S. Supreme Court in this area. In *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983), the Court found that a substantial flow of value had passed from a parent company to its foreign subsidiaries so as to render the company a unitary, integrated business. The value consisted of both monetary and technical assistance. Several key factors were that the parent company assisted in providing both new and used equipment,

loaned funds and guaranteed loans provided by others, supervised, and filled the personnel needs of its subsidiaries that could not be met locally. The task of overseeing the operations of the subsidiaries was placed in the hands of one senior vice president and four other officers. These officers' duties included establishing general standards of professionalism, profitability, and ethical practices, as well as dealing with major problems and long-term decisions. Local executives, however, handled day-to-day management of the subsidiaries. The Court held: "We need not decide whether any one of these factors would be sufficient as a constitutional matter to prove the existence of a unitary business. Taken in combination, at least, they clearly demonstrate that the state court reached a conclusion 'within the realm of permissible judgment.' " 463 U.S. at 179-80.

In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980), the plaintiff both partially and wholly owned foreign corporations that were independently operated and managed. Vermont was allowed to include plaintiff's "foreign source" dividend income from corporations operating abroad. Because plaintiff had failed to show that each corporation was a distinct or discrete business enterprise, the Court agreed that the income from foreign sources had a requisite nexus with instate activities.

Similarly, in *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S. Ct. 2109, 65 L. Ed. 2d 66 (1980), the plaintiff was found to be a vertically integrated petroleum company doing business in several states. The U.S. Supreme Court stated that "[w]hile Exxon may treat its operational departments as independent profit centers, it is nonetheless true that this case involves a highly integrated business which benefits from an umbrella of centralized management and controlled interaction." 447 U.S. at 224. Exxon maintained a "centralized purchasing office in Houston whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers." *Id.*

The important links among the construction sites, showing centralized management and control, were stated most clearly

in the testimony of Harold Elsasser, secretary-treasurer of Pentzien:

> We have two engineers actually, our Vice President is also an engineer. They base in Omaha and they travel to the jobs periodically to review the progress. They also look at the jobs we're going to bid and they inspect them and then come back to the Omaha office to prepare the bids.
>
> . . . .
>
> . . . He [the president] participates in the bidding, promotes work, he reviews all the jobs, he's a very active individual.
>
> . . . .
>
> . . . The President tells him [the job superintendent] what to do.

In the instant case, appellant charged one president with the task of overseeing the entire operation. A team of coworkers in Omaha controls the overall strategy of the enterprise. The operational expertise of a vice president and an engineer is utilized to prepare bids for contracts, the lifeblood of the corporation.

The above analysis, as applied to Pentzien, leads to the conclusion that the individual construction projects do not, in effect, operate independently. On the contrary, they are functionally integrated due to centralized accounting and a considerable interplay between the home office and the construction sites. The central office plays a substantial role in facilitating contract bidding and providing financial services and health care options. Major expenses incurred by individual sites are transferred to Omaha for approval and payment. The obvious purpose behind this scheme is for the Omaha office to retain control over its parts.

The job foreman or supervisor runs the job and calculates time records for payroll purposes. The case of *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983), held that although day-to-day management responsibilities may lie in the hands of local executives, this alone is insufficient to defeat a unitary business finding.

Appellant argues that because there is no exchange of value in its corporation that is "not capable of precise identification

or measurement," its direct accounting method is justified. Brief for Appellant at 15. It states that rent income from its Omaha office building is separate and distinct from its horse farm operation income, which is separate and distinct from income received on construction jobs. Yet, certainly, the individual jobsites reap the benefits of Omaha's accounting and supervisory roles, as well as the central storage and repair facility located there. The sites enjoy a reduced overhead due to the Omaha hub office's handling of all administrative matters. They do not have the capacity to operate independently of the home office. They depend on the office for actual services, including payroll, preparation of tax returns, and hiring of accountants to perform such services.

PMD Investment Co. v. State, 216 Neb. 553, 345 N.W.2d 815 (1984), is of particular significance in deciding this case. There, the plaintiff, PMD, formerly Pamida, Inc., was a parent corporation of individual Gibson Discount Centers. Pamida and its subsidiaries were found to conduct a unitary business such that the proper method of determining its income from sources in Nebraska was the combined income, or apportionment, approach. An order of the Tax Commissioner assessing a deficiency tax was affirmed.

Like Pentzien's home office, Pamida was found to perform a number of administrative services for its Gibson Discount Centers. Pamida maintained the books and records for the local stores. It prepared the payroll, although time records were kept by the local stores. Pamida also provided group insurance for all employees. Furthermore, virtually all income and approximately 95 percent of all expenses were attributed to individual store locations, yet this court found the evidence sufficient to sustain a unitary business finding. The above facts are absolutely identical in form to those in the Pentzien case. Thus, a unitary business finding may be warranted.

On even closer facts to those at hand, the Supreme Court of Utah held that a general construction business based in Sioux City, Iowa, was unitary in nature due to its unity of ownership, unity of operations, and unity of use. The court's holding in *Western Contracting Corp. v. State Tax Com'n*, 18 Utah 2d 23, 414 P.2d 579 (1966), was based on an uncontroverted

memorandum submitted by the plaintiff. This memorandum showed that the corporation had only one permanent home office from whence its executive, administrative, and financial affairs were directed. The president and other principal officers maintained their offices at this location. The corporation's property and equipment were also maintained at this central office.

The court summarized the other aspects of this centralized Sioux City office as follows:

> The central office hires all the permanent employees, such as project managers, project engineers, project accountants, construction superintendents, and master mechanics. These people move from project to project and are often times transferred prior to the completion of a project. The only people hired at the site of local operations are the laborers, nonsupervisory and some clerical help.
>
> The project payroll is prepared at the job site, where a separate set of books are maintained, but reports on these books are forwarded to the home office. From these reports, the central office applies depreciation and overhead costs, and the financial statements are prepared by the general accounting office. The banking functions are handled by the home office. The chief accountant periodically transfers money to local bank accounts from the corporation's general account to cover the local payroll checks at each project. All receipts are processed through this main office. All permanent records in connection with payrolls of each project are maintained at the central office, where quarterly payroll reports to the various governmental agencies are prepared.
>
> All bidding, major supply and equipment purchasing are handled by the Sioux City office. The individual project managers are summoned there regularly to review the progress on their assigned projects. All managerial functions and duties are reposed exclusively in the personnel at the home office, while the project managers perform, primarily, ministerial functions.

Id. at 33, 414 P.2d at 586-87.

Pentzien's horse farm operation is not involved in the same type of business as its pipeline company. However, the record demonstrates that payroll and employee health plans are handled by the corporate office for the horse farm as well as for the pipeline business. Managerial decisions regarding the farm are also made at the home office. The president of Pentzien reviews and approves bills from the farm and decides what kind of inventory (colts, breeding stock, etc.) to maintain. For example, the board of directors of Pentzien recently decided to shift the farm's primary emphasis from the breeding and raising of quarter horses to the thoroughbred racing horse industry.

On similar facts, the Montana Supreme Court held that a paper box business was a unitary one, so as to include the income of its instate cattle ranch operations. The case of *Russell Stover Candies v. Dept. of Revenue*, 204 Mont. 122, 665 P.2d 198 (1983), *reh'g denied* 465 U.S. 1014, 104 S. Ct. 1018, 79 L. Ed. 2d 247 (1984), held that the corporation was not entitled to separate accounting treatment. The court based its holding on the following key facts:

> The ranches depended upon the out-of-state operation for actual services including preparation of federal and state reports, tax returns and financial statements and hiring accountants to perform such services. The home office also kept all records and books and provided financing when funds in the ranch division expense account were insufficient. Further, the directors and officers controlled *all* divisions of Ward, including the ranch divisions. They approved or made *all* major decisions with respect to ranching activity such as buying equipment and buying and selling cattle. If such decisions were not made, the ranches simply would stand idle.
>
> Further, we believe that Ward [the corporation] admitted that the ranches were part of a unitary business by utilizing the unitary business approach when filing corporation income tax forms in the other states where it operated. It considered the ranches part of its unitary business to set off income earned in those states with losses incurred in Montana. However, to minimize tax assessment in Montana, Ward asserted that it was a

separate entity.

204 Mont. at ____, 665 P.2d at 201-02. In an analogous situation, Pentzien has utilized an apportionment formula in some other states.

Finally, in addressing the unitary business issue, appellant contends that because a separate system of accounting was in fact used, a unitary apportionment method of reporting to determine the corporation's income was not necessary.

In *PMD Investment Co. v. State*, 216 Neb. 553, 345 N.W.2d 815 (1984), this court held that the fact that a taxpayer uses a method of separate accounting is not binding on the State if, in fact, the taxpayer is engaged in a unitary business operation. *PMD* relied on *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S. Ct. 2109, 65 L. Ed. 2d 66 (1980), which held that Exxon's use of a separate system of accounting did not preclude the State of Wisconsin from utilizing the combined or apportionment method to figure the amount of Exxon's income subject to Wisconsin's tax laws. The Court in *Exxon* stated: "As this Court has on several occasions recognized, a company's internal accounting techniques are not binding on a State for tax purposes." 447 U.S. at 221.

PMD additionally relied upon *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980), which noted that "separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale." 445 U.S. at 438. The *Mobil* Court continued, "Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.' " *Id.*

The overall purpose of apportionment must be remembered. It is "to permit a fair determination of the portion of business income that is attributable to business activity within the state by the reporting member of the unitary group." *PMD Investment Co. v. State, supra* at 556, 345 N.W.2d at 817. Thus, use of the property, payroll, and sales factors in Pentzien's case is appropriate.

Use of an apportionment formula which is fairly calculated to allocate to a State that portion of the net income reasonably attributable to the business done there has long been recognized as consistent with the requirements of the 14th amendment. *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1942).

"Arbitrary and capricious action, in reference to action of an administrative agency, means action taken in disregard of facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion." *Haeffner v. State*, 220 Neb. 560, 567, 371 N.W.2d 658, 662 (1985). The finding below was not unreasonable.

In making an independent determination, it is concluded that the decision of the Board was based on appropriate evidence which justified the assessment of a tax deficiency. The Board's determination was not in violation of constitutional provisions; in excess of the statutory authority of the agency; unsupported by competent, material, and substantial evidence; or arbitrary or capricious.

The decision of the district court affirming the action of the Board is affirmed.

AFFIRMED.

IN RE INTEREST OF C.M.H. AND M.S.H., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. M.H., NATURAL MOTHER, APPELLANT.

418 N.W.2d 226

Filed January 22, 1988. No. 87-267.

1. **Juvenile Courts: Final Orders: Time: Appeal and Error.** A final order of the separate juvenile court may be reviewed by the Supreme Court within the same time and in the same manner prescribed by law for review of an order of the district court.

2. **Motions for New Trial: Final Orders: Time: Appeal and Error.** Although a motion for a new trial may not be necessary in certain instances to obtain a review of a final order, the filing of such motion within the 10-day statutory period will serve to extend the time within which it is necessary to file a notice of appeal. However, a motion which is not filed within the time constraints required by statute is a nullity and does not extend the time within which a notice of appeal may be filed.
3. **Jurisdiction: Time: Appeal and Error.** It is mandatory and jurisdictional that a notice of appeal be filed within the time required by statute, and the courts have no power to extend the time directly or indirectly.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Appeal dismissed.

Lisa C. Lewis of Byrne, Rothery, Lewis, Bedel, Tubach & Zielinski, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, C.J.

The mother has appealed from an order of the separate juvenile court of Douglas County which terminated her parental rights to her two minor children. She assigns various errors, but because we find that this court is without jurisdiction, we need not discuss them. Rather, we order the appeal dismissed.

The juvenile court entered an order on July 7, 1986, terminating parental rights. On December 19, 1986, appellant filed a motion to vacate that order as set out in "§25-2001 et.seq.," for the reason that she did not receive notice of the termination order until December 12, 1986. The court, on January 26, 1987, considered the motion and, without ruling specifically on it, simply ordered that the appellant "may proceed with her appeal out of time if she so desires with notice of appeal to be filed within 30 days of this date."

Appellant filed a motion for new trial on February 11, 1987, going to the merits of the July 7 termination order, based on her allegations that the order terminating her parental rights was not supported by clear and convincing evidence and was

contrary to law. That motion was overruled by order of the court, dated February 23, 1987, which in turn granted appellant "30 days from this date to filed [sic] notice of appeal." Appellant's notice of appeal from the court's order rendered February 23, 1987, was filed on March 23.

Neb. Rev. Stat. § 43-2,126 (Reissue 1984) provides that "[a]ny final order . . . entered by a separate juvenile court may be reviewed by the Supreme Court of Nebraska within the same time and in the same manner prescribed by law for review of an order . . . of the district court . . . ."

A motion for a new trial must be made within 10 days after the complained-of order was entered, except where unavoidably prevented. Neb. Rev. Stat. § 25-1143 (Reissue 1985). It is required by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1986) that in order to vest this court with jurisdiction a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for a new trial. The timely filing of such notice of appeal is jurisdictional. *Smith v. Smith*, 225 Neb. 93, 402 N.W.2d 688 (1987).

Although Neb. Rev. Stat. § 25-1912.01 (Reissue 1985) does not require the filing of a motion for a new trial as a prerequisite to obtain a review in most cases, the timely filing of such a motion will extend the time within which a notice of appeal must be filed to a period of 30 days following the overruling of that motion. However, a motion for new trial which is not filed within the time constraints required by statute is a nullity and does not extend the time within which a notice of appeal may be filed. *Novak v. Nelsen*, 209 Neb. 728, 311 N.W.2d 8 (1981).

Neb. Rev. Stat. § 25-2001 (Reissue 1985) authorizes the trial court to vacate its order "for mistake, neglect, or omission of the clerk" or "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending . . . ." This apparently was the basis upon which appellant filed her motion of December 19 (failure to receive notice of judgment). Perhaps the trial court could have vacated its order of July 7. However, instead, the court simply extended the time within which appellant could prosecute her appeal. This the court had no authority to do.

This court has consistently held that it is mandatory

> and jurisdictional that notice of appeal be filed within the time required by statute. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. See, Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98; Friedman v. State, 183 Neb. 9, 157 N.W.2d 855.

State v. Kelly, 200 Neb. 276, 278, 263 N.W.2d 457, 458 (1978).

In any event, appellant did not file a notice of appeal within 30 days of the January 26 order; rather, she filed a motion for a new trial, as to the merits of the case, on February 11, more than 10 days after the entry of the court's order. Such motion was a nullity and did not extend the time within which she could perfect her appeal. Her notice of appeal filed on March 23, 1987, was well outside the 30-day period following the order of January 26.

This court never acquired jurisdiction of the case, and the appeal is ordered dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES P. SCHAFER, RESPONDENT.

418 N.W.2d 228

Filed January 22, 1988. No. 87-455.

Original action. Judgment of suspension.

Donald L. Knowles, Special Prosecutor, for relator.

Charles P. Schafer, pro se.

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

PER CURIAM.

This is an original disciplinary proceeding against Charles P. Schafer, an attorney admitted to practice law in Nebraska.

On January 22, 1986, the Counsel for Discipline of the Nebraska State Bar Association received a letter of complaint against the respondent from Galen Sharp, manager of Money Express Co., Inc. On January 23 the respondent received notice that he was the subject of this complaint from the Counsel for Discipline, pursuant to Neb. Ct. R. of Discipline 9(D) (rev. 1986). On February 20, the Counsel for Discipline received another letter of complaint against the respondent, this time by Charles L. Howle. The respondent was notified of this complaint in the same manner. Each letter of notification from the Counsel for Discipline informed the respondent that pursuant to rule 9(E), he had 15 working days to respond to the complaint and that failure to respond alone could be grounds for discipline. In a letter dated April 25, 1986, the Counsel for Discipline notified the respondent that he had failed to file responses to the complaints of Charles L. Howle and Galen Sharp and that if he did not respond immediately charges would be filed with the district Committee on Inquiry.

Thereafter, the Counsel for Discipline forwarded charges to the Committee on Inquiry of the Second Disciplinary District. See rule 9(G). The Committee on Inquiry held a hearing on the matter on February 4, 1987. Having determined that there were reasonable grounds for discipline, the Committee on Inquiry prepared formal charges. See rule 9(H)(3)(h). After reviewing the record of proceedings before the Committee on Inquiry, the Disciplinary Review Board agreed that there were grounds for discipline and accordingly submitted and filed with this court the formal charges. See rule 9(L).

The matter was referred to a referee, and a hearing was held on September 22, 1987. In his report the referee made findings of fact and law based upon all the evidence. No exceptions were filed to the report. Accordingly, the Nebraska State Bar Association, as relator, motioned for judgment pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 1986). Rule 10(L) provides that this court, in its discretion, may consider the findings of the referee final and conclusive.

Count I of the formal charges alleges that the respondent received notice that he was the subject of a complaint written to the Counsel for Discipline by Galen Sharp and that the respondent failed to respond to this complaint. A portion of Count II alleges that the respondent also failed to respond to the complaint initiated by Charles L. Howle. Counts I and II further allege that the respondent's failure to respond to these matters constitutes a violation of his oath of office, the Supreme Court rules of disciplinary proceedings, and Canon 1, DR 1-102(A)1 and 6, of the Code of Professional Responsibility. Rule 9(E) requires, in relevant part, that

> [u]pon receipt of notice of a complaint from the Counsel for Discipline, the member against whom the complaint is directed shall prepare and submit to the Counsel for Discipline, in writing, within fifteen working days of receipt of such notice, an appropriate response to the complaint, or a response stating that he refuses to answer substantively and explicitly asserting constitutional or other grounds therefor.

Neb. Ct. R. of Discipline 3(B) (rev. 1986) provides: "Acts or omissions by a member . . . which violate . . . provisions of these Rules, shall be grounds for discipline . . . ."

The respondent admitted that he did not respond to the complaints within the time required by rule 9(E). In his defense he testified that he did later respond to both complaints in separate letters and that he also had a meeting with Dennis Carlson, Counsel for Discipline, on the matter. Dennis Carlson, on the other hand, testified that, as of the time of the hearing, he had not received a written response to the complaints. No records were produced by the respondent in support of his contention that responses were sent. On these facts the referee found that the respondent did not timely file written responses to the complaints with the Counsel for Discipline as required by rule 9(E).

Count II of the formal charges alleges in relevant part as follows:

> 2. That on or about March 19, 1985, Charles L. Howle retained the Respondent to prepare Mr. Howle's personal and business tax returns for 1984. That the Respondent

agreed to complete the returns within two to three weeks.

3. That Mr. Howle on May 22, 1985, and May 30, 1985, requested information from the Respondent regarding the status of his personal and business tax returns for 1984. That after May 30, 1985, Mr. Howle made additional requests to the Respondent regarding the status of the returns.

4. That the Respondent failed to complete said returns or provide a satisfactory explanation regarding the delay in completing the returns.

5. That on or about November 7, 1985, and again on November 27, 1985, Mr. Howle requested the return of his tax records and data which had been provided to the Respondent.

6. That Mr. Howle has not received his tax records from the Respondent.

Count II further charges that these actions are in violation of Canon 6, DR 6-101(A)3 and Canon 7, DR 7-101(A)2, of the Code of Professional Responsibility. DR 6-101(A)3 states that a lawyer shall not neglect a legal matter entrusted to him. DR 7-101(A)2 states that a lawyer shall not intentionally "[f]ail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105."

The respondent admits that for various reasons he did not complete the returns. In his answer to this charge the respondent alleges that the tax records had been returned to Howle. In support of this contention the respondent testified that he returned the records in July or August of 1985. He also testified that he sent the materials with a handwritten note and that he probably had not kept a copy of it for his own files. The respondent blamed a part-time secretary whom he and his partner employed at the time for not sending the materials by certified mail. The respondent has previously testified, however, that at this time in 1985 he was no longer with his partner. The respondent was unable to produce any evidence other than his own testimony that he did in fact mail the material. In an affidavit dated May 12, 1986, Charles L. Howle stated that he had not received the tax records from the

respondent.

The referee noted the respondent's inconsistent testimony, the lack of documentary evidence, and the contradictory testimony of the complainant, Charles L. Howle, and found that the tax records were not timely returned as required under DR 6-101. Further, the referee found that the respondent failed to perform the services requested in a timely manner prior to his withdrawal as required by DR 7-101.

Count III of the formal charges alleges that the respondent engaged in the unauthorized practice of law after having been suspended for failure to pay bar dues in violation of DR 1-102 and Canon 3, DR 3-101(B), of the Code of Professional Responsibility.

On May 23, 1986, the respondent received a letter from the Clerk of the Supreme Court which advised him that he had not paid his dues and that if he did not pay by June 8, 1986, he would be automatically suspended. The respondent testified before the Committee on Inquiry that he paid his dues on approximately June 14 by sending a money order to the State Bar Association. In his answer to the formal charges, the respondent alleged that he paid the dues by a cashier's check rather than by money order. In his testimony before the referee the respondent stated that he paid his dues sometime after July 10, 1986, which was when he received a second letter from the Clerk of the Supreme Court informing him that his license to practice law had been suspended for failure to pay annual dues for 1986. The respondent was not able to produce any documentary evidence that he mailed his 1986 dues either by money order or cashier's check to the bar association. The respondent testified that after he received the suspension letter of July 10, 1986, he called the bar association and "they said just pay your dues and it's an automatic reinstatement." Article III, § 5, of the Rules Creating, Controlling and Regulating Nebraska State Bar Association (rev. 1981), to which the respondent was alerted in the first letter from the Clerk of the Supreme Court, states in relevant part that "[w]henever a member suspended for nonpayment of dues shall make payment of all arrears, and shall satisfy the Supreme Court of his qualifications to then return to the active practice of law, he

shall be entitled to reinstatement, *upon request*." (Emphasis supplied.) It is uncontroverted that the respondent engaged in the practice of law after his suspension.

The referee found that the respondent "did not exercise even minimum caution and prudence to make sure the Bar Association received his 1986 dues that Respondent claims to have mailed." The referee further found that it was the respondent's responsibility to know whether the suspension order had been revoked. On these facts the referee found that the respondent was guilty as charged of engaging in the unauthorized practice of law.

Pursuant to rule 10(L), the findings of the referee are accepted as final and conclusive. It is therefore the judgment of this court that the respondent, Charles P. Schafer, be and hereby is suspended from the practice of law for a period of 1 year, effective immediately.

JUDGMENT OF SUSPENSION.

ROBERT LOEWENSTEIN, PLAINTIFF, V. AMATEUR SOFTBALL ASSOCIATION OF AMERICA, DEFENDANT.

418 N.W.2d 231

Filed January 22, 1988. No. 87-471.

1. **Handicapped Persons: Statutes: Legislature: Intent: Invitor-Invitee.** By the inclusion of the phrase "and other places to which the general public is invited" within Neb. Rev. Stat. § 20-127(2) (Reissue 1985), the Legislature evidenced its intent that this statute should apply whenever the general public is invited to a given place at a given time.
2. **Statutes: Legislature: Intent.** A penal statute is to be strictly construed, and courts will not read in exceptions omitted by the Legislature or extend the language used by implication. The courts must assume that the Legislature intended to do what it did.
3. **Handicapped Persons: Invitor-Invitee.** Neb. Rev. Stat. § 20-127 (Reissue 1985) is not limited by considerations of safety.

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

Thom K. Cope of Bailey, Polsky, Cada, Todd & Cope, for plaintiff.

Randall L. Goyette of Baylor, Evnen, Curtiss, Grimit & Witt, and Edward T. Colbert and Joseph D. Lewis of Kline, Rommel & Colbert, for defendant.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

WHITE, J.

The U.S. District Court for the District of Nebraska has requested this court to answer questions of state law, the answers to which "may be determinative of the cause then pending in the certifying court." This court accepted the request for certification. Neb. Rev. Stat. § 24-219 (Reissue 1985).

Involved are the provisions of Neb. Rev. Stat. § 20-127 (Reissue 1983). The pertinent part of the statute provides:

> (1) The blind, the visually handicapped, the hearing impaired, and the otherwise physically disabled shall have the same right as the able bodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places.
>
> (2) The blind, the visually handicapped, the hearing impaired, and the otherwise physically disabled shall be entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, street cars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

The questions addressed to us are:

> 1. Does a "public accommodation, amusement or resort, and other places to which the general public is invited" within the meaning of Neb. Rev. Stat. §20-127 (Reissue of 1983), include the playing field of a privately or city-owned playground that is leased to a local

association of ASA during the time an ASA-sanctioned softball game is in progress?

2. Are the words "the same right as the able bodied to the full and free use" limited by considerations of safety, and, if so, what is the limitation standard?

A review of the facts is helpful. The Amateur Softball Association of America (ASA) is a nonprofit corporation which promotes the sport. The ASA organizes a national softball program with approximately 200,000 teams, numerous players, and 65,000 umpires. The ASA is affiliated with amateur sports organizations and is the exclusive national governing body of the sport of softball.

Robert Loewenstein is a paraplegic and confined to a wheelchair. For the past 4 years Loewenstein has been actively engaged as a coach of a women's softball team in Grand Island, Nebraska. In his coaching duties Loewenstein has frequently acted (in addition to his other duties) as an on-the-field base runner coach. In softball, as well as in baseball, areas usually marked by a chalkline are located near the first base and third base of a softball playing field. It is in those areas that a base runner coach generally places himself.

In 1986 the ASA amended rule 3, § 9, of the ASA Official Guide and Rule Book. Section 9 states: "NO EQUIPMENT SHALL BE LEFT LYING ON THE FIELD, EITHER IN FAIR OR FOUL TERRITORY. . . . All non-player equipment — including wheelchairs, crutches and other similar items — shall be confined to out-of-play areas." The Grand Island Softball Association (GISBA) promulgated the rule at the same time. GISBA schedules its games on playing areas leased from either the city of Grand Island or a private owner.

Section 9 effectively prohibits Loewenstein from entry on the playing surface during association games while the contests are in progress.

It is important that this court clearly state what it is called on to do. As a matter of comity, this court has agreed to interpret a statute. It is not called on to make a factual judgment or to apply any factual judgment to a legal standard.

We will consider the questions in the order presented. The plain meaning of the phrase "and other places to which the

general public is invited" within § 20-127(2) is dispositive of the issue raised by the first certified question. By the inclusion of this catchall phrase, the Legislature evidenced its intent that this statute should apply whenever the general public is invited to a given place at a given time. This is the case whether the locale of invitation is private or public in nature. The question before this court, then, is not whether the softball fields here in question possess some immutable characteristic which places them within the scope of the statute but, rather, whether GISBA invited the general public to play softball on these fields "during the time an ASA-sanctioned softball game is in progress." The answer to this question is found in the testimony of Ralph Ribble, who is the president of the board of directors of GISBA:

> [Attorney] There's no restriction on any member of the public becoming a member of the team, though, is there?
>
> [Ribble] Not if they agree to abide by the ASA rules.
>
> [Attorney] Absolutely, and so any member of the public could get a team together, as they do in Grand Island, apply for ASA membership and become a team, right?
>
> [Ribble] As long as they follow the guidelines.
>
> [Attorney] So your ASA sanction is really open to all members of the public, is it not?
>
> [Ribble] Yes.

Clearly, the softball fields are "places to which the general public is invited" under § 20-127(2). The fact that the invitation is restricted to ASA and team members is of no consequence since, in the first instance, all members of the public may become qualified to play. It is not necessary to decide whether the softball fields are per se places of "public accommodation, amusement or resort." It is enough to say that during the time an ASA-sanctioned softball game is in progress, the fields constitute places protected by the statute.

The second question asks whether there is an implied defense or exception to the rule in § 20-127 when the handicapped are excluded from public accommodations for reasons of safety. The defendant would have this court impose limiting language upon the statute that would allow those in control of public accommodations to restrict a physically disabled person from

access whenever they feel that such access would create an unreasonable safety risk. The defendant argues that "[p]laintiff is asking this Court to extend Neb. Rev. Stat. § 20-127 far beyond the laudable and remedial intentions of the legislature." Brief for Defendant at 7. We must recognize, however, that a violation of § 20-127 constitutes a Class III misdemeanor punishable by both fines and imprisonment. See Neb. Rev. Stat. § 20-129 (Reissue 1983). The liability imposed is therefore penal in nature and not limited by the damage caused to the handicapped person who is unjustly excluded. In other words, the Legislature's intent was more than just remedial.

The position of the defendant seems to be that § 20-127 should be open to construction as a matter of course and that we should not only construe it, but judicially rewrite it. The rules of statutory construction applicable here were well stated in *Bachus v. Swanson*, 179 Neb. 1, 4, 136 N.W.2d 189, 192 (1965):

> 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.

Furthermore, since § 20-127 is a penal statute, it must be strictly construed. We will not read in exceptions omitted by the Legislature or extend the language used by implication. *Bachus, supra*. The court will not speculate as to why the Legislature did not include a safety exception. We must assume that the Legislature intended to do what it did. *Id.*

As we have said, § 20-127 is unambiguous. Consideration of legislative intent is therefore unnecessary. However, evidence of the fact that this section is devoid of safety considerations is found in the floor debate which took place on a 1980 amendment to § 20-127. This amendment added subsection (4) to § 20-127, which provides: "Every totally or partially blind person shall have the right to make use of a white cane in any of the places listed in subsection (2) of this section." In discussing

the amendment, Senator Nichol addressed the Legislature as follows:

> Mr. President, members of the Legislature, this was brought to my attention over the weekend by Dr. Nyman who is the Director of the visually impaired for the State of Nebraska and he states that this is necessary because people using white canes would not be allowed in certain public places although their seeing eye dogs would be allowed, for example, skating rinks, other public places where many visually impaired people use their white canes instead of a seeing eye dog.

Floor Debate, L.B. 932, Urban Affairs Committee, 86th Leg., 2d Sess. 7588 (Mar. 3, 1980). The Legislature had before it an example of a potentially dangerous situation, a blind person with a cane in a skating rink, and yet, without regard to safety, chose to extend the protection provided by this section by passing the amendment. In fact, the amendment was passed by a unanimous vote. The answer to the second question is therefore no.

The only foreseeable limitation on § 20-127 would be that in a given situation the statute might cause a regulatory taking without just compensation contrary to the 5th and 14th amendments to the U.S. Constitution. This would be the case only if the statute as applied does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). See, also, *Agins v. Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). Whether a particular restriction on the use of property will be rendered invalid depends largely upon the particular circumstances. *Id.* Such an issue, however, is not before this court.

The cause is remanded to the U.S. District Court for the District of Nebraska.

JUDGMENT ENTERED.