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# REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 30, 1988 and JANUARY 26, 1989

IN THE

# Supreme Court of Nebraska

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## VOLUME CCXXX

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TRINA SOLLARS

OFFICIAL REPORTER

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LINCOLN

1990

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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

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

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

| Number of District | Counties in District | Judges in District | City |
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| First | Johnson, Nemaha, Pawnee, and Richardson | Robert T. Finn | Tecumseh |
| Second | Cass, Otoe, and Sarpy | Ronald E. Reagan | Papillion |
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| | | George A. Thompson | Papillion |
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| | | Robert V. Burkhard | Omaha |
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| | | 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<br>Richard P. Garden | Creighton<br>Norfolk |
| Tenth | Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster | Bernard Sprague<br>Stephen Illingworth | Red Cloud<br>Hastings |
| Eleventh | Hall and Howard | Joseph D. Martin<br>William H. Riley | Grand Island<br>Grand Island |
| Twelfth | Buffalo and Sherman | DeWayne Wolf | Kearney |
| Thirteenth | Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas | Donald E. Rowlands II<br>John P. Murphy | North Platte<br>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<br>Paul D. Empson | Alliance<br>Chadron |
| Seventeenth | Scotts Bluff | Alfred J. Kortum<br>Robert O. Hippe | Gering<br>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<br>John M. Brower | Columbus<br>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 |
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| | | Donald R. Grant | Lincoln |
| | | Jack Lindner | Lincoln |
| | | Gale Pokorny | Lincoln |
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| | | Walter H. Cropper | Omaha |
| | | Lyn V. Ferer | Omaha |
| | | Richard M. Jones | Omaha |
| | | John McGrath | Omaha |
| | | Thomas V. McQuade | Omaha |
| | | Jane Prochaska | Omaha |
| | | Mark Ashford | 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 | J. Patrick McArdle | Wilber |
| Eighth | Cedar, Dakota, Dixon, and Thurston | Rodney Smith | Dakota City |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

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

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# TABLE OF CASES REPORTED


A-15145, A-15146, A-15147, and A-15148, In re Applications ..... 580
ABA Corp.; Commercial Fed. Sav. & Loan v. ..... 317
A.G.G., In re Interest of ..... 707
A.L.G., In re Interest of ..... 732
A.Z., B.Z., and R.Z., In re Interest of ..... 291
Abdouch; State v. ..... 929
Adams, In re Interest of ..... 109
Alderman; State ex rel. Thompson v. ..... 335
Application of United Tel. Co., In re ..... 747
Applications A-15145, A-15146, A-15147, and A-15148, In re ..... 580
Archbishop Bergan Mercy Hosp.; Uryasz v. ..... 323
Ardan, Inc.; White v. ..... 11
Arthaloney; State v. ..... 819

Bailey; State v. ..... 229
Bank of Bellevue; Bock v. ..... 908
Barnes; State v. ..... 949
Beatrice Nat. Bank v. Southeast Neb. Co-op ..... 671
Bedrosky v. Hiner ..... 200
Behnke; Norfolk Iron & Metal v. ..... 414
Bender; D & R Realty v. ..... 301
Bennett; Obermeier v. ..... 184
Berkman; State v. ..... 163
Beverly Ent.; Scottsbluff Typewriter Leasing v. ..... 699
Blair; State v. ..... 775
Board of Ed. of Sch. Dist. No. 5; Stephens v. ..... 38
Board of Ed. of Sch. Dist. of Ogallala; Kennedy v. ..... 68
Board of Regents v. Lueder Constr. Co. ..... 686
Board of Regents v. Lueder Constr. Co. ..... 698
Board of Regents v. Wilscam Mullins Birge ..... 675
Bock v. Bank of Bellevue ..... 908
Borland; Brown v. ..... 391
Bosselman, Inc. v. State ..... 471
Brown v. Borland ..... 391
Buffalo Cty. Bd. of Equal.; Ev. Luth. Soc. v. ..... 135
Burhoop v. Burhoop ..... 594
Bustos; State v. ..... 524
Butler Manuf. Co.; Smith v. ..... 734

Cadwallader; State v. ..... 881
Cambridge, City of; Municipal Energy Agency of Neb. v. ..... 61
Christensen v. City of Tekamah ..... 576
City of Cambridge; Municipal Energy Agency of Neb. v. ..... 61
City of Mead; Hutmacher v. ..... 78
City of Omaha; Franklin v. ..... 598
City of Omaha; Sorensen v. ..... 286
City of Tekamah; Christensen v. ..... 576
Commercial Fed. Sav. & Loan v. ABA Corp. ..... 317
Consolidated Freightways; Fisher Corp. v. ..... 832
Cool; Nelson v. ..... 859
Cooperative Serv. Co.; McCook Equity Exch. v. ..... 758
Cornhusker Packing Co.; Grauerholz v. ..... 641
County of Lancaster; Olson v. ..... 904
County of York v. Johnson ..... 403

D & R Realty v. Bender ..... 301
D.L.S., In re Interest of ..... 435
Dabbs v. Dabbs ..... 368
Dakota Title; Everlasting Golden Rule Ch. v. ..... 590
DeGroot; State v. ..... 101
Delgado v. Inryco, Inc. ..... 662
Derby; Sanchez v. ..... 782
Dewey v. Dewey ..... 538
Dittenber; Raben v. ..... 822
Dolan; Nelson v. ..... 848
Dunn v. Hemberger ..... 171

E.R., J.R., and A.R., In re Interest of ..... 646
Employers Mut. Cas. Co.; Jones v. ..... 549
Ensrud v. Ensrud ..... 720
Estate of Peterson, In re ..... 744
Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal. ..... 135
Everlasting Golden Rule Ch. v. Dakota Title ..... 590

Ferrell; State v. ..... 958
First Fed. Sav. & Loan Assn. v. Thomas ..... 465
First Nat. Bank of Omaha v. State ..... 259
First Nat. Bank of O'Neill; Svoboda v. ..... 595
Fisher Corp. v. Consolidated Freightways ..... 832
Fleming Co. of Nebraska v. Michals ..... 753
Forney; Palmer v. ..... 1
Foster; State v. ..... 607
Fox v. Fox ..... 218
Franklin v. City of Omaha ..... 598
Fraser; State v. ..... 157
Friend; State v. ..... 765

Gard v. Pelican Publishing Co. ..... 656
Garza v. Maaco Auto Painting & Bodyworks ..... 341
General Electric Credit Corp. v. Lewis ..... 429
Georgetowne Ltd. Part. v. Geotechnical Servs. ..... 22
Geotechnical Servs.; Georgetowne Ltd. Part. v. ..... 22
Gillespie v. State ..... 587
Glen Park Terr. #1 Homeowners Assn. v. M. Timm, Inc. ..... 48
Golden; State v. ..... 284
Grauerholz v. Cornhusker Packing Co. ..... 641
Greeno; State v. ..... 568
Griffith v. Griffith ..... 314
Grone v. Lincoln Mut. Life Ins. Co. ..... 144
Gugelman; Security State Bank v. ..... 842
Guida; State v. ..... 961

Harton; State v. ..... 167
Hawthorne; State v. ..... 343
Hazer; Weiner v. ..... 53
Heithoff v. Nebraska State Bd. of Ed. ..... 209
Hemberger; Dunn v. ..... 171
Herold; Strother v. ..... 801
Hibbard v. Hibbard ..... 364
Hiner; Bedrosky v. ..... 200
Hjorth; Williams v. ..... 97
Hub Hall Co.; Topil v. ..... 151
Hutmacher v. City of Mead ..... 78

In re Application of United Tel. Co. ..... 747
In re Applications A-15145, A-15146, A-15147, and A-15148 ..... 580
In re Estate of Peterson ..... 744
In re Interest of A.G.G. ..... 707
In re Interest of A.L.G. ..... 732
In re Interest of A.Z., B.Z., and R.Z. ..... 291
In re Interest of Adams ..... 109
In re Interest of D.L.S. ..... 435
In re Interest of E.R., J.R., and A.R. ..... 646
In re Interest of J.D.M. ..... 273
In re Interest of Jones ..... 462
In re Interest of M.M., C.M., and D.M. ..... 388
In re Interest of N.B. ..... 717
In re Interest of S.L.P. ..... 635
In re Interest of Z.D.D. and N.J.D. ..... 236
Inryco, Inc.; Delgado v. ..... 662

J.D.M., In re Interest of ..... 273
J. Q. Office Equip. v. Sullivan ..... 397
Jensen; Koepp v. ..... 489
Johnson; County of York v. ..... 403

Jones, In re Interest of ..... 462
Jones; State v. ..... 528
Jones; State v. ..... 968
Jones v. Employers Mut. Cas. Co. ..... 549

K N Energy, Inc.; Reimer v. ..... 74
K.M.H. v. Lutheran Gen. Hosp. ..... 268
K.M.H. v. Lutheran Gen. Hosp. ..... 269
Kavanaugh; State v. ..... 889
Kemper v. State ..... 740
Kennedy v. Board of Ed. of Sch. Dist. of Ogallala ..... 68
Klein v. Klein ..... 385
Kleiva v. Paradise Landscapes ..... 234
Knievel v. Knievel ..... 453
Koepp v. Jensen ..... 489

L. J. Vontz Constr. Co. v. State ..... 377
LaMere; State v. ..... 629
Lancaster, County of; Olson v. ..... 904
Lanners v. Lanners ..... 60
Lewis; General Electric Credit Corp. v. ..... 429
Lewis; State v. ..... 224
Lewis; State v. ..... 972
Lincoln Mut. Life Ins. Co.; Grone v. ..... 144
Lueder Constr. Co.; Board of Regents v. ..... 686
Lueder Constr. Co.; Board of Regents v. ..... 698
Luna; State v. ..... 966
Lutheran Gen. Hosp.; K.M.H. v. ..... 268
Lutheran Gen. Hosp.; K.M.H. v. ..... 269
Lyman; State v. ..... 457

M. Timm, Inc.; Glen Park Terr. #1 Homeowners Assn. v. ..... 48
M.M., C.M., and D.M., In re Interest of ..... 388
Maaco Auto Painting & Bodyworks; Garza v. ..... 341
Marco; State v. ..... 355
Marrs; State v. ..... 977
Masur; State v. ..... 620
McArthur; State v. ..... 653
McCook Equity Exch. v. Cooperative Serv. Co. ..... 758
McDonald; State v. ..... 85
McKain; State v. ..... 817
McLaughlin v. McLaughlin ..... 460
Mead, City of; Hutmacher v. ..... 78
Meisinger v. Meisinger ..... 37
Michals; Fleming Co. of Nebraska v. ..... 753
Miller v. Radtke ..... 561
Miracle Hills Ctr. Ltd. Part. v. Nebraska Nat. Bank ..... 899
Mullendore v. Nuernberger ..... 921

Muller v. Thaut ..... 244
Mundt v. Northwestern Bell Tel. Co. ..... 192
Municipal Energy Agency of Neb. v. City of Cambridge ..... 61
Murman; Selection Research, Inc. v. ..... 786

N.B., In re Interest of ..... 717
Nebraska Nat. Bank; Miracle Hills Ctr. Ltd. Part. v. ..... 899
Nebraska State Bd. of Ed.; Heithoff v. ..... 209
Nelson v. Cool ..... 859
Nelson v. Dolan ..... 848
Norfolk Iron & Metal v. Behnke ..... 414
Northern States Beef Co.; Tatara v. ..... 230
Northwestern Bell Tel. Co.; Mundt v. ..... 192
Nuernberger; Mullendore v. ..... 921

Obermeier v. Bennett ..... 184
Ogallala, Board of Ed. of Sch. Dist. of; Kennedy v. ..... 68
Oliver; State v. ..... 864
Olson v. County of Lancaster ..... 904
Omaha, City of; Franklin v. ..... 598
Omaha, City of; Sorensen v. ..... 286
O'Neal; Transcon Lines, Inc. v. ..... 31

Palmer v. Forney ..... 1
Paradise Landscapes; Kleiva v. ..... 234
Pelican Publishing Co.; Gard v. ..... 656
Peterson, In re Estate of ..... 744
Peterson v. Peterson ..... 479
Polinski; State v. ..... 43

Quiring; State v. ..... 535

Raben v. Dittenber ..... 822
Radtke; Miller v. ..... 561
Reddick; State v. ..... 218
Reimer v. K N Energy, Inc. ..... 74
Rollogas v. Rollogas ..... 46
Rubin v. Rubin ..... 919

S.L.P., In re Interest of ..... 635
Sanchez v. Derby ..... 782
Schreiner v. Schreiner ..... 674
Scottsbluff Typewriter Leasing v. Beverly Ent. ..... 699
Sears, Roebuck & Co.; White v. ..... 369
Security State Bank v. Gugelman ..... 842
Selection Research, Inc. v. Murman ..... 786
Sheridan; State v. ..... 979
Sievers v. Sievers ..... 983
Slezak; State v. ..... 197

Smith v. Butler Manuf. Co. ..... 734
Snell v. Snell ..... 764
Snodgrass; State v. ..... 119
Sorensen v. City of Omaha ..... 286
Southeast Neb. Co-op; Beatrice Nat. Bank v. ..... 671
State; Bosselman, Inc. v. ..... 471
State ex rel. Thompson v. Alderman ..... 335
State; First Nat. Bank of Omaha v. ..... 259
State; Gillespie v. ..... 587
State; Kemper v. ..... 740
State; L. J. Vontz Constr. Co. v. ..... 377
State v. Abdouch ..... 929
State v. Arthaloney ..... 819
State v. Bailey ..... 229
State v. Barnes ..... 949
State v. Berkman ..... 163
State v. Blair ..... 775
State v. Bustos ..... 524
State v. Cadwallader ..... 881
State v. DeGroot ..... 101
State v. Ferrell ..... 958
State v. Foster ..... 607
State v. Fraser ..... 157
State v. Friend ..... 765
State v. Golden ..... 284
State v. Greeno ..... 568
State v. Guida ..... 961
State v. Harton ..... 167
State v. Hawthorne ..... 343
State v. Jones ..... 528
State v. Jones ..... 968
State v. Kavanaugh ..... 889
State v. LaMere ..... 629
State v. Lewis ..... 224
State v. Lewis ..... 972
State v. Luna ..... 966
State v. Lyman ..... 457
State v. Marco ..... 355
State v. Marrs ..... 977
State v. Masur ..... 620
State v. McArthur ..... 653
State v. McDonald ..... 85
State v. McKain ..... 817
State v. Oliver ..... 864
State v. Polinski ..... 43
State v. Quiring ..... 535

State v. Reddick ..... 218
State v. Sheridan ..... 979
State v. Slezak ..... 197
State v. Snodgrass ..... 119
State v. Swift ..... 373
State v. Tatara ..... 279
State v. Temple ..... 624
State v. Texel ..... 810
State v. Trevino ..... 494
State v. Uwanaka ..... 808
State v. Vann ..... 601
State v. Walters ..... 539
State v. Wiggins ..... 632
State v. Wilcox ..... 123
State v. Zemunski ..... 613
State v. Zemunski ..... 954
State; Zwygart v. ..... 128
Stephens v. Board of Ed. of Sch. Dist. No. 5 ..... 38
Strother v. Herold ..... 801
Sullivan; J. Q. Office Equip. v. ..... 397
Svoboda v. First Nat. Bank of O'Neill ..... 595
Svoboda v. Svoboda ..... 283
Swift; State v. ..... 373

Tatara; State v. ..... 279
Tatara v. Northern States Beef Co. ..... 230
Tekamah, City of; Christensen v. ..... 576
Temple; State v. ..... 624
Texel; State v. ..... 810
Thaut; Muller v. ..... 244
Thiel v. Thiel ..... 806
Thomas; First Fed. Sav. & Loan Assn. v. ..... 465
Thompson, State ex rel. v. Alderman ..... 335
Topil v. Hub Hall Co. ..... 151
Transcon Lines, Inc. v. O'Neal ..... 31
Trevino; State v. ..... 494

United Tel. Co., In re Application of ..... 747
Uryasz v. Archbishop Bergan Mercy Hosp. ..... 323
Uwanaka; State v. ..... 808

Vann; State v. ..... 601

Walters; State v. ..... 539
Weiner v. Hazer ..... 53
White v. Ardan, Inc. ..... 11
White v. Sears, Roebuck & Co. ..... 369
Wiggins; State v. ..... 632

Wilcox; State v. ..... 123
Williams v. Hjorth ..... 97
Wilscam Mullins Birge; Board of Regents v. ..... 675

York, County of v. Johnson ..... 403

Z.D.D. and N.J.D., In re Interest of ..... 236
Zemunski; State v. ..... 613
Zemunski; State v. ..... 954
Zwygart v. State ..... 128

## CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 86-340: **Line v. Line.** Motion of appellee for summary affirmance sustained; see Neb. Rev. Stat. § 42-351 (Reissue 1984); judgment affirmed; see Rule 7B(2).

No. 87-019: **Warner v. Hochstetler.** By order of the court, bankruptcy stay lifted. Stipulations allowed; appeal dismissed.

No. 87-058: **Kirwan v. Potter.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-158: **Coolidge Hospital v. State.** Stipulation allowed; appeal dismissed.

No. 87-177: **In re Guardianship of Garvey.** By order of the court, appeal dismissed as moot.

No. 87-180: **Peterson v. Wohlgemuth.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-198: **Fuss v. Island Electric Construction Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-316: **Burbach v. Steinbach.** Stipulation allowed; appeal dismissed.

Nos. 87-334, 87-383, 87-562: **In re Application of Teleconnect Co. v. Lincoln Telephone.** Stipulation allowed; appeal dismissed.

No. 87-385: **Waugh v. Andsager.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-492: **American Savings Co. v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-500: **Federal Deposit Ins. Corp. v. Slangal.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-513: **State of Iowa ex rel. Carlson v. Carlson.** Appeal dismissed. See Rule 7A(2).

No. 87-551: **Hunt Transportation v. Sorensen.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-584: **Production Credit Assn. v. Kudlacek.** Stipulation allowed; appeal dismissed.

No. 87-589: **Imperial Casualty and Indemnity Co. v. Protective Natl. Ins. Co. of Omaha.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-714: **Contemporary Industries Midwest v. Nebraska Liquor Control Comm.** Stipulation allowed; reversed and remanded with directions.

No. 87-760: **Central Transfer v. Tri-County Bank.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-783: **Hunt Transportation v. Sorensen.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-1027: **Wittmaack v. Fuhrmeister.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-1136: **Barnthouse v. Barnthouse.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-011: **Smith v. Department of Corrections.** Motion of appellant to dismiss appeal sustained; appeal dismissed as moot; mandate to issue accordingly forthwith.

No. 88-055: **Beck v. County Committee for School District Reorganization.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-086: **State v. Kopfle.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-097: **Ak-Sar-Ben Fixture & Supply v. Bill & Bucks, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 88-107: **State v. Riggs.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-111: **Fetherkile v. Fetherkile.** Stipulation allowed; appeal dismissed.

No. 88-116: **State v. Smith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 88-117: **State v. Smith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-132: **State v. Eagles.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-169: **Markley Farms, Inc. v. Riverside Fertilizer Co.** Stipulation allowed; appeal dismissed.

No. 88-177: **State v. Rohe.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-185: **Norwest Bank v. Nelson Ranches.** Appeal dismissed for failure to file briefs.

No. 88-208: **Thoms v. Thoms.** Stipulation allowed; appeal and cross-appeal dismissed.

No. 88-236: **Federal Land Bank of Omaha v. Cihlar.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-241: **State v. Bruce.** Affirmed. See Rule 7A(1); all pending motions of appellant rendered moot.

No. 88-246: **Midwest Animal Products v. Dubuque Packing Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-253: **In re Application of Adams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-258: **State v. Heesacker.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-263: **State v. Sloan.** Affirmed. See Rule 7A(1).

No. 88-283: **State v. Nesbitt.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-287: **Barnes v. Wickes Companies, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-291: **State v. Jackson.** Affirmed. See Rule 7A(1).

No. 88-295: **In re Interest of Tyler.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-310: **State v. Bain.** Affirmed. See Rule 7A(1).

No. 88-312: **State v. Bird Head.** Affirmed. See Rule 7A(1).

No. 88-315: **First National Bank & Trust v. Aalborg.** By

order of the court, appeal dismissed for lack of a final order; see Rule 7A(2).

No. 88-323: **State v. Patchin.** Affirmed. See Rule 7A(1).

No. 88-324: **State v. Patchin.** Affirmed. See Rule 7A(1).

No. 88-338: **Nelsen v. Schaad.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-359: **State v. DeJaynes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-376: **State v. Kling.** Affirmed. See Rule 7A(1).

No. 88-381: **Weaver v. Mercy Care Center.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 88-393: **Ditter v. Smith-Camp.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-407: **State v. Ball.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-416: **State v. Parrish.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-422: **State v. Beason.** Affirmed. See Rule 7A(1).

No. 88-423: **State v. Kilcoin.** Affirmed. See Rule 7A(1).

No. 88-432: **State v. Young.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-445: **State v. Coleman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-447: **State v. Swigart.** Affirmed. See Rule 7A(1).

No. 88-454: **In re Interest of Strickland.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-456: **Mefferd v. Mefferd.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 88-460: **State v. Kellogg.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 88-461: **State v. O'Donnell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-472: **Gushard v. State.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-474: **In re Estate of Barrett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-482: **N & K Investment Co. v. T.D.S., Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-487: **State v. Fowler.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-493: **Crete State Bank v. Kraus.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-495: **Travelers Ins. Co. v. Baltensperger.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-496: **In re Adoption of Blue.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-499: **State v. McKain.** Affirmed. See Rule 7A(1).

No. 88-501: **Champlain Valley Fed. Savings v. Krauss.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-503: **State v. Nussbaum.** Affirmed. See Rule 7A(1).

No. 88-510: **Oltman & Assoc. v. Brown.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-511: **State v. Long Soldier.** Affirmed. See Rule 7A(1).

No. 88-523: **State v. King.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-524: **State v. Murphy.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-525: **State v. Austin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 88-527: **State v. Brewer.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-537: **Scott v. Mattingly.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 88-539, 88-628: **State v. West.** Affirmed. See Rule 7A(1).

No. 88-545: **In re Interest of Dabney.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-550: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-551: **State v. Ramirez.** Affirmed. See Rule 7A(1).

No. 88-554: **State v. Patterson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-556: **Upper Big Blue N.R.D. v. City of Kearney.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-557: **In re Interest of Lawrence.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-559: **Dahir v. Blue Cross Blue Shield.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 88-561: **Ford v. Ford.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 88-562: **Federal Land Bank of Omaha v. Gotschall.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-566: **Adams v. John.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-576: **Mettenbrink v. FirsTier Bank.** Affirmed. See Rule 7A(1)(c) and (d).

No. 88-579: **State v. Brewer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-580: **State v. McGhee.** Court finds appeal wholly

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

No. 88-582: **Hauf v. Day.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-583: **Geiger v. Geiger.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-587: **Busboom v. D. Michaelsons, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-590: **State v. Bodfield.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-591: **State v. Martin.** Affirmed. See Rule 7A(1).

No. 88-592: **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. 88-593: **Deuel v. K-Mart Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-595: **Brillas v. Midlands Community Hospital.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 88-598: **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. 88-600: **State v. Bailey.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-607: **Schmale v. Schmale.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-608: **Foss v. First Data Resources, Inc.** Stipulation allowed; appeal dismissed.

No. 88-613: **Dudden Elevator, Inc. v. First National Bank of Ogallala.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 88-614: **Gorcos v. Gorcos.** Stipulation allowed; appeal dismissed.

No. 88-618: **State v. Smith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 88-622: **State v. Brewer.** Affirmed. See Rule 7A(1).

No. 88-623: **State v. Whitney.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-624: **State v. Kampe.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-625: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-627: **Holdrege Cooperative Assn. v. Wilson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-629: **State v. Dan.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-630: **State v. Johnson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-632: **State v. Lemon.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-633: **State v. Bruce.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-634: **State v. Matthews.** Affirmed. See Rule 7A(1).

No. 88-636: **Mackey v. Alex Polyascko.** Stipulation allowed; appeal dismissed with prejudice.

No. 88-638: **State v. Lobush.** Affirmed. See Rule 7A(1).

No. 88-641: **State v. Beecher.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-642: **State v. Sanders.** Motion of appellant to dismiss

appeal sustained; appeal dismissed.

No. 88-646: **State v. Frazee.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-647: **State v. Frazee.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-650: **Timperley v. Timperley.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 88-673: **State v. Hinsley.** Affirmed. See Rule 7A(1).

No. 88-674: **State v. Sharp.** Affirmed. See Rule 7A(1).

No. 88-680: **State v. Bowersmith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-697: **LaPage v. Poppe.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-700: **Missouri River Farms v. Riverland Recreation Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 88-703: **State v. Milam.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-704: **State v. Lingenfelter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-705: **Westlawn Memorial Park Cemetery v. City of Grand Island.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-717: **State v. Burke.** Affirmed. See Rule 7A(1).

Nos. 88-718, 88-719: **State v. Holbert.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-720: **State v. Yager.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-723: **State v. Weaver.** Appeal dismissed. See Rule 7A(2).

No. 88-728: **State v. Moore.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-729: **State v. Sterba.** Affirmed. See Rule 7A(1).

No. 88-730: **State v. Carney.** Affirmed. See Rule 7A(1).

No. 88-734: **Professional Firefighters v. City of Omaha.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-735: **Transportation Leasing Co. v. City of Omaha.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-754: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3C.

No. 88-755: **State v. Walker.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 88-758: **Roza v. Thobough.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-776: **Uribe v. Uribe.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-779: **State v. Karpen.** Affirmed. See Rule 7A(1).

No. 88-783: **State v. Staudenmeier.** By order of the court, appeal dismissed for failure to file briefs.

Nos. 88-788, 88-789: **State v. Prior.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3C.

Nos. 88-791, 88-792: **State v. Richardson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3C.

No. 88-793: **State v. Coleman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-794: **State v. Imes.** Affirmed. See Rule 7A(1).

No. 88-799: **Stanko v. Chaloupka.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-802: **Adams County School Dist. v. Moeller.** Stipulation allowed; appeal dismissed.

No. 88-804: **Gentleman v. Gentleman.** Stipulation allowed;

appeal dismissed with prejudice.

No. 88-812: **Hagebush v. Lahners.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-825: **Steimer v. State Farm Fire & Casualty.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 88-829: **Kitt v. Dahm.** Affirmed. See Rule 7A(1).

No. 88-832: **Minihomes, Inc. v. Snider.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-836: **Bank of Chadron v. Hay Springs Land and Cattle Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-847: **Scarpello v. Scarpello.** Stipulation allowed; appeal dismissed.

No. 88-850: **Gay v. Hoagland.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-864: **Houdek v. Houdek.** Stipulation to modify district court order and dismiss appeal allowed; appeal dismissed.

No. 88-868: **State v. Schultz.** Stipulation allowed; appeal dismissed.

No. 88-891: **State v. Tvrdy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-892: **State v. Tvrdy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-898: **State v. Robinson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-906: **Brestel v. Dikeman Farms, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 88-907: **State v. Kallos.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-910: **Pacific City Graphics, Inc. v. Perfection Press.** Appeal dismissed. See Rule 7A(2).

No. 88-917: **Bello v. Lockheed Corporation.** Stipulation allowed; appeal dismissed.

No. 88-918: **State v. Prince.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-921: **State v. Fager.** Motion of appellant to dismiss

appeal sustained; appeal dismissed.

No. 88-945: **State v. Mitchell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-948: **Stanko v. Chaloupka.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-956: **Deegan v. Deegan.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-1037: **State v. Paulter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1057: **State v. Cudaback.** By order of the court, appeal dismissed for lack of jurisdiction.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

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CHARLENE PALMER, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF DENNIS GALE PALMER, DECEASED, APPELLANT, V. GLEN FORNEY, M.D., ET AL., APPELLEES.

429 N.W.2d 712

Filed September 30, 1988. No. 86-626.

1. **Expert Witnesses: Appeal and Error.** Absent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed.
2. **Trial: Expert Witnesses.** The determination of the truthfulness or accuracy of an expert's conclusions is for the jury.
3. **Trial: Expert Witnesses: Evidence.** An allegation that an expert offered false testimony will not be sustained on a mere difference of expert opinion, and where opinion evidence of experts is in conflict, it becomes a question for the jury.
4. **Trial: Negligence.** Where reasonable minds may draw different conclusions from the evidence, the question of negligence is for determination by the jury.
5. **Trial: Evidence: Witnesses: Appeal and Error.** All conflicts in the evidence, expert or lay, and the credibility of the witnesses are for the jury and not the Supreme Court on review.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Daniel B. Cullan and Gene M. Cullan, of Cullan, Cullan & Morrison, and Michael J. Javoronok, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, for appellant.

J.L. Zimmerman, of Atkins Ferguson Zimmerman Carney, P.C., for appellee West Nebraska General Hospital.

William P. Mueller and Rita C. Grimm, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., and William M. Lamson,

Jr., and Patricia A. Zieg, of Kennedy, Holland, DeLacy & Svoboda, for appellees Forney and Myers.

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

GRANT, J.

This is an appeal from the district court for Scotts Bluff County. Plaintiff-appellant, Charlene Palmer, as surviving spouse of her deceased husband, Dennis Gale Palmer, brought this action against defendants-appellees, Glen Forney, M.D., Kent Myers, M.D., and West Nebraska General Hospital. In her petition, plaintiff alleged that her husband had come under the defendants' care on October 29, 1982, after receiving injuries in a car accident. Plaintiff further alleged that her husband died on November 12, 1982, as a result of the negligent "consultation, care, management, and treatment of plaintiff's decedent" by Drs. Forney and Myers, and by the negligence of defendant hospital in not correcting the negligence of the doctors and in not rendering proper care. Defendants separately answered, denied any negligence, and alleged that the decedent's death was caused by the decedent's own contributory negligence. After a trial to a jury, the jury found for the defendants. After plaintiff's motion for a new trial was denied, plaintiff timely appealed to this court. Plaintiff sets out two assignments of error, alleging that the trial court erred (1) "in not discrediting the false testimony of Todd Sorensen, M.D., as a matter of law"; and (2) "in not finding Defendants negligent as a matter of law for the release of [the decedent] from the hospital despite his deteriorating respiratory condition and moderate respiratory failure." We affirm.

The record shows that on the morning of October 29, 1982, Dennis Palmer sustained severe chest injuries, after the vehicle he was operating at 45 miles per hour struck a parked semitrailer truck. Palmer was taken to the emergency room at defendant West Nebraska General Hospital in Scottsbluff. Defendant Dr. Forney was the physician on call. After reviewing Palmer's medical history, various lab tests, and chest x rays, Dr. Forney testified, he placed Palmer in the intensive care unit of the hospital for close observation and to monitor

his cardiac condition. Dr. Forney diagnosed Palmer's condition as follows:

> He had an automobile accident with multiple trauma; he had blunt trauma to his chest and abdomen, either probably a pulmonary contusion or bruising of the lung tissue, he had possible intraabdominal hemorrhage, a blunt trauma to his abdomen with unknown internal injuries. He had chronic bronchitis with a history of tobacco abuse.

The x rays showed that Palmer had at least one fractured rib and partial collapse of the lower lungs. Palmer was placed on supplemental oxygen, given pain medication, and encouraged to cough and breathe deeply to help clean up abnormal secretions. On the day of admission, the blood gas value for arterial oxygen ($PO_2$), or oxygen carrying capacity, of Palmer's blood was 59.9 millimeters of mercury (mm Hg). Testimony established that the normal blood gas measurement is between 70 and 100 mm Hg. After Palmer was placed on supplemental oxygen, his blood gas value improved to 75.2 mm Hg.

After Dr. Forney's initial diagnosis, defendant Dr. Myers joined in the treatment of Palmer. On October 30, Dr. Forney examined Palmer and determined that Palmer was bleeding intra-abdominally and that his ankle was sprained. Palmer's blood gas level on that day was 67.7 mm Hg. The next day Palmer's blood gas level went up to 72.4 mm Hg. Dr. Forney noted that Palmer had possibly contracted pneumonia. On November 1, Dr. Forney noted that Palmer's condition was improving, as Palmer was able to take deep breaths and was able to clear the secretions out of his lungs, and as his abdominal condition had stabilized.

Dr. Myers examined Palmer on November 2 and noted a fever. On November 5, Dr. Forney, after examining Palmer, changed the delivery mode of his respiratory treatment. On November 5, Palmer's blood gas was 53.5 mm Hg while oxygen was being administered. Dr. Forney observed that Palmer's condition was deteriorating, as Palmer was breathing rapidly, was in "lots of pain," and still had a fever. Dr. Forney testified at trial that these symptoms were common complications consistent with his earlier diagnosis. On November 6, Palmer

still had a high temperature. On November 7, Dr. Myers noted that Palmer was walking in the hallway without oxygen but still had a temperature. On November 7, Dr. Forney also saw Palmer but had nothing to add to Dr. Myers' observations. On November 8, Dr. Myers noted that Palmer's temperature was coming down and that his chest was clearing. Dr. Myers ordered Palmer's supplementary oxygen discontinued. Palmer's blood gas on room air (i.e., without supplementary oxygen) was 52.4 mm Hg. On that same afternoon, Dr. Forney discharged the patient. Dr. Forney testified that Palmer's condition on discharge was as follows:

> Mr. Palmer had shown significant improvement, especially over the last several days and at the time I dismissed him, I felt that he no longer needed the nursing care or nursing observation as long as we were able to provide him with close outpatient follow-up, specifically his exercise tolerance was improved, being that he was able to get up and around with less distress. His pain was diminished somewhat, of course, he still had pain. His temperature, especially compared over the last several days, had improved. His chest x-ray and his lung sounds were improving. I can't remember other specific things, but putting the whole clinical picture together along with his laboratory tests and vital signs and his examination and input that I had from the staff, I felt that he was significantly improved and felt that he could be dismissed safely.

Dr. Forney testified as to his final diagnosis on discharge, as follows:

> Final diagnosis was pulmonary contusion syndrome, which refers to the bruised lung and, then, the subsequent pneumonia that had followed, in addition to the chest wall injury, the broken ribs, the bruised chest. The final diagnosis as far as the abdominal injury was the same on admission as dismissal was, blunt trauma to the abdomen with lacerated liver, the diagnosis of sprained ankle was maintained throughout and did not change.

Dr. Forney gave instructions to Palmer on the date of discharge that he was to see Dr. Myers in 2 days, and gave

Palmer prescriptions for pain medication and for an antibiotic. Dr. Forney also instructed Palmer to contact him or Dr. Myers immediately should he begin to experience any problems.

On November 10, Palmer went to Dr. Myers' office for a followup examination. Dr. Myers noted that although Palmer was still experiencing chest pain and "some pain in his leg," he was doing "quite well." Dr. Myers examined Palmer's leg and determined that Palmer had a sore calf on his left leg with incipient phlebitis. Dr. Myers instructed Palmer to use moist heat and to elevate his leg, and gave him a prescription for an inflammatory agent.

On November 12, Mrs. Palmer called Dr. Myers' office and left word for him to call her. When Dr. Myers returned her call before 9:30 a.m., she informed him that her husband was "profoundly short of breath" and was having chest pain and that that condition had existed since the evening before. Mrs. Palmer told Dr. Myers that Palmer had not called the night before because he did not want to be told to return to the hospital. Dr. Myers talked to Palmer over the telephone and told him to get back to the hospital immediately, and then again talked to Mrs. Palmer and told her to return Palmer to the hospital immediately. Palmer apparently died while en route to the hospital as the result of a pulmonary embolism. After resuscitative efforts at the hospital failed, Palmer was pronounced dead in the emergency room. An autopsy showed that a clot had formed in one of Palmer's veins. The clot fatally occluded a major portion of the blood flow to Palmer's lungs. Dr. Forney testified that "pulmonary embolism was not strongly suspected in this situation because everything he had was better explained by his known diagnosis of bruised lung, pneumonia, bronchitis, chest wall injury."

In her first assignment of error, plaintiff contends that the trial court erred in not discrediting the testimony of Todd Sorensen, M.D., as a matter of law. Plaintiff's brief, at page 12, contends Dr. Sorensen, a witness called by the defense, "falsely interpreted" what Palmer's blood gas reading would have been on the date of discharge had Palmer been placed on supplemental oxygen, and alleges: "Specifically, Dr. Sorensen falsely used the A-a gradient equation and subsequently made

false predictions about the decedent's $PO_2$ based on the A-a gradient." Plaintiff contends that Palmer's $PO_2$ could not be determined from an A-a gradient calculation as done by Dr. Sorensen. Dr. Sorensen testified as to his opinion of what Palmer's $PO_2$ would have been had he been on supplemental oxygen on November 8, over plaintiff's objection. This court held in *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979), that under Neb. Rev. Stat. § 27-705 (Reissue 1985), an expert may render an opinion without first disclosing the underlying data upon which that opinion is based. Dr. Sorensen was not directly asked by plaintiff on cross-examination as to his extrapolation of the $PO_2$ from his A-a gradient calculations, although Dr. Sorensen could have been required to explain the basis of his opinion. *Dawson v. Papio Nat. Resources Dist.*, 206 Neb. 225, 292 N.W.2d 42 (1980).

At trial, Dr. Sorensen referred to Palmer's blood gas reading ($PO_2$) on November 5 of 53.5 mm Hg, which was determined while Palmer was receiving supplemental oxygen, and the blood gas reading ($PO_2$) on November 8 of 52.4 mm Hg, which was determined after Palmer's supplemental oxygen had been withdrawn. Dr. Sorensen testified that, considering the impact of the A-a gradient, the blood gas determination on the 8th, the date of discharge, showed improvement compared to the blood gas determination on the 5th. The A-a gradient refers to the ability of oxygen to defuse from the alveoli (the air sacs in the lungs) into the arteries (the blood vessels that carry blood past the lungs). It measures the efficiency of the blood gas exchange.

From an examination of the record, including the exhibits presented by plaintiff, it is clear that the contention most strongly made by plaintiff in connection with the liability issue is that plaintiff's decedent was discharged from the hospital when his condition was worse than when he entered. This contention is based primarily on the facts that, as set out above, Palmer's $PO_2$ was 59.9 mm Hg when admitted and 52.4 mm Hg when discharged.

In answer to the question addressed to him by one of defendants' counsel, "Well, how can you say that [Palmer was improving at the time of his discharge] when his $PO_2$ was the

lowest number it had been during his hospitalization?" Dr. Sorensen responded:

> A. Well, taking the $PO_2$ by itself is a little — It's out of context. There were other signs suggesting improvement, like I have just mentioned, the $PO_2$ was in fact the lowest, but what had been seen was that three days prior to that his $PO_2$, I think, was 54. He had been receiving supplemental oxygen at that point, which was not being given on the 8th when that last blood gas determination was made. If you consider the impact of Aa gradient, the $PO_2$, the blood gas determination on the 11th — I'm sorry, on the 8th, actually shows improvement compared to the blood gas determination on the 5th.

In support of his testimony, Dr. Sorensen went on to demonstrate how the A-a gradient could be calculated in clinical practice, but testified that the formula he used was "not precise enough for a physiologist to do an experiment with . . . ."

Dr. Sorensen further testified he did not use the formula in his practice and had not done the equation for "about 15 years" before he testified. As set out above, Dr. Sorensen testified that plaintiff's decedent was improving based partly on the reasoning that the $PO_2$ of 52.4 mm Hg on discharge on November 8 showed an improvement over the $PO_2$ of 53.5 mm Hg on November 5, because the 53.5 mm Hg reading was taken while Palmer was on 5 liters of oxygen and the 52.4 mm Hg reading was taken after the supplementary oxygen had been discontinued. Dr. Sorensen testified that had Palmer been tested on oxygen on the date of discharge the "likely finding would have been more like a $PO_2$ of 70 to 75."

Plaintiff objected to the giving of Dr. Sorensen's opinion on this issue. Her objection was overruled, and Dr. Sorensen's opinion, as set out above, was testified to before the jury. We first note that "[a]bsent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed." *Little v. Gillette*, 225 Neb. 70, 74, 402 N.W.2d 852, 854 (1987); *Sanchez v. Derby*, 228 Neb. 497, 423 N.W.2d 420 (1988). The jury heard all of the testimony. It is apparent the jury found such an assumption could be made. Unless the conclusions of an expert are based on factors that a court

knows are wrong, as a matter of widespread, accepted, public knowledge, a court cannot say that the conclusions of the expert are wrong as a matter of law. The determination of the truthfulness or accuracy of an expert's conclusions is for the jury. In *Little v. Gillette, supra* at 74, 402 N.W.2d at 854-55, we said:

> We have stated in *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968), that this court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility. *Id.* Whether the plaintiff's experts' assumptions regarding duration were the most credible was properly left to the jury.

Plaintiff recognizes the general rule, but contends Dr. Sorensen's conclusions were false, as a matter of law, and that the cause should be remanded for a new trial. In support of her motion for a new trial, plaintiff offered into evidence the affidavits of three physicians. In all three of the affidavits, the physicians concluded that, in their opinion, Dr. Sorensen had offered "false" testimony at trial in regard to his calculations concerning the blood gas results. The trial court overruled plaintiff's motion. Plaintiff in this court contends that Dr. Sorensen's testimony is false in two respects: first, that with the decedent's known blood gas data the A-a gradient could not be calculated and, second, that the medical treatise upon which Dr. Sorensen relied provides contrary to his expressed opinion.

Defendants contend the A-a gradient calculation can be made with the information available to Dr. Sorensen. Dr. Sorensen testified as follows concerning the A-a gradient:

> So the final formula then boils down to . . . the atmospheric pressure minus 47 from water vapor times the percent $O_2$ minus the alveolar $PCO_2$, minus the arterial $PO_2$. Now, in clinical practice you accept a formula like this which is not precise enough for a physiologist to do an experiment with, but it's every bit as precise as the need for clinical medicine.

The affidavits of plaintiff's experts take exception to Dr. Sorensen's calculations in various respects. One expert's

affidavit set out, "The concepts involved, although confusing to laymen such as the Jury, are very basic pulmonary physiology. It is inconceivable that Dr. Sorensen could make such false statements without knowledge of the falsity of such testimony."

Plaintiff also supported her motion for a new trial upon the affidavit of another doctor, who stated that Dr. Sorensen did not use the true alveolar air equation, and who also takes exception with Dr. Sorensen's $FiO_2$ calculation, stating that his "very rough approximation" would be 40 percent rather than 35 percent. This difference of opinion on the calculation of the $FiO_2$ does not render Dr. Sorensen's testimony false as a matter of law.

A third doctor's affidavit set out that Dr. Sorensen's "basic medical facts regarding pulmonary physiology [are] in error."

In his affidavit filed on behalf of defendants in connection with the motion for new trial, Dr. Sorensen stated that he vehemently denied any of his testimony was false, and stated that he based his calculation of the A-a gradient on a simplified version of the equation in Cecil Textbook of Medicine (P. Beeson, W. McDermott & J. Wyngaarden 15th ed. 1979).

Plaintiff argues that Dr. Sorensen "selectively attached medical authorities" to support his A-a gradient calculations. Brief for appellant at 19. Plaintiff alleges that the next page of the medical treatise upon which Dr. Sorensen relied disputes his testimony regarding the A-a gradient. Plaintiff does not point out how Dr. Sorensen's approach is contrary to Cecil in that textbook's entirety. If an absolute contradiction exists, it is an elusive one to nonmedical persons. An allegation that an expert testified falsely will not be sustained on a mere difference of expert opinion, and where opinion evidence of experts is in conflict, it becomes a question for the jury. *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983); *Fremont Farmers Union Coop. Assn. v. City of Fremont*, 179 Neb. 576, 139 N.W.2d 369 (1966). As we stated in *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968), this court will not sit as a "super expert." It was not error for the trial court to refuse to grant a new trial on the basis that Dr. Sorensen's testimony was false as a matter of law.

Plaintiff also urges that we apply *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 53, 313 N.W.2d 208, 213 (1981), wherein we held: " ' "Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded." ' "

We note, initially, that Dr. Sorensen was not a party to this litigation. Moreover, Dr. Sorensen's testimony concerning the A-a gradient was at least partially initiated by plaintiff's attorney. On plaintiff's cross-examination of the defendant Dr. Forney, Dr. Forney was asked whether he had made an A-a gradient calculation and the importance or purpose of making such a calculation. Plaintiff's assertion that she was surprised by Dr. Sorensen's later testimony concerning the calculation of an A-a gradient is not supported by the record. Dr. Sorensen testified as an expert witness for the defendants. As such an expert, he could testify concerning the A-a gradient. There is no evidence that Dr. Sorensen changed his testimony in any respect. We find the principles of *Momsen, supra*, inapplicable to the case at bar.

Plaintiff also assigns as error the trial court's refusal to hold the defendants negligent as a matter of law. Plaintiff contends that the defendant physicians discharged Palmer when objective test results revealed him to be in a worse condition than when admitted. This conclusion is based in large part on the factors set out above, but doctors testified further that defendants Drs. Forney and Myers were negligent in that they did not perform additional tests, particularly a venogram to rule out venous thrombosis, and in that they failed to administer anticoagulants to plaintiff's deceased.

This testimony was directly contradicted by other medical witnesses. Defendant's experts were a family practitioner and an internist, who testified there was no reason to keep Palmer in the hospital on November 8 because his condition had improved and essentially the same treatment and monitoring could be provided at Palmer's home. Other testimony was adduced that it was not necessary for Dr. Myers to rehospitalize Palmer on November 10 because Palmer, at the time he came to

Dr. Myers' office, was smiling, cheerful, feeling better, and walking without a limp.

There was testimony elicited by both plaintiff and defendants agreeing that a physician does not determine whether to discharge a patient on a single criterion. The family practitioner for defendants, Dr. Stageman, testified that a physician looks at what the hospital can do for the patient if the patient were not dismissed; and if the patient is up and able to get around and take care of himself, if he is eating, drinking, and urinating, if his bowels are moving, and if he is not receiving IVs, supplemental oxygen, or shots, then the physician would be criticized for keeping the patient in the hospital. Defendants' witnesses testified that the defendants did not violate the proper standard of care.

There was sufficient conflicting evidence for the trial judge to submit the issue of negligence to the jury. "Where reasonable minds may draw different conclusions from the evidence, the question of negligence is for determination by the jury." *Mantz v. Continental Western Ins. Co.*, 228 Neb. 447, 451, 422 N.W.2d 797, 801 (1988). "All conflicts in the evidence, expert or lay, and the credibility of the witnesses [are] for the jury and not the court on review." *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 313, 363 N.W.2d 155, 163 (1985).

Plaintiff's assigned errors do not require a reversal of this case. The judgment is affirmed.

AFFIRMED.

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TERRY WHITE, BETSY E. BREWER, AND RITA SMAILYS, APPELLANTS, V. ARDAN, INC., AND GARY CURL, APPELLEES.
430 N.W.2d 27

Filed September 30, 1988. No. 86-791.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented.

2. _____: _____: _____. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.
3. _____: _____: _____. On a motion for judgment on the pleadings, the court may consider all the pleadings and give judgment for the party entitled thereto.
4. **Rules of the Supreme Court: Appeal and Error.** It is the duty of counsel, in briefing a case for this court, to comply with the rules, and so assist the court in the ready transaction of business. If counsel fails to do so, the court may, at its option, correct any manifest error observed in the record which is of such a nature as to have probably caused a miscarriage of justice.
5. _____: _____. It is counsel's duty to point out specifically alleged errors, and, unless the briefs indicate at what page of the bill of exceptions these may be found, the court will not search for nor consider them.
6. **Employer and Employee.** When employment is not for a definite term, and there are no constitutional, contractual, or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability.
7. **Summary Judgment: Appeal and Error.** On appeal, the Supreme Court is required to view the evidence most favorably to a party against whom a motion for summary judgment is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
8. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
9. **Libel and Slander: Proof.** In an action for a libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him or her.
10. **Libel and Slander.** Generally, whether a publication is privileged is a question of law to be determined by the court.
11. _____. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information.

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

Bradley R. Brewer, of Brewer & Soeiro, and Warren S. Zweiback and Scott H. Rasmussen, of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellants.

Frederick L. Warren, of Stokes, Lazarus & Carmichael, and C.G. Wallace III, of Thompson, Crounse, Pieper & Quinn, for appellees.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and JOHN MURPHY, D.J.

FAHRNBRUCH, J.

This is an appeal by the plaintiffs, Terry White, Betsy E. Brewer, and Rita Smailys, from the dismissal of their lawsuits against the defendants, Ardan, Inc., and Gary Curl, for (1) malicious termination of employment, (2) breach of contract by wrongful or "bad faith" discharge from employment, and (3) defamation. We affirm.

Plaintiffs contend their firings were based upon false statements that they were involved in dishonest acts during their employment at an Ardan, Inc., retail store in Omaha. Plaintiffs accuse the defendant Gary Curl, an Ardan security executive, of making the false statements.

In regard to the claims for malicious termination of employment and breach of contract by wrongful or "bad faith" discharge from employment, both defendants filed a motion for partial judgment on the pleadings. After argument, the motions were sustained, and these two claims were dismissed by the trial court.

A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted. On a motion for judgment on the pleadings, the court may consider all the pleadings and give judgment for the party entitled thereto. *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985). See, also, *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986).

On appeal, plaintiffs claim the trial court erred in determining that Nebraska does not recognize a cause of action in tort for malicious termination of employment or a cause of

action sounding in breach of contract for "bad faith" discharge based upon a "public policy" exception to the employment-at-will doctrine.

In analyzing the record and plaintiffs' briefs, we note their initial brief is not prepared in accordance with the rules of this court. Facts are cited and argued without proper reference to the record. See Neb. Ct. R. of Prac. 9 (rev. 1986). Plaintiffs' brief sets forth a proposition of law followed by a list of 38 "supporting authorities." Only five cases from that list are cited in the brief, and some of those are not properly cited or referenced.

It has long been the rule of this court that it is counsel's duty to point out specifically alleged errors, and, unless the briefs indicate at what page of the bill of exceptions these may be found, the court will not search for nor consider them. See *Stroman v. Atlas Refining Corporation*, 112 Neb. 187, 199 N.W. 26 (1924). It is the duty of counsel in briefing a case for this court to comply with the rules, and so assist the court in the ready transaction of business. If counsel fails to do so, the court may, at its option, correct any plain error observed in the record which is of such a nature as to have probably caused a miscarriage of justice. See, *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988); *In re Interest of A. W.*, 224 Neb. 764, 401 N.W.2d 477 (1987); *Winterringer v. Sellen*, 97 Neb. 739, 151 N.W. 162 (1915).

There is no pleading or claim that the plaintiffs were employed by Ardan for a definite period of time. Since all parties treated the plaintiffs as employees at will, we also shall treat them as such.

Plaintiffs first claim they were discharged from Ardan's employment maliciously. In their brief, plaintiffs alleged:

> Nebraska should recognize *and does recognize* both (a) a cause of action sounding in tort for malicious termination of employment and (b) a cause of action sounding in contract for discharge in bad faith where the plaintiff alleges that he was discharged from his employment (1) without reasonable cause, (2) on the basis of knowingly false allegations of dishonesty and theft of property, and (3) for the specific purpose of depriving him of valuable

> terms and conditions of employment enjoyed by the plaintiff as a matter of contractual right before the discharge.

(Emphasis supplied.) Brief for appellants at 6.

For that proposition of law, plaintiffs cite the Nebraska case of *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980). Their reliance is misplaced. *Mau* stands for the general rule that when employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability.

*Mau* does recognize that the employment-at-will rule is not, in some jurisdictions, an absolute bar to a claim of wrongful discharge. In a number of jurisdictions, an exception to the "terminable-at-will" rule has been articulated in recent years. Under this exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. At the time of *Mau*, Nebraska had not adopted the exception.

Certain exceptions to the "terminable-at-will" rule have, however, been recognized by this court. Those instances include where the discharge infringes upon a constitutionally protected interest of the employee and where a statute or contract prohibits an employer from discharging an employee for a particular reason or without good cause. *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988), lists a number of Nebraska cases supporting these propositions.

In this case, our attention has not been directed to, nor have we found, any Nebraska case that recognizes a cause of action sounding in tort for malicious termination of employment. As previously stated, unless constitutionally, statutorily, or contractually prohibited, an employer may terminate an at-will employee at any time with or without reason and not be liable for his actions.

There are no allegations which bring the plaintiffs within the constitutional, statutory, or contractual protection against their firings.

Plaintiffs have invited this court to declare by judicial fiat, as

a matter of public policy, a cause of action for malicious termination of employment and a cause of action for "bad faith" discharge from employment. It is proposed that these two causes of action would be exceptions to the "employment-at-will" rule which permits an employer to discharge an employee whenever and for whatever cause he chooses, without incurring liability. We decline the invitation. Instead, we adhere to our observations in *Schriner v. Meginnis Ford Co., supra* at 91, 421 N.W.2d at 758-59:

> The Supreme Court of Hawaii, in *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982), recognized that public policy can be difficult to define, but quoted with approval a definition which included in public policy those matters embodied in state statutes. In holding that public policy protected one presumably discharged because she gave truthful answers in an antitrust investigation, the *Parnar* court nonetheless cautioned: "In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject. Of course, the plaintiff alleging a retaliatory discharge bears the burden of proving that the discharge violates a clear mandate of public policy." *Id.* at 380, 652 P.2d at 631. We agree with that caveat and agree as well with the observation in [*Adler v. American Standard Corp.*, 830 F.2d 1303 (4th Cir. 1987)], that courts must use care in creating new public policy and that " 'recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch.' " (Citations omitted.) *Adler* at 1306.

There being a cause of action in Nebraska neither for malicious termination of employment nor for bad faith

discharge from employment, we find that on those alleged causes of action the defendants were entitled to judgment on the pleadings.

Next to be considered are the plaintiffs' allegations that they should recover damages because the defendants published defamatory material about them. The trial judge found there was no genuine issue as to the material facts on this defamation issue and granted defendants' motions for summary judgment, thereby dismissing the balance of plaintiffs' lawsuit.

On appeal, we are required to view the evidence most favorably to a party against whom the motion for summary judgment is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence. A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law. See, *County of Polk v. Wombacher*, 229 Neb. 239, 426 N.W.2d 266 (1988); *Hirschman v. Maddox*, 223 Neb. 302, 389 N.W.2d 297 (1986).

Inherent in the trial judge's dismissal of the case is a finding that there was no evidence to support the plaintiffs' claim of wrongful publication of defamatory material, or that the defamatory material was true, or both. Both possibilities will be examined.

Neb. Rev. Stat. § 25-839 (Reissue 1985) provides:

> In an action for a libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him.

Neb. Rev. Stat. § 25-840 (Reissue 1985) provides:

> In the actions mentioned in section 25-839, the defendant may allege the truth of the matter charged as defamatory . . . . The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from

publication.

The defendants' answer denied that defamatory material about each of the plaintiffs was false and that it was wrongfully published.

Each plaintiff claims that defendant Curl, as Ardan's security executive, maliciously, and with intent to harm the plaintiffs, made false written statements regarding each plaintiff's firing. Plaintiffs allege Curl, knowing certain statements to be false, showed those statements to Ardan supervisory personnel and to others. Plaintiffs allege the statements were not privileged when made to Ardan personnel.

Plaintiff Brewer claims the false statement made and published defaming her states she engaged in " 'unauthorized (fraudulent) use of mystery discounts.' "

Brewer used one of the store's promotional 50-percent mystery discount coupons to purchase a video recorder. The coupons were contained in Ardan's catalogs. When a customer purchased an item and did not have a coupon, the checkout cashier would furnish one to the customer at the time of a purchase. In either event, the surface of the coupon was not to be disturbed until after a purchase was made. After the purchase, the cashier removed the surface of the coupon by scratching it, and the amount of the discount was revealed. Discounts ranged from 10 to 50 percent. Brewer admitted that she removed the surface off several coupons until she found a 50-percent discount coupon. She obtained the coupons from a security booth while no one was there. Brewer knew before she went to the cashier to complete her purchase that the coupon she used represented a 50-percent discount. Brewer claims that the store manager advised employees that each could use one discount coupon.

In her written statement, Brewer also stated she and a coworker "used 30% mystery discount on baby gift." When Brewer used the 50-percent discount coupon, she signed the name of her sister's business on the back of the coupon, according to her signed statement. There is nothing in the record that employees were ever authorized to determine the value of a coupon before presenting it to a cashier on a purchase. In her deposition, when asked: "Now, you admitted

that what you did was wrong and you agreed it [sic] pay for the items; did you not?" Brewer replied, "Well, yes." She testified she did in fact pay Ardan back on the item purchased with a 50-percent discount coupon. She testified there was nothing untrue in the statements that Ardan made.

Plaintiff Smailys complains that her notice of termination falsely states that she had been an "accomplice in fraudulent discounts (theft)." In her deposition, Smailys testified she did not use a coupon, but gave a 50-percent discount coupon to her boyfriend so he would not have to chance getting a lesser discount. The boyfriend used the coupon to purchase a camera, which he placed on layaway. Smailys also testified that while working at the store's courtesy desk, she checked out some employees who used 50-percent discount coupons, the surfaces of which had been removed to reveal the value of the discount before they were presented to her. Smailys testified she knew the procedure she used was not authorized. She testified she knew it was wrong for her to honor a coupon where the amount of the discount was revealed before it was presented to a checkout person.

Plaintiff White claims that she was defamed by Curl's making and publishing her termination form which falsely stated, "Assisted fellow employees in the fraudulent use of discounts in the showroom." White testified in her deposition she was the cashier that checked out her coplaintiff, Betsy Brewer, when Brewer used a 50-percent coupon improperly. She testified she knowingly gave a coupon, the value of which had previously been revealed, to someone before it was used to purchase an item. Referring to Brewer, Smailys, and herself, White testified about the misuse of coupons, "Yes, we're guilty. I don't think we should have been terminated."

Generally, whether a publication is privileged is a question of law to be determined by the court. *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987). A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information. *Turner v. Welliver, supra*; *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); *Dangberg v. Sears, Roebuck*

*& Co.*, 198 Neb. 234, 252 N.W.2d 168 (1977).

Here, the plaintiffs claim that Curl was acting as an employee of Ardan's in a security capacity when he made the statements regarding the terminations. Each plaintiff testified she did not know of any publication to individuals other than Ardan personnel. Curl's relationship with Ardan was such that it was not only his duty but also his responsibility to give the information contained in the statements to Ardan personnel, such as the store and regional managers. There is no evidence Curl gave the statements to anyone else. The statements made to Ardan personnel were privileged, absent proof of malice. See, *Kloch v. Ratcliffe, supra*; *Bartels v. Retail Credit Co.*, 185 Neb. 304, 175 N.W.2d 292 (1970).

The record clearly shows that each alleged defamatory statement was true. As a matter of law, the defendants were entitled to a summary judgment on the defamation issue unless the plaintiffs proved malice. There is no evidence reflecting maliciousness on the part of Curl when he revealed either the plaintiffs' statements or the results of his own investigation to Ardan personnel. Brewer testified she had no evidence of malice on the part of Curl in making the statements of which she was complaining. Smailys testified "I guess not" when asked if she had any evidence of specific acts of malice on the part of Curl. White testified she did not have any facts evidencing intent on the part of the defendants to harm her. The trial court correctly concluded that the defendants were entitled to a summary judgment on the defamation issue. The plaintiffs' assignment of error addressing defamation is without merit.

On appeal, plaintiffs claim that the trial judge failed to give proper consideration to plaintiffs' "affidavits" received in evidence at the summary judgment hearing. Plaintiffs attempted to "correct" or "explain" "the intended" meaning of the statements made during their depositions. The exhibits received in evidence were not executed by the plaintiffs, nor do they reflect that the plaintiffs took an oath that the "facts" contained in the "affidavits" were true. The three affidavits are virtually carbon copies and contain the "understandings," "beliefs," and conclusions of the plaintiffs. Plaintiffs'

"affidavits" argue with statements in the defendants' brief filed in support of defendants' motions for summary judgment.

The rule in Nebraska regarding such affidavits requires that "[s]upporting and opposing affidavits [1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." Neb. Rev. Stat. § 25-1334 (Reissue 1985).

In construing § 25-1334, this court has held that " ' " '[u]nder this provision [Fed. R. Civ. P. 56(e)] . . . statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments, and of statements which would be inadmissible in evidence . . . .' " ' " *In re Estate of Villwok,* 226 Neb. 693, 696, 413 N.W.2d 921, 924 (1987); *Hanzlik v. Paustian,* 216 Neb. 575, 344 N.W.2d 649 (1984) (citing *Eden v. Klaas*, 165 Neb. 323, 85 N.W.2d 643 (1957)). See, also, *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987).

In writing this opinion, great care has been taken to use only that deposition testimony of each plaintiff that is unambiguous and where the intent of the party is clearly shown. We note that each plaintiff was represented by counsel at the time her deposition was taken. At that time, apparently, there was no question as to the clarity or intent of answers the plaintiffs gave. At least, there were no questions by the plaintiffs' own counsel to clarify any "ambiguous" or "confused" answer.

The plaintiffs' complaints regarding the consideration given to their affidavits are without merit.

Plaintiffs White and Brewer claim that res judicata should preclude the defendants from claiming that the charges of fraudulent and wrongful conduct alleged against them are true.

White and Brewer applied for unemployment pay pursuant to the Nebraska Employment Security Law. An initial unemployment determination found they were guilty of "willful intentional misconduct," which disqualified them from receiving benefits for 10 weeks. Neb. Rev. Stat. § 48-628(b) (Cum. Supp. 1986). On appeal, an administrative law judge reversed that finding. Ardan's did not appeal from the administrative law judge's decision.

White and Brewer's brief claims the benefit of the res judicata doctrine, but their argument does not set forth any Nebraska authority for their position. Neb. Rev. Stat. § 48-636 (Cum. Supp. 1986) provides that any determination made under the Nebraska Employment Security Law is *conclusive for the purpose of that law.* Here, we are not dealing with the Nebraska Employment Security Law, and we decline to apply res judicata as plaintiffs request.

None of the plaintiffs' assignments of error have any merit, and the trial judge's rulings should be affirmed.

AFFIRMED.

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## GEORGETOWNE LTD. PARTNERSHIP, APPELLANT, V. GEOTECHNICAL SERVICES, INC., APPELLEE.

430 N.W.2d 34

Filed September 30, 1988. No. 86-870.

1. **Trial: Pleadings: Limitations of Actions: Proof.** A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.
2. **Limitations of Actions: Words and Phrases.** Discovery, as applied to 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 court.
3. **Limitations of Actions: Time.** A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.
4. **Negligence: Limitations of Actions: Words and Phrases.** Within the meaning of the professional negligence statute of limitations (Neb. Rev. Stat. § 25-222 (Reissue 1985)), a profession rendering professional services is defined as a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.
5. _____: _____: _____. Engineers are professionals for the purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), and this statute of limitations applies to an

action against such a professional, even though the professional services rendered by the engineer amount to an improvement to real property.

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

Patrick W. Meyer and Gordon R. Hauptman, of Westergren, Hauptman, O'Brien, Wolf & Hadley, P.C., for appellant.

Larry E. Welch, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WARREN, D.J.

WARREN, D.J.

This is an appeal by Georgetowne Ltd. Partnership from the dismissal of its negligence action against Geotechnical Services, Inc. (Geotech), after a separate trial to the court on the issue of the statute of limitations defense.

On October 4, 1978, after performing soil tests and analysis for Georgetowne, Geotech submitted to plaintiff a written consultation report evaluating soils and making foundation recommendations for the proposed construction of commercial buildings at a site near 140th Street and West Center Road in Omaha. Separate from its services for plaintiff, Geotech later performed compaction tests at the same site for a building contractor. The shopping center building was completed by April 1979.

Subsequently, two problems developed which plaintiff alleges were caused by the negligence of Geotech in failing to properly investigate subsoils and evaluate and report thereon, as a result of which the building settled. In February 1982, a Georgetowne representative notified Geotech that a crack had appeared in the floor of a restaurant located in the building. Geotech investigated, after which, on March 26, 1982, it advised Georgetowne that the crack was not caused by settling and could be remedied simply by filling it with grout. In March 1983, the crack reappeared, there were vertical cracks found on the building face through the brick, the roof would not drain water due to a change in the roof line, and a plate glass window in the restaurant shattered for no apparent reason. Secondly, a

floral business tenant complained of the smell of gas around its premises. The fire marshal and Metropolitan Utilities District employees investigated and attributed the methane gas (swamp gas) to decaying matter in the soils. Geotech was again notified of these problems, and it investigated. On April 8, 1983, the plaintiff's architect notified Georgetowne that he had detected a 2-inch settlement of floor lines and doorsills, and he advised that the crack in the restaurant floor was possibly caused by settlement which could be occurring further down in the lower soils. The architect requested that Geotech return to the site and investigate settlement of the building as a possible cause. On April 18, 1983, Geotech gave plaintiff an estimate of costs for further testing. Georgetowne was also investigating other possible causes.

After an April 25, 1983, meeting with its architect and a representative of another soil engineering firm, Woodward-Clyde, during which Geotech's 1978 report was discussed and criticized, the Georgetowne representative called an attorney as directed by her superior to discuss representation of Georgetowne regarding its legal rights against Geotech. On April 27, 1983, this same employee, Nancy Pratt, delivered a letter to Geotech advising it that Georgetowne had relied upon Geotech's soil report of October 4, 1978, requesting Geotech to return to the site and make all necessary tests at its own expense to determine the cause of the settling, and concluding as follows:

> The cracked floor in Godfathers and improper roof drainage are two of the problems that are apparent at this time. To the extent these damages and other undisclosed damages have occurred or may occur as a result of incomplete or inaccurate soil investigations, we would as [sic] Geotechnical Services to make the necessary repairs and take other preventative actions made necessary by the situation (subject to our prior approval of construction methods.).

Woodward-Clyde then performed test borings, and its findings were presented to Georgetowne on June 14, 1983, by a report dated June 8, 1983. Plaintiff filed suit June 7, 1984.

After an evidentiary hearing, the district court dismissed

plaintiff's second amended petition for the reason that the action was barred by the statute of limitations governing professional services set forth in Neb. Rev. Stat. § 25-222 (Reissue 1985). The trial court specifically found that (1) defendant Geotech was a civil engineering firm which provided professional services within the meaning of § 25-222; (2) Geotech performed its services for plaintiff on October 4, 1978; (3) Georgetowne's cause of action was not discovered and could not have been reasonably discovered within 2 years from October 4, 1978, and, therefore, plaintiff had 1 year from the date of discovery or the discovery of facts which would reasonably lead to such discovery, whichever was earlier, to commence its action; (4) by April 27, 1983, plaintiff had discovered sufficient facts that the statute of limitations had commenced to run; (5) plaintiff's cause of action was barred by the limitation of § 25-222 on April 27, 1984; and (6) the statute of limitations had run by the time the suit was filed on June 7, 1984.

Plaintiff assigns as error that the court erred in (1) determining that the commencement date for the running of the statute of limitations was April 27, 1983, rather than June 8, 1983, and (2) determining that the appropriate statute of limitations was § 25-222, instead of Neb. Rev. Stat. § 25-223 (Reissue 1985). We affirm.

There is no question that Geotech had fully performed its soil testing services as of the date of its report on October 4, 1978. Similarly, no one contends that Georgetowne could have reasonably discovered its cause of action within 2 years thereafter. Therefore, the question is, When did Georgetowne have sufficient facts to discover its cause of action? Plaintiff contends that the statute of limitations did not begin to run until June 8, 1983, when the Woodward-Clyde report was completed.

A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense. *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985). The point at which a statute of limitations commences to run must be determined from the facts of each case. *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985). In our review of the

district court's judgment on the issue of the statute of limitations, the finding and decision of the district court, unless clearly wrong, will not be set aside. *League v. Vanice, supra.*

Discovery, as applied to 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 court. A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. See *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

Here, Georgetowne was aware of damage to its building as early as February 1982. While its earlier determination of the cause was hindered by Geotech's initial report that settling was not the cause of the floor crack, on April 8, 1983, Georgetowne became aware of building damage which its architect said could have been caused by settlement occurring in the subsoils. On April 11, 1983, Georgetowne's property manager was directed to "pick up Geotech's 1978 report . . . and store it in the fire safe." It is a fair inference that that order was for the purpose of preserving evidence for a claim against Geotech. However, if there was any question as to the extent of plaintiff's discovery prior to April 27, 1983, Georgetowne effectively dispelled any doubts by its demand letter of April 27 to Geotech, part of which we have quoted above. A further quote from that letter is illuminating:

> Further, we suspected settlement as early as February 1982 when a crack appeared in the floor of Godfathers. At that time . . . you ruled out settlement as the cause of this crack . . . . Now the same problem is apparent again and settlement is clearly obvious from changes in the roofline.

Clearly, the finding of the trial court that the statute of limitations began to run on April 27, 1983, was correct and fully supported by the evidence. There is no merit in plaintiff's first assignment of error.

Section 25-222 provides:

> Any action to recover damages based on alleged

> professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

The next issue for the court was whether Geotech was rendering professional services to Georgetowne within the meaning of § 25-222. This court has previously held that professional services under § 25-222 were provided by architects and engineers, in *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985), and by architects, in *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987). The most recent analysis of what constitutes professional negligence has defined a "profession" as a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service. *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987). The testimony here established that Geotech was a specialty engineering firm providing consulting services for all aspects of soils and foundations to architects, owners, and agencies involved in construction projects. Registered and licensed civil engineers, who had college degrees, provided the engineering services. There can be no doubt that Geotech was rendering professional services as defined by this court.

Georgetowne urges by its last assignment of error that § 25-223 is the applicable statute of limitations. Section 25-223 reads:

> Any action to recover damages based on any alleged

> breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. . . .

Georgetowne argues that the services provided by Geotech involved the "design" or "planning" of the building and that even if its services fall within the professional services statute of limitations (§ 25-222), Georgetowne is entitled to the benefit of the 2-year postdiscovery provision of § 25-223 because of the longstanding rule that where different statutes of limitations are equally applicable, the one allowing the longer period governs. *Crum v. Johnson*, 3 Neb. (Unoff.) 826, 92 N.W. 1054 (1902). Georgetowne further argues that the last expression of legislative will is law, and in the case of conflicting provisions in different statutes of limitations, the last in point of time or order of arrangement prevails. See *Stoller v. State*, 171 Neb. 93, 105 N.W.2d 852 (1960). Section 25-223 was adopted by the Legislature in 1976, while § 25-222 dates from 1972.

When asked to interpret a statute, the Supreme Court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is our duty to discover, if possible, legislative intent from the statute itself. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question. *Spence v. Terry*, 215 Neb. 810,

340 N.W.2d 884 (1983).

While the chief proponents of 1972 Neb. Laws, L.B. 1132 (§ 25-222), were from the medical community, the intention of the Legislature, as demonstrated by legislative history, was to pass a statute inclusive of all professionals. Exemplary discussion was as follows:

> SENATOR LUEDTKE: How would this relate to lawyers and architects? You mentioned it as professional negligence, malpractice, etc.
>
> MR. WRIGHT: Well, I think a malpractice case, as I interpret it, a professional negligence case, is one that is based upon the failure of the person performing special service, to render the degree of care that is ordinarily rendered by accepted practitioners in his service, in his area, or in similar areas in the country. If he fails to render that quality of service, he is then guilty of malpractice, or, in effect, causes damage, then a cause of action arises. This would cover malpractice cases, generally.
>
> SENATOR LUEDTKE: This is what I was getting at. This would also cover the lawyers, the architects, and everybody.
>
> MR. WRIGHT: Right.

Judiciary Committee Hearing, L.B. 1132, 82d Leg., 2d Sess. 18-19 (Jan. 17, 1972).

On the other hand, 1976 Neb. Laws, L.B. 495, which eventually became § 25-223, was sponsored by the Home Builders Association with some comment from the Associated General Contractors of America. In committee hearings, Senator Cavanaugh testified that the bill related to "seting [sic] the statute of limitations on construction of homes and home warranties." Miscellaneous Subjects Committee Hearing, L.B. 495, 84th Leg., 1st Sess. 55 (Feb. 27, 1975). At the same hearing, the attorney for the Home Builders Association, Mr. Beam, referring to construction contractors, stated: "I think this is the only major segment of business in Nebraska that does not have the statute of limitations of any kind . . . ." *Id.* at 58-59. Continuing and referring to § 25-222, Beam said: "It says all professional people, and I assume if they're professional people, they're covered under the statute. We think it's a matter

of simple equity that builders have the same rights." Miscellaneous Subjects Committee Hearing, *supra* at 60. Furthermore, there was no discussion in the legislative history that architects, engineers, or other design professionals would fall under § 25-223. We think it is clear that the Legislature did not intend in enacting § 25-223 to carve out an exception to § 25-222, but, rather, it intended to provide protection to a different class of persons other than the professionals already covered by § 25-222.

All statutes relating to the same subject are considered as parts of a homogeneous system, and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together. *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340 (1975). Courts should not give an interpretation to a statute which would have the effect of nullifying another statute, when obviously that was not the clear legislative intent. *Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn.*, 191 Neb. 1, 213 N.W.2d 443 (1973). It is clear from the legislative history that § 25-222 applies to professional services and that § 25-223 applies to nonprofessional builders or contractors making improvements to real property, and such interpretation harmonizes the two statutes.

This court has already provided such an interpretation in two recent cases. In *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985), plaintiff sustained damages to his home, which he had constructed, when a water pipe broke. He sued the general contractor, the architect, the engineer, the plumbing subcontractor, and the manufacturer of the pipe. All defendants were involved in providing services or products for improvements to realty. The appeal resulted when the trial court sustained motions for summary judgment filed by defendants, alleging application of various statutes of limitations applicable to the various defendants. The manufacturer of the pipe raised the defense of the statute of limitations provided by Neb. Rev. Stat. § 25-224 (Reissue 1985), applicable to causes of action for products liability. The contractor raised the defense of the statute of limitations in § 25-223 (improvements to real

property). The architect and the engineer each raised the defense of § 25-222. This court disposed of the various defenses based on the respective statutes of limitations raised, despite the fact that all defendants had provided services or materials for the improvement of the real property. Regarding the architect, the court said: "Again, however, whether pled in tort or contract, there can be no question that the period of professional repose contained in Neb. Rev. Stat. § 25-222 (Reissue 1979) applies." *Witherspoon, supra* at 125, 362 N.W.2d at 42. The court then went on to also apply § 25-222 to the professional services rendered by the engineer.

In *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987), this court has again recently held that § 25-222 is applicable to bar the cause of action against an architect, Davis, Fenton, Stange & Darling, but applied § 25-223 to bar the cause of action against a contractor, Kingery Construction Company, while specifically holding that architects and engineers are professionals for the purposes of § 25-222.

We see no reason to depart from the holdings in these two most recent cases. The trial court was correct in applying the provisions of § 25-222 to plaintiff's cause of action and in dismissing plaintiff's petition.

AFFIRMED.

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TRANSCON LINES, INC., APPELLANT, V. LAWRENCE D. O'NEAL, APPELLEE.

429 N.W.2d 718

Filed September 30, 1988. No. 87-093.

**Equal Opportunity: Jurisdiction: Final Orders: Records: Time.** Neb. Rev. Stat. § 48-1120 (Reissue 1984) requires the filing of a petition and a certified copy of the transcript of proceedings before the Nebraska Equal Opportunity Commission within 30 days from the date of the NEOC's final order in order to confer jurisdiction on the district court.

Appeal from the District Court for Doulgas County: J. PATRICK MULLEN, Judge. Affirmed.

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Clyde A. Christian for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

WHITE, J.

Transcon Lines, Inc., appeals the order of the district court for Douglas County dismissing Transcon Lines' appeal from the final order of the Nebraska Equal Opportunity Commission (NEOC) finding Transcon Lines in violation of Neb. Rev. Stat. § 48-1104(1) and (2) (Reissue 1984) of the Nebraska Fair Employment Practice Act.

The facts in this action are not in dispute. This case arose out of an action by Lawrence D. O'Neal against his former employer, Transcon Lines, seeking reinstatement and backpay. O'Neal alleged he was terminated from employment based on disability, in violation of § 48-1104. The NEOC, in a final order dated October 10, 1986, found that Transcon had discriminated against O'Neal due to physical disability, in violation of § 48-1104. The NEOC awarded backpay and reinstatement.

On November 10, 1986, Transcon filed a petition for review in the district court for Douglas County, Nebraska, pursuant to Neb. Rev. Stat. § 48-1120 (Reissue 1984) of the Nebraska Fair Employment Practice Act. Transcon did not file a certified copy of the transcript of the record until November 19, 9 days after the 30-day period for appeal had passed. On November 14, O'Neal filed his motion to dismiss Transcon's petition for review on the ground that the district court lacked jurisdiction over the subject matter of the appeal because Transcon failed to file a certified copy of the transcript of proceedings before the NEOC within 30 days of the NEOC's final order.

After a hearing, the lower court entered an order sustaining O'Neal's motion to dismiss and dismissing Transcon's petition for review. The lower court held that because Transcon had not filed a certified copy of the transcript of record within the

30-day appeal period, Transcon "failed to substantially comply with the jurisdictional requirements contained in RRS 48-1120, 1943." Transcon appeals the district court's dismissal.

Whether § 48-1120 requires a certified copy of the transcript of record to be filed within the 30-day appeal period in order for the court to have jurisdiction over the appeal is a question of first impression. Section 48-1120 provides in relevant part:

> (1) Any party to a proceeding before the commission aggrieved by such decision and order and directly affected thereby may institute proceedings in the district court . . . *Provided*, that the time for appeal from such order of the commission to the district court shall be limited to thirty days from the date of the entry of the order to which complaint is made . . . .
>
> (2) Such proceeding shall be initiated by the filing of a petition in such court, together with a transcript of the record upon the hearing before the commission and the service of a copy of such petition upon the commission and upon all parties who appeared at the hearing. Thereupon the court shall have jurisdiction of the proceeding and of the question determined therein.

While this court has not yet determined whether the filing of a certified copy of the transcript of proceedings before the NEOC is jurisdictional, the court has addressed the jurisdictional issue in the context of other statutes which require the aggrieved party to file a petition for review in the district court.

This court has repeatedly held that Neb. Rev. Stat. §§ 25-1905 and 25-1931 (Reissue 1985) require the transcript of proceedings to be filed with the petition for review to confer jurisdiction on the district court. See, *Clark v. Cornwell*, 223 Neb. 282, 388 N.W.2d 848 (1986); *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986); *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976); *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973); *Anania v. City of Omaha*, 170 Neb. 160, 102 N.W.2d 49 (1960). Timely filing of both items is mandatory to confer jurisdiction on a court asked to review a final

judgment or order. Neb. Rev. Stat. §§ 25-1901 et seq. (Reissue 1985), governing review of lower tribunal decisions, including decisions of administrative bodies, provide that proceedings "be commenced . . . within one calendar month after the rendition of the judgment or making of the final order complained of . . . ." § 25-1931. In addition, the plaintiff in error is required to "file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified." § 25-1905.

In addition to concluding that the filing of a certified copy of the transcript is mandatory and jurisdictional under § 25-1905, this court recently established that the filing of the transcript of proceedings relating to the refusal to issue or cancel a driver's license is jurisdictional in proceedings under Neb. Rev. Stat. § 60-420 (Reissue 1984). In *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987), the court held that the language of § 60-420 compelled the conclusion that the filing of the transcript is a necessary step to the acquisition of subject matter jurisdiction. Section 60-420 states in pertinent part, "The applicant or licensee shall file a petition in such district court within thirty days from the date of filing of the director's final order in the matter and shall file the transcript before answer day . . . ." This court in *Ernest* focused on the mandatory language in § 60-420, finding the language in that section stating that the applicant "*shall* file the transcript before answer day" to be controlling, and stated, "[W]e see no reason to depart from our previous holdings that 'shall' means that a mandatory action must be accomplished." *Ernest* at 763, 415 N.W.2d at 124.

We believe the analysis utilized in construing § 25-1905 and § 60-420 is controlling in this case. The language in § 48-1120 is analogous to that in both §§ 25-1905 and 60-420. Section 48-1120(2) states that the proceeding "shall be initiated by the filing of a petition . . . together with a transcript of the record . . . . Thereupon the court shall have jurisdiction . . . ." Similarly, § 25-1905 states that "[t]he plaintiff in error shall file with his petition a transcript of the proceedings," while § 60-420 mandates that "[t]he applicant . . . shall file a petition . . . within thirty days . . . and shall file the transcript before answer day . . . ." Clearly, if the filing of the transcript is mandatory and

jurisdictional in proceedings under both §§ 25-1905 and 60-420, such a filing is also jurisdictional in actions under § 48-1120. As stated in *Ernest, supra*, "shall" means that a mandatory action must be accomplished. The conclusion that the filing of a certified copy of the transcript is jurisdictional in proceedings under § 48-1120(2) is further supported by language within the statute. The statement "Thereupon the court shall have jurisdiction" comes *after* the language in § 48-1120(2) requiring a transcript of the record to be filed. By stating that the court shall have jurisdiction *after* delineating the requirement of filing a transcript, presumably the Legislature intended jurisdiction to be vested in the court only after such a transcript was filed.

The fact that this court has held the filing of a transcript not jurisdictional in proceedings under other statutes requiring the aggrieved party to file a petition for review in the district court does not affect our conclusion in this case. In an appeal under Neb. Rev. Stat. § 84-917 (Reissue 1987) of the Administrative Procedure Act, this court held that while the transcript is critical to the final disposition of the case, jurisdiction is not contingent upon filing the transcript within the statutory time set for filing the petition. *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982). Section 84-917 provides:

> (2) Proceedings for review shall be instituted by filing a petition . . . within thirty days after the service of the final decision by the agency. . . .
>
> . . . .
>
> (4) Within fifteen days after service of the petition or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified transcript of the proceedings had before it
>
> . . . .

As stated in *Ernest, supra*, the holding in *Maurer* was specifically limited to appeals under the Administrative Procedure Act. In addition, this court in *Maurer* specifically noted that § 84-917(4) allowed the court to extend the 15-day period "for good cause shown." The idea that time could possibly be extended "militates against such a time's being jurisdictional." *Ernest* at 762, 415 N.W.2d at 123. No possible

extension of time is contained within § 48-1120.

In addition, this court held in *Sorensen v. Bernhardt*, 223 Neb. 395, 389 N.W.2d 583 (1986), that the filing of a certified copy of the transcript of prior proceedings is not jurisdictional in appeals pursuant to Neb. Rev. Stat. § 48-638 (Reissue 1984). That section provides:

> Within thirty days after a decision of an appeal tribunal has become final, the commissioner, or any party to the proceedings . . . may obtain judicial review thereof by filing . . . . With his answer or petition, the commissioner shall certify and file with the court a certified copy of the records of the case, including . . . a transcript of all testimony taken in the matter . . . .

In *Sorensen*, this court held that the requirement of a transcript under § 48-638 is distinguishable from the requirement in an error proceeding. The requirement of filing a transcript in an error proceeding is applicable to any party filing a petition in error, while the requirement in § 48-638 applies only to the commissioner and therefore cannot be jurisdictional unless it is the commissioner who has filed the petition for review. The same distinction discussed in *Sorensen* applies in proceedings under § 48-1120. Therefore, both §§ 48-638 and 84-917 are inapposite to proceedings under § 48-1120, and decisions regarding jurisdiction in proceedings under those sections are not controlling here.

We therefore hold that where appeals are taken from the NEOC pursuant to the provisions of § 48-1120, the certified transcript of proceedings before the NEOC is required to be filed within the 30-day limitation period provided for in § 48-1120 in order for the district court to have jurisdiction over the appeal. The judgment of the district court is affirmed.

AFFIRMED.

MELISSA MEISINGER, APPELLANT, V. MARK MEISINGER, APPELLEE.
429 N.W.2d 721

Filed September 30, 1988. No. 87-203.

1. **Contempt: Appeal and Error.** A finding of contempt alone, without a noncontingent order of sanction, is not appealable.
2. **Modification of Decree: Contempt.** A court has no power of modification of a dissolution decree on its own motion during the course of a contempt proceeding.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed.

S. Caporale for appellant.

Richard W. Harter for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

HOWARD, D.J.

Following a decree dissolving the marriage of the parties, in which it was ordered that certain quarter horses be sold, the wife, appellant herein, was ordered to show cause why she should not be held in contempt for her failure to turn over the horses' registration papers for a sale. Upon a hearing, the court adjudged the appellant

> guilty of contempt in the secreting of the registration papers for the horses ordered sold, which would substantially diminish their value on the open market, she to purge herself of the finding of contempt by the delivery of the registration papers to the respondent forthwith and the payment of one-half of the care and maintenance costs for each horse until sold as determined in the above findings.

Counsel advised this court that the registration papers have been turned over. Appellant assigns error in the finding of contempt and in the court's purportedly modifying the decree of dissolution in the context of contempt proceedings.

The finding of contempt alone, without a noncontingent order of sanction, is not appealable. *State ex rel. Kandt v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747

(1987); *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984); *Frandsen v. Frandsen*, 216 Neb. 828, 346 N.W.2d 398 (1984). That part of the order is not now subject to review.

The portion of the order requiring appellant to pay half the cost of care and maintenance of the horses until sold may well be reasonable, but it finds no support, express or implied, in the decree. "In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered." *Malec v. Malec*, 196 Neb. 533, 537, 244 N.W.2d 82, 85 (1976). Accordingly, the order can only be understood as a modification of the decree. But it is well established that the court has no such power of modification on its own motion during the course of contempt proceedings. *Neujahr v. Neujahr*, 218 Neb. 585, 357 N.W.2d 219 (1984). The portion of the order requiring appellant to make payments must be reversed.

REVERSED.

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## LYLE STEPHENS, APPELLANT, V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 5, PIERCE COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

429 N.W.2d 722

Filed September 30, 1988. No. 87-309.

1. **Schools and School Districts: Teacher Contracts.** Unprofessional conduct and immorality constitute just cause for termination of the employment of a teacher.
2. **Evidence: Words and Phrases.** Evidence is sufficient as a matter of law if a judge could not direct a verdict if the case were tried to a jury. It is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions.
3. **Schools and School Districts: Teacher Contracts: Public Meetings.** Approval in an open meeting of a motion to consider termination of a teacher without stating any details is not a public release of information in violation of Neb. Rev. Stat. § 79-12,110(3) (Reissue 1987).
4. **Schools and School Districts: Teacher Contracts.** Conduct may by itself give rise to reasonable inferences of unfitness to teach or from which an adverse impact on students can reasonably be assumed.

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

P.D. Furlong for appellant.

John M. Gerrard, of Domina, Gerrard, Copple & Stratton, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

HOWARD, D.J.

Following a hearing, the board of education of School District No. 5 of Pierce County, Nebraska (Plainview), terminated the contract of Lyle Stephens, a certificated teacher at the Plainview public schools, for unprofessional conduct and immorality. The charges substantially arose from an incident between Stephens and a visiting salesman. Stephens appealed the board's termination decision to the district court for Pierce County. The district court dismissed the petition in error and affirmed the termination, and this appeal followed. "Just cause" for termination is defined, among other things, as "unprofessional conduct" and "immorality." Neb. Rev. Stat. § 79-12,107(4)(c) and (e) (Reissue 1987).

We review the record to determine whether there is sufficient evidence as a matter of law to support the board's decision. Evidence is "sufficient as a matter of law" if a judge could not direct a verdict if the case were tried to a jury. It is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions. *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985).

Assigned as error are certain alleged violations of procedure leading to and occurring during the hearing, and the finding of the district court that the termination was not arbitrary or capricious.

Gerald Zimmerman, a typewriter salesman from Norfolk, Nebraska, testified that on September 29, 1986, he arrived for a meeting with the high school principal, Gale Retzlaff. Retzlaff was unavailable for approximately 40 minutes, and Stephens invited Zimmerman into the teacher's lounge for a cup of coffee. Initially, an unidentified teacher was in the lounge also,

but, eventually, Stephens and Zimmerman were left alone. The two men discussed a variety of subjects for about half an hour. This conversation included several out-of-context remarks by Stephens which were sexually oriented. During these periods of the conversation, Stephens appeared restless, moving in his chair and "actually rubbing his own genital area."

Toward the end of the conversation, the two men discussed woodworking and Zimmerman's attempt to build his own bar stools. Zimmerman stated he was having difficulty routing the seat area, but neither party arrived at any solution to the problem, other than freehand power sanding. Zimmerman stood up and walked toward the door of the lounge, making a parting comment about letting him know any suggestions Stephens might come up with on the bar stools. At the same time, Stephens began to walk toward Zimmerman. Stephens said he really did not have any immediate ideas. At the same time, he was walking toward Zimmerman and closing in for a face-to-face conversation. Stephens suggested that Zimmerman might try using a foam cushion, which might conform to his "ass." While saying this, Stephens placed his hand directly on Zimmerman's genital area, making three or four fondling motions as he ended the conversation.

Del Beaudette, whose wife was a secretary at the Plainview school, described an incident in the men's room of the American Legion Club in Plainview, where he attended a school staff Christmas party on December 15, 1985. According to Beaudette, while Beaudette was washing his hands, Stephens grabbed him in the genitals and on the buttocks after "playing with himself," "flipping his penis."

Stephens denied all misconduct as attributed to him by the witnesses Zimmerman and Beaudette and stated that he had never engaged in such conduct with anyone. Two "rebuttal" witnesses described similar actions by Stephens.

Appellant argues the violation of Neb. Rev. Stat. § 79-12,110(3) (Reissue 1987), requiring that prior to the hearing the notice of possible cancellation of the teacher's contract and the reasons supporting possible cancellation shall be considered confidential employment matters subject to Neb. Rev. Stat. §§ 79-4,156 to 79-4,158 and 84-1410 (Reissue 1987),

and that such matters shall not be released to the public or any news media. The October 22 edition of the Plainview News contained a front-page item relating that the school board was considering termination of Stephens "for reasons authorized by law." Two days previously, on October 20, a special meeting of the Plainview board of education was held to discuss the Stephens matter. The board opened the meeting and then went immediately into closed session to discuss the Stephens situation. Upon returning to open session, the board approved a motion to consider the cancellation of Stephens' teaching contract for reasons authorized by law. A reporter from the Plainview News attended the open session and reported on the meeting in the next issue of the newspaper, as above stated. In the meantime, on October 21, before the publication, Stephens, through his attorney, requested a public hearing in accordance with Neb. Rev. Stat. § 79-12,115 (Reissue 1987).

Leaving aside the questions of whether the board's approval in open session of a motion to consider termination without giving details can be said to have prejudiced Stephens, and whether any violation of the statute vitiates a hearing, we conclude that the board did all that was possible to comply with § 79-12,110(3), which mandates a closed session in accordance with § 84-1410 only for matters preparatory to any formal action. Section 84-1410 itself requires that the meeting be "reconvened in open session before any formal action may be taken." The approval of the motion, necessarily made in open session, cannot be taken as a "release" to the public or the news media in violation of § 79-12,110(3), which itself incorporates a provision of the public meetings law with which it must be read. In refraining from specifics and resolving to consider cancellation "for reasons authorized by law," the board complied as closely with the spirit of the law as with its terms.

Appellant also urges error in the board's reception of testimony from two "rebuttal" witnesses, who were discovered only the day before the hearing. Section 79-12,115(1) requires that, if requested, the names of witnesses to be called against the teacher be furnished at least 5 days before the hearing. We need not decide whether an exception for rebuttal witnesses should be read into the statute or whether under the circumstances the

two were actually rebuttal witnesses, for the reason that without their testimony the evidence is clearly sufficient to support the board's decision. The perpetration of an aggressive or uncontrollable third degree sexual assault in the school premises, with the evident purpose of sexual arousal, is a clear departure from moral behavior and professional standards. While this court has said that for a teacher's conduct to be immoral it must be directly related to a teacher's ability to teach, and indicate an unfitness to do so (*Clarke v. Board of Education*, 215 Neb. 250, 338 N.W.2d 272 (1983)), we agree with the Arizona court in *Welch v. Bd. of Ed. of Chandler U. Sch. Dist.*, 136 Ariz. 552, 555, 667 P.2d 746, 749 (1983), which pointed out:

> There may be conduct which by itself gives rise to reasonable inferences of unfitness to teach or from which an adverse impact on students can reasonably be assumed. Further, we are concerned that by imposing an absolute requirement that specific harm must be proven prior to dismissal, we would deter school administrators from acting to prevent or control predictable future harm.

As stated by the California court in *Morrison v. State Board of Education*, 1 Cal. 3d 214, 229, 461 P.2d 375, 386, 82 Cal. Rptr. 175, 186 (1969), "[T]he board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers . . . ."

The decision of the board is founded upon sufficient competent evidence. The decision of the district court upholding the termination and dismissing the petition in error is correct and must be affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. JON P. POLINSKI, APPELLANT.

429 N.W.2d 725

Filed September 30, 1988. No. 87-1093.

**Trial: Prosecuting Attorneys: Juries.** Where, during a jury trial, the judge has information that might reasonably be an improper, out-of-court contact between the prosecutor and a juror, it is error for the judge to fail to hold a hearing outside of the presence of the jury to determine whether or not defendant's right to a fair trial by an impartial jury had been violated.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for a new trial.

Edward F. Fogarty, of Fogarty, Lund & Gross, for appellant.

Robert M. Spire, Attorney General, and David Edward Cygan for appellee.

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

COLWELL, D.J., Retired.

Jon P. Polinski was convicted by a jury in the county court for Douglas County, Nebraska, of driving while intoxicated. He was sentenced to 6 months' probation and fined $235, and his driver's license was suspended for 60 days.

Polinski appealed to the district court, alleging prosecutor misconduct. The conviction and sentence were affirmed by the district court. Polinski now appeals to this court. We reverse and remand for a new trial.

Polinski assigns only one error: The court below erred in not determining that defendant was prejudiced and entitled to a mistrial because of inappropriate contact with a juror made by the prosecuting attorney.

During the afternoon recess of Polinski's trial, defendant's counsel saw the prosecutor talking with a juror, and he asked the prosecutor to accompany him into the judge's chambers, where this record was made:

> MR. FOGARTY: I'm going to move for a mistrial 'cause just as I was sitting out in the chamber coming into the court I saw David Smalheiser, the prosecutor, walking with Connel Hessen (phonetic), one of our jurors, and

making small talk. It was very — it was social talk about something. But the small talk lasted from inside this room here all the out [sic] to about 30 feet outside the double doors where there was a session of about 50 feet and — and I know nothing was said about the case but I — I've always understood and always practiced, in 20 years, that the etiquette involved in lawyer contact with jurors is that there is to be none and you're not to curry favor with jurors and you're not to make small approaches like that and I think it's inappropriate and I just want to go on record and make a motion for a mistrial.

THE COURT: David?

MR. SMALHEISER: I apologize if it seemed I was currying favor. I certainly didn't. We were leaving the door at the same time, I think it would have been rude to ignore and say anything and I certainly didn't talk about the case, didn't try and undermine or try and establish any basis of friendship or any common ground with him.

MR. FOGARTY: Your Honor, - - -

MR. SMALHEISER: I think, sure if I had done that, that would have been improper but I certainly didn't do that.

MR. FOGARTY: Your Honor, the Court is well aware what the practice and custom amongst lawyers litigating cases with contact with jurors and such things as you don't even take the same elevators down, you warn (indiscernible) voir dire. I think it's inappropriate and that's the basis of my motion.

THE COURT: This — I'll overrule it.

After sentencing, Polinski's attorney filed a motion for a new trial, accompanied by his affidavit regarding the above-related contact. The prosecutor also filed an affidavit. There is nothing in either the attorneys' affidavits or the transcript of the in-chambers discussion to indicate that the conversation involved anything other than "small talk." The juror involved was later selected jury foreman.

There is no doubt that the circumstances of the conversation between the prosecutor and juror were improper, leaving the question of whether defendant had a fair trial before an

impartial jury. We first turn to approved trial procedures in similar circumstances.

" ' " 'It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof.'. . ." ' " *State v. Eggers,* 175 Neb. 79, 86, 120 N.W.2d 541, 546 (1963). In *State v. Myers,* 190 Neb. 466, 209 N.W.2d 345 (1973), it was brought to the attention of the court that some impaneled jurors might be subject to challenge because of prior service in a criminal case. The trial judge denied a motion to reexamine those jurors before proceeding to trial. On appeal, this court said at 472, 209 N.W.2d at 349:

> [I]t is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guaranty of the right to trial by an impartial jury. Any lowering of those constitutional standards strikes at the very heart of the jury system.

Later, in *State v. Robinson,* 198 Neb. 785, 255 N.W.2d 835 (1977), it was held appropriate and not prejudicial to the defendant to hold a hearing and examine jurors on the issue of an impartial jury under circumstances where two jurors might have become unfairly prejudiced from hearing out-of-court statements concerning the credibility of the State's witnesses.

In the case at bar, the trial court did nothing to determine whether the juror could continue as an impartial juror. The court simply denied the defendant's motion for a mistrial. We hold that where, during a jury trial, the judge has information that might reasonably be an improper, out-of-court contact between the prosecutor and a juror, it is error for the judge to fail to hold a hearing outside of the presence of the jury to determine whether or not defendant's right to a fair trial by an impartial jury had been violated. It is not enough that both counsel agreed that the contact was "small talk." The trial judge must determine the impartiality of the juror, which generally will require his or her examination.

Polinski's conviction and sentence must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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MARTHA J. ROLLOGAS, APPELLANT, V. TIMOTHY X. ROLLOGAS, APPELLEE.

429 N.W.2d 727

Filed September 30, 1988. No. 88-089.

**Child Custody.** A deliberate and continued violation of a condition of an order granting custody justifies a change in custody.

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

James H. Hoppe, of Watkins-Scott-Hoppe, for appellant.

Douglas W. Marolf for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

HOWARD, D.J.

The mother appeals from an order of the district court modifying a decree of dissolution by awarding custody of the minor child, Brandon, to the father. She assigns as error the court's determination that a material change of circumstances had occurred which affected Brandon's best interests.

In a previous order, of December 20, 1985, denying the respondent father's application for a change in custody, the court stated that "due to the criminal record of one MacArthur Miles [sic] and his propensity toward violence as reflected in the evidence . . . the petitioner should be enjoined from permitting Brandon Rollogas to have any contact whatsoever with MacArthur Miles [sic] . . . ." The decretal portion provided that "the petitioner be and she hereby is enjoined from permitting Brandon Rollogas, a minor, to have any contact whatsoever with MacArthur Miles [sic] . . . ." There was no appeal from this order. On August 11, 1987, the temporary custody of Brandon

was granted to the father until trial on November 3, 1987, of the matter now appealed from.

Appellant argues that, conceding several contacts of Brandon with McArthur Myles permitted by the mother, no change of circumstances has been shown in that there was no evidence of any material change in Brandon's condition through any unfitness or neglect of the mother, nor any harmful effect on Brandon by reason of his contacts with Myles. The father presented evidence of many contacts of the child with Myles, who was observed at the home on a more or less regular basis, although he apparently did not reside there. The mother has stated that she does not like the order prohibiting Brandon's contact with Myles, and according to the guardian ad litem, his lengthy pleas for her to discontinue the contacts "fell on deaf ears." Finally, the father and his present wife testified as to the lack of extracurricular activities allowed Brandon when living with his mother, in contrast with church, athletic, and family activities he had enjoyed during the approximately 3 months he was in the father's custody before trial, as well as to his educational development and personality improvement.

We regard the previous order granting custody to the mother as conditional in nature. The finding of a deliberate and continued violation of the condition effectively recalled the case for consideration anew, in the service of the child's best interests. Moreover, the Myles contacts and defiant attitude of the mother created an environment for the child unanticipated by the trial court, which was entitled to assume its orders would be obeyed. A defiant violation of the court's orders is generally regarded as a factor in itself to be considered in a custody contest. *Steward v. Steward*, 464 So. 2d 525 (Ala. App. 1985); *Foster v. Foster*, 300 S.W.2d 857 (Mo. App. 1957); *Ford v. Ford*, 108 Idaho 443, 700 P.2d 65 (1985); *Grein v. Grein*, 364 N.W.2d 383 (Minn. 1985).

We find no abuse of discretion, and to the extent that the evidence is in conflict, we consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986).

AFFIRMED.

GLEN PARK TERRACE #1 HOMEOWNERS ASSOCIATION, APPELLEE, V. M. TIMM, INC., APPELLANT AND CROSS-APPELLEE, RALPH SMITH ET AL., INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

430 N.W.2d 40

Filed October 7, 1988. No. 86-415.

1. **Summary Judgment.** A summary judgment shall be granted where there is no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Pleadings.** The presence of a justiciable counterclaim, presenting genuine issues of fact, which is in excess of the amount sought in the petition, and arising out of the transaction or occurrence which is the subject matter of a plaintiff's claim, is a bar to the granting of plaintiff's motion for summary judgment.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded for further proceedings.

James F. Fenlon, of Harris, Feldman Law Offices, for appellant.

Ross A. Stoffer, of Mueting, DeLay & Stoffer, for intervenors-appellees.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

GRANT, J.

The 252-page transcript filed in this court shows that this case began by the filing of a petition by Glen Park Terrace #1 Homeowners Association (hereinafter association) in the county court for Madison County, Nebraska. In that petition, the association pled that it was "an association of homeowners organized for the purpose of administrating a condominium property regime pursuant to Sections 76-801 et. seq." of the Nebraska statutes, and alleged, in seven counts, that defendant owned property in Madison County, within the condominium regime, located at seven addresses, e.g., "1308 C Goleta"; that defendant had not paid its pro rata share of the common expenses on the seven pieces of property, as required by Neb. Rev. Stat. § 76-817 (Reissue 1986); and that defendant was

therefore indebted to the association in the amount of $8,956.90.

Defendant, M. Timm, Inc. (hereinafter Timm), generally denied plaintiff's allegations and, as an affirmative defense, alleged that the master deed and declaration provided that no assessments "shall be allocated to any Unit with respect to any period prior to the date of closing of the initial sale thereof by the Developer"; that Timm was the developer; and that the units in question had not been sold.

After interim pleadings, on June 25, 1984, Timm filed an amended answer and a "counterclaim" seeking judgment against the association for $36,346 plus general damages, based on the allegation that Timm had directly paid "certain costs and expenses of administration, maintenance, repair and replacement of the common elements" of the condominium regime. The county court found that "the Counterclaim of the Defendant exceeds the jurisdiction of the County Court, and that this matter should be and hereby is certified to the docket of the District Court for further proceedings."

After the case was in the district court, various discovery motions, motions for sanctions for Timm's failure to respond, and a motion for summary judgment were filed by the association. On June 10, 1985, Timm filed a motion, together with a copy of the minutes of a regular annual meeting of the plaintiff association. The motion sought "an Order finding that Attorney Ross Stoffer has no authority to continue representing the Plaintiff in this matter other than for the purpose of dismissing this action." The attached minutes showed that on March 26, 1985, the association held a regular annual meeting and that, at that meeting, Milan E. Timm (president of defendant) and four other persons had been "properly elected to the Board of Administrators of such Association." The June 10 motion further alleges that on April 3, 1985, the board of administrators had adopted a resolution "to terminate this action."

On June 24, 1985, the plaintiff association and "the Plaintiffs, Ralph Smith, Carmella Huey and Mike Smalley," through the same lawyer who had been representing the association, moved to file an amended petition. This motion

was denied by the court, as was defendant's motion for an order finding that association's counsel had no further authority. On July 25, 1985, Smith, Huey, and Smalley moved for an order to allow them to be substituted as plaintiffs in the place of the association. On August 20, 1985, this motion was denied. On August 29, Ross Stoffer filed his motion to withdraw as attorney for the association and was allowed to withdraw by the court on September 30, 1985.

On September 6, 1985, Smith, Huey, and Smalley filed a "Petition in Intervention." This petition began: "Come now the Plaintiffs and for Their First Cause of Action against the Defendant allege as follows: . . . ." The petition stated plaintiffs were owners of property within the condominium regime and went on to plead the first seven counts as set out in the petition filed by the association.

On September 19, 1985, the trial court entered its order stating that the court "being advised that a Petition in Intervention was filed herein on September 6, 1985, hereby orders that all parties adverse to the Petition in Intervention file an Answer thereto on or before October 18, 1985." On October 30, Timm filed its answer to the petition in intervention. No counterclaim was filed with this answer. The petition in intervention and Timm's answer were captioned: "Ralph Smith, Carmella Huey, and Mike Smalley, Plaintiffs, vs. M. Timm, Inc., A Nebraska Corporation, Defendant."

On January 27, 1986, a pretrial conference was held and a pretrial order signed. This order was captioned: "Glen Park Terrace #1 Homeowners Association, Plaintiff, vs. M. Timm, Inc., A Nebraska Corporation, Defendant, vs. Ralph Smith, Carmella Huey, and Mike Smalley, Intervenors." The court noted that counsel appeared for Timm and for the intervenors, but there was no appearance for the plaintiff association. The order required that the association show cause within 20 days why its petition should not be dismissed for want of prosecution and contained, in part, the following orders: "Request to file a Counter-claim Denied. There will be no further amendment of pleadings. The case will be tried as it is now postured . . . . Said matter is set for trial to the jury commencing at 9:00 a.m. on the April 8, 1986 Trial Term."

On March 7, 1986, the association's petition was dismissed without prejudice, and the court ordered: "All other issues joined on the Petition in Intervention will stand for trial . . . ." On the same day, the intervenors filed a motion for summary judgment.

Intervenors' motion prayed that "Judgment be entered for them on their Petition and that if Judgment is not rendered for all the relief asked that the Court ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted . . . ." Accompanying this motion was the affidavit of Huey, one of the intervenors, who was also the treasurer of the association. This affidavit stated that "the total amount now due from Defendant to Plaintiff . . . is $19,907.03; that Plaintiff admits there is a credit due to the Defendant herein the sum of $2,622.02 for insurance premiums paid . . . leaving a balance due . . . of $17,285.01." On April 16, 1986, the trial court granted intervenors' motion for summary judgment in the following language: "IT IS THEREFORE ORDERED that judgment be entered for the benefit of Glen Park Terrace #1 Homeowners Association and against M. Timm, Inc., on the petition in intervention in the sum of $19,907.03 . . . ." The court further ordered that "the issues raised by the defendant's counterclaim be set for trial to a jury . . . on April 23, 1986." Since the January 27, 1986, pretrial order had denied a request to file a counterclaim, it is apparent that the counterclaim set for trial was Timm's counterclaim filed on June 25, 1984, against the association.

Timm moved to amend its counterclaim after this pretrial order and to continue the trial. The intervenors moved for the allowance of an attorney fee for their attorney. The court denied these motions. Defendant Timm timely appealed to this court from the summary judgment. The intervenors have cross-appealed.

In this court, Timm sets out four errors, which may be consolidated into three, alleging that the trial court erred (1) in granting the intervenors' motion for summary judgment, (2) in entering a judgment not in conformity with the evidence, and (3) in not allowing Timm to amend its counterclaim. On their

cross-appeal, intervenors set out three assignments of error, alleging that the trial court erred (1) "in considering the evidence submited [sic] by the Appellant over the objection of the Intervenors," (2) "in not dismissing the Appellant's counterclaim and in setting such counterclaim for trial," and (3) "in not awarding attorneys fees to the Intervenors." We reverse as to appellant's first assignment of error and remand the cause for further proceedings.

With regard to Timm's first assignment of error, that the trial court erred in granting intervenors' motion for summary judgment, we determine that assignment is correct and that it was error for the trial court to grant intervenors' motion while there was a pending counterclaim concerning the same subject matter. In so holding, we reaffirm our earlier general holdings that a summary judgment shall be granted where there is no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1985); *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987).

That general rule is applicable to the situation presented where a counterclaim is pending at the time summary judgment is sought on the petition. In that situation, we hold that the presence of a justiciable counterclaim, presenting genuine issues of fact, which is in excess of the amount sought in the petition, and arising out of the transaction or occurrence which is the subject matter of a plaintiff's claim, is a bar to the granting of plaintiff's motion for summary judgment. *Kirkpatrick v. 1st State Bank of DeQueen*, 265 Ark. 285, 578 S.W.2d 28 (1979); *Tipton v. Harden*, 128 Ga. App. 517, 197 S.E.2d 746 (1973); *Parmelee v. Chicago Eye Shield Co.*, 157 F.2d 582 (8th Cir. 1946).

In this case, the amount of defendant's counterclaim exceeded plaintiff's claim. The trial court has determined that Timm's counterclaim presents genuine issues of fact, since the counterclaim was set for trial. Both intervenors' claim and Timm's counterclaim against the association arise out of the rights of various parties under the master deed and declaration for the condominium regime. The trial court erred in granting

intervenors' motion for summary judgment.

This ruling by this court does not mean that the trial court may not, under Neb. Rev. Stat. § 25-1333 (Reissue 1985), "ascertain what material facts exist without substantial controversy" and grant such further relief as set out in § 25-1333. We are herein recognizing the caution set out by Judge Boslaugh, concurring in *Burroughs Corp. v. James E. Simon Constr. Co.*, 192 Neb. 272, 276-77, 220 N.W.2d 225, 228 (1974), when he stated, "Some difficulty might be avoided in partial summary judgments if phraseology were used which clearly expressed the interlocutory nature of the decision and avoided the implication that a judgment subject to execution had been entered."

The cause is remanded for further proceedings, but we do note that the summary judgment, as entered, does exceed the amount claimed by intervenors in that the judgment does not give Timm credit for $2,622.02 admittedly advanced by Timm.

The other matters raised by both Timm and the intervenors are either not final orders or may not arise on a trial after remand.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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LOUIS WEINER, APPELLANT, V. THEODORE HAZER ET AL., APPELLEES.

430 N.W.2d 269

Filed October 7, 1988. No. 86-669.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader.
2. **Statute of Frauds.** The object of the statute of frauds is prevention of frauds and perjuries.
3. **Contracts: Statute of Frauds.** While certain contracts are declared void under the statute of frauds, such contracts are not void but merely unenforceable.
4. **Real Estate: Brokers: Statute of Frauds.** In the absence of a specific dollar amount or percentage of the sale price, or some other formula whereby the

amount of commission may be calculated and determined with reasonable certainty, the specified compensation requirement of Neb. Rev. Stat. § 36-107 (Reissue 1984) is unsatisfied.

5. **Estoppel: Public Policy.** The doctrine of equitable estoppel is based on grounds of public policy and good faith, and is interposed to prevent injustice and inequitable consequences.
6. **Estoppel: Fraud.** Equitable estoppel is interposed to prevent injury, fraud, injustice, and inequitable consequences by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence.
7. **Contracts: Real Estate: Equity: Statute of Frauds.** A contract for payment of a real estate commission is analogous to a contract for the sale of real estate, inasmuch as the same equitable principles govern both contract situations in relation to the statute of frauds.
8. **Contracts: Equity: Statute of Frauds.** Equitable enforcement of a contract, otherwise unenforceable on account of a statute of frauds, is available when the contract has been fully performed by one party and nonfulfillment of the contract would amount to a fraud on the performing party.

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

Walter M. Calinger for appellant.

S.J. Albracht for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

SHANAHAN, J.

Cheri Weiner, personal representative of the estate of Louis Weiner, deceased, appeals from the order of the district court for Douglas County, sustaining a demurrer and dismissing Weiner's petition with prejudice. The court found that Weiner's claim for a real estate commission was unenforceable as the result of failure to satisfy Neb. Rev. Stat. § 36-107 (Reissue 1984):

> Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent. Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in

case of sale by the broker or agent.

Weiner's petition alleged that sometime in 1980 the defendants offered for sale certain real estate in Omaha, asking $1.8 million for the property. In November 1980, Weiner, a licensed real estate broker, presented to Theodore Hazer, agent for all other defendants, a purchase offer of $1.8 million for the property. Hazer assured Weiner that the usual 6-percent broker's commission would be paid when the transaction was closed, but, for some unexplained reason, the sale was never consummated.

After the first sale fell through, Weiner continued to seek a buyer for the property and subsequently found buyer, who submitted a written offer of $1.8 million for the land. Hazer assured Weiner that the "usual commission" would be paid. Weiner received a $10,000 earnest money deposit by the buyer for the sale, and then gave Hazer the buyer's written offer to purchase the property. Hazer conditionally accepted the offer, but instead of writing in the amount payable to Weiner, as broker, Hazer simply drew a line through the space where the dollar amount was to be entered. Thus, the clause relating to the broker's compensation read, "I (We) further agree to pay the above named agent [Weiner] the cash commission agreed upon in the amount of $ ____." Hazer had drawn a line through the space for the dollar amount of the commission to avoid injecting the issue of commissions into the continuing negotiations between the defendants and the buyer. Again, Hazer assured Weiner orally that a 6-percent commission would be paid at the time of closing.

The sale was eventually closed on May 19, 1981, when Hazer once again promised Weiner that the 6-percent commission would be paid, but would be delayed until the defendants sold some other real estate. After the defendants sold their other land, Hazer failed to pay Weiner's commission as orally promised.

The defendants demurred on the basis that Weiner's petition failed to state a cause of action. Relying on § 36-107, the court sustained the demurrer and dismissed Weiner's petition.

In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pled and the factual and

legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader. *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987).

Regarding § 36-107, Weiner contends that (1) the statute is inapplicable to a broker's contract for a real estate commission; (2) the instrument, as alleged, satisfies the statute; (3) the defendants are estopped from relying on the statute; and (4) Weiner's performance removed the contract from operation of the statute.

Weiner's first contention relates to *Mid-Continent Properties, Inc. v. Pflug*, 197 Neb. 429, 249 N.W.2d 476 (1977). In *Pflug*, a broker sued the seller of land to recover a commission due after the sale of real estate. The only writing to which the broker could refer, however, did not satisfy the requirements of § 36-107 because it was not "subscribed by . . . the broker or agent." The contract of sale between the buyer and seller contained a clause which required the seller to pay the broker a 5-percent commission for the sale. Despite the absence of the broker's signature on the contract, as required by § 36-107, this court remanded the cause for a new trial, and stated:

> Since plaintiff was a third-party beneficiary, we deem the statute inapplicable. . . . "The object of the statute is, as we have seen, to prevent frauds and perjuries; and, while certain contracts are by the terms thereof declared void, the uniform construction placed upon the statute by the courts renders it not void, but merely unenforceable." [Quoting from *Mohr v. Rickgauer*, 82 Neb. 398, 117 N.W. 950 (1908).] . . .
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> . . . .
>
> . . . " '[T]he uniform construction placed upon the statute by the courts renders such contracts not void, but merely unenforceable for want of the evidence which the statute requires.' " [Quoting from *Svoboda v. De Wald*, 159 Neb. 594, 68 N.W.2d 178 (1955).]
>
> . . . Clearly and indisputably there was an understanding between the broker and the landowner for the commission sought to be recovered. No reliance on oral testimony is required; the agreement is definitely

> established and the object of the statute of frauds complied with.

197 Neb. at 431-32, 249 N.W.2d at 477-78.

Weiner's reliance on *Pflug* is misplaced. Unlike *Pflug*, the contract upon which Weiner relies is silent on a subject crucial to enforcement of the contract, namely, the amount of compensation to be paid. When a material term, such as provision for compensation, is not stated in the contract to be enforced, the purposes underlying § 36-107 would be thwarted if oral testimony is necessary and allowed to establish the missing term, regardless of the theory under which the broker sues. We express no view on the question whether Weiner is a third-party beneficiary inasmuch as Weiner's case is clearly distinguishable from *Mid-Continent Properties, Inc. v. Pflug, supra*. Section 36-107 expressly requires that the commission contract shall "set forth the compensation to be allowed by the owner . . . ." In the absence of a specific dollar amount or percentage of the sale price, or some other formula whereby the amount of commission may be calculated and determined with reasonable certainty, the specified compensation requirement of § 36-107 is unsatisfied. A mere statement that the seller, as owner, will pay "the cash commission agreed upon," without specifying the amount of the commission or means to determine the commission, does not satisfy § 36-107.

Next, Weiner contends that equitable estoppel prevents the defendants' use of § 36-107 to preclude recovery on the commission contract.

As we expressed in *Osmera v. School District of Seward*, 216 Neb. 261, 265-66, 343 N.W.2d 886, 890 (1984):

> The doctrine of equitable estoppel is based on grounds of public policy and good faith, and is interposed to prevent injustice and inequitable consequences. *Koop v. City of Omaha*, 173 Neb. 633, 114 N.W.2d 380 (1962). " '[Equitable estoppel] is interposed to prevent injury, fraud, injustice, and inequitable consequences by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence.' " *City of Grand Island v.*

*Willis*, 142 Neb. 686, 697, 7 N.W.2d 457, 463 (1943) (citing 31 C.J.S. *Estoppel* § 63 (1942)).

. . . .

"The essential elements of equitable estoppel are: As to the party estopped, '* * * (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.' As to the other party, '* * * (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.' " *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 798-99, 186 N.W.2d 711, 714 (1971). See *County of Scotts Bluff v. Hughes*, 202 Neb. 551, 276 N.W.2d 206 (1979).

Weiner was a licensed real estate broker, charged with knowledge of § 36-107 concerning the necessity of a written contract for a specified real estate commission. Under the circumstances, Weiner could not in good faith rely on an oral contract for payment of a real estate commission to a broker. Consequently, the doctrine of equitable estoppel is inapplicable in the present case.

Finally, Weiner contends that a broker's performance of an oral contract for a real estate commission removes the contract from the statute of frauds.

A contract for payment of a real estate commission is analogous to a contract for the sale of real estate, inasmuch as the same equitable principles govern both contract situations in relation to the statute of frauds. *Latson v. Buck*, 87 Neb. 16, 126 N.W. 760 (1910).

In *Garner v. McCrea*, 147 Neb. 541, 23 N.W.2d 731 (1946), an action for a specific performance of a parol agreement to

convey land, this court stated:

> Equity will grant specific performance of a parol contract to convey real estate to another where the terms of the contract are established by evidence that is clear, convincing, and satisfactory, and where it has been wholly performed by one party and its nonfulfillment would amount to a fraud on that party.

147 Neb. at 547-48, 23 N.W.2d at 734.

Thus, as expressed in *Garner, supra*, equitable enforcement of a contract, otherwise unenforceable on account of a statute of frauds, is available when the contract has been fully performed by one party and nonfulfillment of the contract would amount to a "fraud" on the performing party.

The statute of frauds contained in the Uniform Commercial Code, see Neb. U.C.C. § 2-201(1) (Reissue 1980), was examined in *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976), which involved an action brought by the co-op, as buyer, for breach of an oral contract for the sale of corn valued greater than $500. Although there was no written contract, the co-op claimed that the sellers of the corn knew that the co-op would rely on the oral contract and resell the subject corn to third parties. Noting that there was no written confirmation of the contract, which was not within any exceptions specified by the U.C.C., the court concluded:

> It is clear to us that the mere breach or violation of an oral agreement which is specifically covered by the statute of frauds by one of the parties thereto or the mere denial of an agreement or refusal to perform it is not of itself a fraud either in equity or in law for which the court should give relief. The mere pleading of reliance on the contract to his detriment should not be sufficient to permit a party to assert rights and defenses based on a contract barred by the statute of frauds. If he were permitted to do so, the statute of frauds would be rendered meaningless and nugatory. The mere failure to perform an oral contract within the statute where no relation of trust and confidence exists does not constitute fraud authorizing the right to relief.

196 Neb. at 543, 244 N.W.2d at 90.

For disposition of Weiner's case, it is unnecessary to characterize, consider, or discuss the circumstances beyond completed performance of an oral contract, which would supply the additional basis for equitable relief concerning a contract otherwise unenforceable on account of the statute of frauds. Weiner's petition alleges only performance, which by itself is insufficient for the equitable relief sought. See, *Garner v. McCrea, supra*; *Farmland Service Coop, Inc. v. Klein, supra*.

Under the circumstances, Weiner's petition failed to state a cause of action. Therefore, the district court's judgment is affirmed.

AFFIRMED.

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EDMUND JOSEPH LANNERS, APPELLANT, V. EILEEN FRANCES LANNERS, APPELLEE.

430 N.W.2d 44

Filed October 7, 1988. No. 86-992.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Jerome J. Ortman for appellant.

Pamela Hogenson Govier, of McGill, Koley, Parsonage & Lanphier, P.C., for appellee.

HASTINGS, C.J., WHITE, and SHANAHAN, JJ., and WARREN and BUCKLEY, D. JJ.

PER CURIAM.

This is an appeal from the judgment of the district court in a dissolution of marriage action. The appellant husband assigned as error the valuations placed by the trial court on the family residence and the personal property of the parties, including a 1983 Ford van. He also assigns as error that the trial court failed to set aside certain property he claims was inherited or gifted

from his father and that the amount of child support ordered was excessive.

We have reviewed the record de novo and conclude that the trial court did not abuse its discretion in its decision as to the matters complained of. Therefore, the judgment of the district court is affirmed.

Appellant shall pay the costs of this appeal, including the sum of $500 to apply toward the services of appellee's attorney in this court.

AFFIRMED.

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## MUNICIPAL ENERGY AGENCY OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE, V. CITY OF CAMBRIDGE, APPELLANT.

430 N.W.2d 44

Filed October 7, 1988. No. 87-035.

1. **Appeal and Error.** In reviewing an action at law tried without a jury, it is not the role of the Supreme Court to resolve conflicts in or reweigh the evidence. The court presumes that the trial judge resolved any controverted facts in favor of the successful party, and the evidence and the permissible inferences therefrom are considered most favorably to the successful party. In such actions the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside unless clearly wrong.
2. _____. Generally, this court will dispose of a case on appeal on the theories which were presented to the trial court.
3. **Contracts: Intent.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract.
4. **Estoppel: Municipal Corporations.** The doctrine of equitable estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers did.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Affirmed.

Charles J. Cuypers, of Sherwood Law Office, for appellant.

Richard M. Duxbury, of Erickson & Sederstrom, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

BOSLAUGH, J.

On August 6, 1979, the defendant, City of Cambridge, Nebraska, entered into a contract, known as an Electrical Resources Pooling Agreement (ERPA), with the Nebraska Municipal Power Pool (NMPP). The contract was assigned to the plaintiff, Municipal Energy Agency of Nebraska (MEAN), the successor to NMPP, on January 11, 1982.

Under the ERPA contract a participant was required to choose whether it wanted bulk or service power under the agreement. Under a bulk power arrangement, the participant contracts to deliver its power production to MEAN, pays a standard rate, and MEAN schedules the power.

The city originally intended to become a bulk service power participant, and an ordinance authorizing the mayor to execute the bulk service power agreement was passed. However, disputes arose between the city and MEAN, and the city never executed the bulk service power schedule (schedule K).

Under a service power arrangement, the participant decides on a day-to-day basis how much power it needs and from whom it will purchase the power. The ERPA contract requires that a participant act in accordance with the "service schedules." Schedule F is used for service power participants. The contract does not require that a participant execute such a schedule, but merely requires that the participant act in accordance with that schedule.

The contract does not require the execution of any other document. The schedules were developed originally by the pool staff and set out the charges to be billed for electrical power services. The management committee of the pool, comprised of a representative of each participant, reviews and approves the schedules and any amendments. In proposing schedules and amendments, the normal practice was to send each participant a copy of the proposed amendment for final approval at a meeting. The defendant city was treated as a service power

participant and was billed according to the service schedule adopted on March 6, 1981.

The city contends that its authorized representative (Councilman Gufford) was not present at the meetings at which schedule F was adopted and later amended. The city's powerplant supervisor, Kenneth Fichtner, did attend those meetings, but the city contends Fichtner was not authorized to approve the schedule on behalf of the city.

The service power schedule (schedule F) requires that participants reimburse MEAN for transmission charges (also called "wheeling" charges). Included in those charges is the applicable "billing demand ratchet" (ratchet) in effect, which is based on MEAN's agreement with the Nebraska Public Power District. The ratchet is fixed by the highest demand for power in a given period. That demand level is in effect for the succeeding 11 months, and MEAN is obligated to pay at that demand level regardless of whether that amount of power is used.

The contract requires each participant to reserve transmission capacity in advance. In effect, the participant is required to nominate a demand amount, which is the maximum the participant will be entitled to receive unless surplus is available because other participants are not using their maximum demand capacity. In August of 1979, Fichtner made a reservation for the city of 800 kilowatts. In 1981 he increased the demand reservation of the city to 1200 kilowatts. Each month a participant is billed for the demand capacity reserved whether it is used or not. The city paid all such charges until October 1982.

From August of 1979 to July 15, 1982, the city bought power and transmission services from MEAN. During that time, both parties treated the city as if it were a service power participant. The city bought power on a day-to-day basis, and it was billed for transmission charges as a service power participant. Each day the powerplant manager, Fichtner, called MEAN and reserved the amount of power required for that day. During the course of the 3-year period, the city increased the amount of power it purchased as a service power participant, although Fichtner had no recollection of a long-term agreement between the city and MEAN to purchase power. However, Fichtner

testified that he had assumed that MEAN was treating the city as a service power participant.

It is undisputed that the city timely paid its power bills from MEAN until October of 1982. In July of 1982, the city discontinued scheduling and paying for power from MEAN. It paid the ratcheted transmission charges for the months of August and September of 1982, but at that time decided to discontinue paying those charges.

The second amended petition was filed October 16, 1984, to recover unpaid "wheeling" or transmission charges. A bench trial was held on March 5, 1986. On June 23, 1986, the trial court found that ERPA participants could choose whether they would be service power or bulk power participants; that by their actions, the parties chose for the city to be a service power participant; that the schedules necessary for service power participation had been adopted as contemplated in the contract; that the city had been represented at the meetings by Fichtner; and that the city was estopped to deny the contract. The trial court found that the city owed MEAN $14,673.55 plus prejudgment interest, for a total award of $19,994.62.

The city has appealed and has assigned as error the finding that there was a valid contract between the parties with respect to ratcheted transmission charges. The city argues that the trial court's decision reformed the terms of the contract and that MEAN failed to establish the existence of the schedules necessary to form a complete and binding contract. Finally, the city argues that since it was not billed for any use of power after it canceled service from MEAN, it does not owe MEAN any transmission charges.

This is a suit on a contract and is an action at law. The standard of review for an action at law, tried without a jury, as in this suit, is well settled in Nebraska. In *Osmond State Bank v. Uecker Grain*, 227 Neb. 636, 637, 419 N.W.2d 518, 519 (1988), we said:

> In reviewing an action at law tried without a jury, it is not the role of the Supreme Court to resolve conflicts in or reweigh the evidence. Rather, the court presumes that the trial judge resolved any controverted facts in favor of the successful party. This court will also consider the evidence

> and the permissible inferences therefrom most favorably to the successful party. Moreover, in such actions the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside unless clearly wrong.

This standard was reiterated in *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 424 N.W.2d 885 (1988).

The pleadings show that MEAN was advancing two theories of recovery. The second amended petition alleged a cause of action for breach of contract because of the city's failure to pay accrued charges for the period of October 1982 through June 1983. The second cause of action was based in quantum meruit for the value of services provided to the city. There was no prayer for the equitable relief of reformation.

The city argues that the trial court reformed the contract when it found that even though the city expressed its intention, by ordinance, to enter into a bulk power contract, the parties actually had a service power contract.

Generally, this court will dispose of a case on appeal on the theories which were presented to the trial court. *Ward v. Nebraska Electric G. & T. Coop., Inc.*, 195 Neb. 641, 240 N.W.2d 18 (1976); *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982); *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984); *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984); *Cimino v. W. A. Piel, Inc.*, 227 Neb. 196, 416 N.W.2d 505 (1987).

It is undisputed that the city executed ERPA expecting to be a bulk power participant, but then failed to execute any other documents necessary to establish its service as a bulk power participant. The evidence shows that the city bought and paid for power and transmission services from MEAN under some type of arrangement. An aid in interpreting contracts is the course of performance of the parties. In *Smith v. Daub*, 219 Neb. 698, 703, 365 N.W.2d 816, 820 (1985), we held that "in attempting to construe the meaning of a contract . . . the interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract, and ordinarily such construction

of the contract should be enforced." See, also, *Lortscher v. Winchell*, 178 Neb. 302, 133 N.W.2d 448 (1965).

In *Omaha P. P. Dist. v. Natkin & Co.*, 193 Neb. 518, 524-25, 227 N.W.2d 864, 868-69 (1975), this court held:

> In the construction of questioned provisions in a contract, the rule has long been established in this jurisdiction that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Ordinarily, such a construction of the contract should be enforced. . . . This is a rule of justice and equity, and we apply it herein. To hold otherwise would permit OPPD to take advantage of its own omissions and permit it to interpret the contract of the parties contrary to its own actions.

(Citation omitted.)

In this case MEAN and the city dealt with each other in much the same manner—they were parties to a validly executed agreement, but not all steps were taken which were necessary to identify the type of power participant the city was. As both parties concede, they acted as if the city were a service participant. In addition, the ERPA contract itself does not obligate a participant, by its language, to execute any further agreement. It merely states that a participant must choose which type of service it wishes to use. Although the contract does not obligate a participant to execute schedule K, its execution was necessary in order to carry out the bulk power arrangement. Clearly, the parties were acting in accordance with some agreement. The finding that there was a valid contract between the city and MEAN was not clearly wrong.

The city argues that because its authorized representative did not attend the board meetings at which the service power charges were finally adopted, the city is not bound by those charges. It further argues that Neb. Rev. Stat. § 18-412.06 (Reissue 1987) requires that an ordinance be passed for the adoption of service power schedules as well as any other contract to which the city might bind itself. Ordinance No. 81, which was properly passed on August 6, 1979, authorized the city to enter into the bulk service contract.

In this case, there was a valid contract under which both parties performed. The action of the city, buying power, was authorized; the only disputes relate to the type of arrangement which the city wanted to make and whether Fichtner, its representative at the meetings, was authorized to approve service schedule F. There is no evidence that the city specifically withheld authority from Fichtner. In fact, Fichtner dealt daily with MEAN in ordering power for which the city paid.

MEAN argues, and the trial court found, that the city is estopped from denying the validity of the contract. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions, but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. *Hammer v. Department of Roads*, 175 Neb. 178, 120 N.W.2d 909 (1963), citing *Talbott v. City of Lyons*, 171 Neb. 186, 105 N.W.2d 918 (1960). In *Hammer*, this court held:

> We feel the rule that the doctrine of equitable estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done . . . .

175 Neb. at 187, 120 N.W.2d at 915. In *Hammer*, the plaintiffs were contesting the State's refusal to allow access off a state highway onto a street in Kearney which had been dedicated, but not yet developed. The evidence in that case showed that the city knew when it contracted with the State concerning the highway that the State did not intend to allow access off any street between the two access points already agreed upon. Even though the city did not specifically agree that it would not open an access way between the two already agreed-upon points, the city knew the State would not allow access. This court held that the State was not bound by the record of dedication of intent to open the street, and found that the denial of access was not arbitrary and unreasonable.

The city argues that because it received no power from MEAN after July 15, 1982, when the city canceled service, it

was under no obligation to reimburse MEAN for the ratcheted transmission charges. This argument is based on the semantics of ERPA. The contract provides that participants will reimburse MEAN for the services which NPPD provides to service participants, including ratcheted transmission charges. When a new peak demand for electricity by the participants was reached in July of 1982, MEAN became obligated to pay for power at that level for the succeeding 11 months. As a service power participant at that time, the city was obligated under ERPA and schedule F to reimburse MEAN for the transmission charges. It was a matter of contract, to which the city had agreed and acted upon.

After entering into a contract for the purchase of electrical energy and transmission services, and purchasing and paying for energy and transmission services under the contract for a period of approximately 3 years, the city will not now be heard to claim that no valid contract existed between the parties.

The judgment of the district court is affirmed.

AFFIRMED.

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LAUREL KENNEDY, APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF OGALLALA, KEITH COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

430 N.W.2d 49

Filed October 7, 1988. No. 87-038.

**Schools and School Districts: Teacher Contracts: Notice.** Neb. Rev. Stat. § 79-12,111(4) (Reissue 1987) subjects the nonrenewal of a probationary teacher's contract because of a reduction in force to the notice provisions of subsections (3) and (5) of that section.

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

Mark D. McGuire, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

R. Kevin O'Donnell, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and MORAN and BROWER, D. JJ.

PER CURIAM.

Petitioner in error, Laurel Kennedy, appeals from the judgment of the district court affirming the decision of the defendant in error, the board of education of the School District of Ogallala, not to renew her teaching contract after the 1985-86 school year. Kennedy asserts the district court erred in a variety of respects, including its finding that she received proper notice. In addition to resisting Kennedy's assignments of error, the board challenges our jurisdiction to consider this matter, claiming that the notice of appeal was not seasonably filed, and therefore asks that we dismiss the appeal. Having previously disposed of the board's jurisdictional challenge by overruling its motion for summary dismissal filed pursuant to Neb. Ct. R. of Prac. 7B (rev. 1986), and finding that the notice given Kennedy was deficient, we reverse.

Kennedy is a certified teacher who was employed by the board to provide instruction in mathematics and history, the two fields in which she was endorsed as qualified. During the 3 years of her probationary employment, Kennedy taught algebra and American history at the Ogallala High School in the mornings and seventh grade mathematics at the middle school in the afternoons. In addition, she coached volleyball.

In a letter dated January 27, 1986, John Brennan, the board's superintendent, informed Kennedy that the board would be reviewing his recommendation not to renew her contract of employment as "a result of a change of circumstances necessitating a reduction in staff . . . ." Kennedy received a second letter from the board, dated February 4, 1986, in which she was informed that the board might "not renew or may modify [her] contract for the 1986-87 school year as a result of a change of circumstances necessitating a reduction in staff . . . ." This letter also informed Kennedy that she had the right to file a written request for a hearing before the board.

On February 8, 1986, Kennedy requested a hearing "[p]ursuant to Sections 79-12,107 through 79-12,121 and Sections 79-1254.05 through 79-1254.08 . . . for the purpose of

determining if a change in circumstances has occurred necessitating a reduction . . . ." Kennedy also requested a complete listing of all reasons to be offered as a basis for terminating her contract, a list of all witnesses to testify on behalf of the administration or school district, a summary of their testimony, and copies of all documents to be used as exhibits.

Shortly after February 17, 1986, Kennedy received another letter from Brennan which advised that the hearing would be held

> pursuant to Sec. 79-12, 114 and 79-12, 116 R.R.S. 1943. It is the statutory criteria for hearing to be had for the contract amendment, termination, nonrenewal and cancellation of a probationary certificated employee. The procedure outlined in Sec. 79-12, 115 will not be followed. The reason for this is that such procedure is reserved for permanent or tenured certificated employees. You presently do not meet the requirements for tenure with the district and are not considered a permanent certificated employee. If you object to our determination in this regard, please so advise in writing prior to February 24th and state the reasons therefore [sic]. It is our intention to afford you every opportunity and every statutory safeguard guaranteed to you. In that regard, if you or your legal representative care [sic] to see copies of such stature [sic], so there is no confusion in this matter, please so advise our office to provide the same.

(Emphasis in original.)

On March 17, 1986, Kennedy appeared with a representative at a hearing conducted by the board. Kennedy's representative objected to the hearing on the basis that the specific information requested by Kennedy had not been provided. Brennan again refused to provide the data on the basis that Kennedy was not a tenured teacher, whereupon Kennedy's continuing objection to the conduct of the hearing was noted.

Brennan testified that Kennedy's performance was not at issue but that the positions of certain employees were at issue because of the proposed reduction in force necessitated by budget cuts. It appears the board had been overspending its

budget at the rate of $200,000 per year, and some way to control spending had to be found, as tax relief had been promised via a resolution passed at a January 20, 1986, meeting.

Brennan explained that he initially met with a certified public accountant to determine what needed to be done to reduce the board's spending, and in the process identified staff positions to be eliminated. Decisions as to which staff members were to be eliminated from employment were made on the basis that nontenured, or probationary, teachers were to be eliminated first and in accordance with the board's reduction in force policy. That policy provides in relevant part: "Selection of non-tenured teachers for release will be based on such factors as performance evaluation, academic and professional qualifications, potential for future success, and maintenance of a well-balanced educational program and staff." Brennan explained that among the factors considered in selecting Kennedy as one of the persons to be eliminated from the staff were principal recommendations, number of endorsements (i.e., the number of subjects she is certified as competent to teach), and the likelihood of her future success as a teacher. He also stated it was believed that Kennedy's position could be absorbed by tenured teachers and that there were no other available positions which Kennedy was qualified to perform. Brennan declined to identify or otherwise provide information concerning the teachers with whom Kennedy was compared.

Kennedy expressed the opinion that the decision not to renew her contract was part of a plan to shift teachers in order to create a vacancy for a physical education teacher who would also be a basketball coach. In support of that position, Kennedy adduced the testimony of Dixie Wilson that when Wilson requested a transfer to a different area of teaching, she was told by those in authority that it was not possible due to the need for shifting teachers to make way for a basketball coach.

After Kennedy concluded her evidence, the board, "[b]ased upon the recommendation made by the Superintendent and . . . given . . . by [the] school attorney," unanimously found:

> 1) a reduction in force policy exists and that it covers certificated probationary employees, 2) a change of circumstances requiring a reduction in force has occurred,

> 3) such change in circumstances are specifically related to Mrs. Laurel Kennedy, the teacher to be riffed, 4) there are no other vacancies on the staff for which Mrs. Kennedy is qualified by endorsement or professional training to perform.

Thereafter, the board unanimously passed a motion to terminate Kennedy's employment due to a reduction in force.

The board responds to Kennedy's claim that the notice she was given preceding the hearing was inadequate by reminding us that in *Roth v. School Dist. of Scottsbluff*, 213 Neb. 545, 330 N.W.2d 488 (1983), we held that the rights granted to tenured teachers by former Neb. Rev. Stat. §§ 79-1254 to 79-1254.08 (Reissue 1981) did not apply to probationary teachers. The legal reality is, however, that much of what was said in *Roth* has been superseded by subsequent legislative enactments. While the Legislature has not yet obliterated all distinctions between probationary and permanent employees, it has unquestionably given probationary teachers greater protection than they formerly enjoyed and has thereby correlatively limited the power of boards of education over them. See, *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988).

As one holding a certificate issued by the Nebraska Commissioner of Education authorizing her to teach specified subjects at designated grade levels, Kennedy is a "certificated employee." Neb. Rev. Stat. §§ 79-1233, 79-1247.07, and 79-12,107 (Reissue 1987). According to Neb. Rev. Stat. § 79-12,111(1) (Reissue 1987), 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 sections 79-12,107 to 79-12,121." Section 79-12,111(4) permits a school board not to renew the contract of a probationary certificated employee "for any reason it deems sufficient," so long as the reason is not constitutionally impermissible, but provides that a nonrenewal by "reason of reduction in force shall be subject to sections 79-1254.05 to 79-1254.08 and 79-12,107 to 79-12,121."

Thus, § 79-12,111(4) makes the provisions of § 79-12,111(3)

and (5) applicable to a probationary certificated teacher whose contract of employment is in jeopardy because of a reduction in force. Those latter portions of § 79-12,111 require that, upon request, such a teacher be given notice stating the employment-related reasons for the proposed action with sufficient specificity as to provide an opportunity to respond and be afforded a hearing before the board.

In *Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 340 N.W.2d 877 (1983), we held that a notice which stated the cause for which Irwin was to be terminated in conclusionary form, lacking detail sufficient to enable him to prepare an adequate defense and show any error, rendered the subsequent hearing meaningless and thus violated due process. Kennedy argues that the same rationale renders the notice the board gave her inadequate. See, also, *Benton v. Board of Ed. of Sch. Dist. No. 17*, 219 Neb. 134, 361 N.W.2d 515 (1985).

Without reaching the due process question, it is clear the notice given Kennedy did not meet the statutory requirement that, upon request, the board supply a teacher in Kennedy's position with data sufficient to enable her to respond; that is, to prepare a defense and show any error that might exist. Simply telling one that nonrenewal of her contract of employment is being considered because of a reduction in force does not afford such opportunities. The notice must advise the teacher of the basis of the reduction, e.g., a diminished enrollment or a lack of funds, and the basis on which her contract was selected for nonrenewal. Only in that way can the teacher prepare to meet the board's evidence and show any error the board might have made.

That being so, the board's decision cannot stand, and we need not consider Kennedy's other assignments of error.

The judgment of the district court affirming the decision of the board is erroneous and is hereby reversed.

REVERSED.

## HENRY F. REIMER ET AL., APPELLANTS, V. K N ENERGY, INC., A NEBRASKA CORPORATION, APPELLEE.

430 N.W.2d 273

Filed October 7, 1988. No. 87-064.

1. **Appeal and Error.** This court is obligated to reach its own independent conclusion with respect to a question of law.
2. **Constitutional Law: Public Utilities: Rates: Due Process.** The courts of this state have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus to take unconstitutionally a consumer's property without due process of law.
3. **Public Utilities: Rates.** A charge which in part defrays the costs a gas supplier incurs in keeping service available to a customer and which lowers the customer's charge per unit of gas used is not arbitrary, unreasonable, or confiscatory.

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

Robert I. Eberly for appellants.

William M. Connolly and James D. Conway, of Conway, Connolly & Pauley, P.C., James W. Symonds, of Cronin, Symonds & Heitz, and B.J. Becker for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and MORAN and BROWER, D. JJ.

CAPORALE, J.

Plaintiff-appellant, Henry F. Reimer, on his own behalf and purportedly on behalf of all others similarly situated, seeks a declaration that a certain monthly "customer charge" imposed by defendant-appellee and counterclaimant, K N Energy, Inc., a Nebraska corporation, is confiscatory and thus uncollectible; seeks to enjoin future collection of the charge; and seeks to recover such payments of the charge as may have been made in the past by members of the purported class. In its counterclaim, K N Energy seeks judgment for the monthly customer charges Reimer has refused to pay. The district court dismissed Reimer's petition and entered judgment in favor of K N Energy on its counterclaim. Reimer asserts the district court erred in (1) dismissing his petition and (2) denying this suit class action status. Reimer assigns no error to the judgment entered in favor of K N Energy. We affirm.

Reimer first contracted with K N Energy for residential gas service in 1964. At that time, K N Energy informed Reimer of a $2 monthly minimum fee, which Reimer paid because it equaled the amount he would have had to pay in disconnection and reconnection charges to discontinue his gas service through the summer months and to resume it in the fall. This $2 monthly minimum fee was billed to all of K N Energy's gas customers regardless of the amount of gas actually used, although customers using more than $2 worth of gas per month were billed only for the gas they consumed.

Under a new rate structure approved by the city of O'Neill, K N Energy, in August of 1982, abandoned the minimum monthly fee and began in October to separately bill $4 per month as a "customer charge" and a separate amount for "gas service," which varies with the amount of gas actually used. Reimer remitted to K N Energy all charges for gas actually used but has continually refused to pay the $4 monthly customer charge.

The only evidence concerning K N Energy's current rate structure came from its expert witness, who testified that he supervised an economic analysis of the rate structure K N Energy employed in O'Neill. Based on this analysis, which was completed in June 1982, the witness recommended institution of the customer charge about which Reimer now complains.

This witness testified that K N Energy's cost of providing service is based on two major components, the cost of the gas itself and other customer-related costs. The latter component reflects the cost of providing services to each individual customer and includes items such as installation and maintenance of the portion of the gas supply line which runs from the common main supply line to the individual customer's home, the cost of meter reading, and the clerical costs associated with maintaining each customer's account. These costs are independent of those associated with a customer's actual use of gas, and exist for the utility regardless of whether an individual customer uses any gas in a given month. Thus, according to this witness, the use of a bifurcated system of cost allocation based on these two components provides "greater equity between customer classes or customer groups." Using the customer charge concept in designing a rate structure generally

lowers the corresponding charge per unit volume of gas, thereby rewarding conservative volume users with lower total bills. The monthly customer charge partially defrays the cost of having the service available should a customer such as Reimer wish to avail himself of it.

This witness' analysis revealed that K N Energy's customer-related cost in O'Neill, as of December 31, 1981, was $7.61 per customer per month; nevertheless, he recommended that the monthly customer charge be set at $4 "to temper the impact of the change in rate design" upon customers. In this witness' opinion, prior to adoption of the customer charge, K N Energy's O'Neill revenues "were deficient enough to be confiscatory, weren't even recovering enough money to meet interest expense." Indeed, if K N Energy were denied collection of the customer charges billed from October 1982 through the time of trial, K N Energy "would not receive a reasonable, fair and equitable return on [its] investment devoted to public service."

In view of the fact that the evidence concerning the nature of the disputed monthly customer charge is uncontradicted, we are confronted solely with a question of law, in connection with which this court is obligated to reach its own independent conclusion. *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988). We have previously established that the courts of this state have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus to take unconstitutionally a consumer's property without due process of law. *Bard v. Cox Cable of Omaha, Inc.*, 226 Neb. 880, 416 N.W.2d 4 (1987); *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986) (in which we reversed the sustainment of K N Energy's demurrer in this case, thus setting the stage for the trial producing this appeal).

Contrary to Reimer's claim that he receives nothing for the monthly service charge and that it is therefore confiscatory, the evidence establishes that the charge enables him to remain connected to the utility in order that he may avail himself of its services at will without incurring disconnection and reconnection charges. Further, payment of the costs associated

with that ability and with other activities associated with maintaining his account reduces the unit cost of the gas he consumes. The monthly customer charge therefore cannot be characterized as arbitrary, unreasonable, or confiscatory. Although the holdings of regulatory bodies are not controlling, it is nonetheless noteworthy that a number of such bodies have approved similar rate structures. E.g., *Re Lawrenceburg Gas Co.*, 52 Pub. Util. Rep. 4th (PUR) 453 (Apr. 11, 1983); *Re Washington Gas Light Co.*, 52 Pub. Util. Rep. 4th (PUR) 1 (Feb. 25, 1983); *Re Hope Nat. Gas Co.*, 51 Pub. Util. Rep. 4th (PUR) 431 (Jan. 31, 1983).

Reimer next argues that K N Energy's customer charge violates its franchise agreement with the city of O'Neill. The franchise is embodied in a city ordinance which requires K N Energy to "furnish and install for its customers, and at its cost keep in repair reliable meters." Reimer's position is, apparently, that the "customer charge" includes a component for furnishing, installing, and repairing reliable meters and that, to this extent, the customer charge violates the relevant ordinance.

In considering Reimer's position, we first note that the record is silent regarding the extent to which meter installation and maintenance costs are reflected in the customer charge. However, assuming for the sake of argument that such costs are in fact part of the fixed capital costs of service which are in part defrayed through the imposition of the customer charge, we see no conflict with the language of the ordinance.

The relevant language proscribes direct billing to an individual customer specifically for installation and maintenance of that customer's particular meter. Under the terms of the franchise agreement, K N Energy may not submit a bill to a customer containing an itemized charge for installation or repair of that customer's meter. K N Energy may, however, prorate such costs among all users within the franchise area as a fixed estimable cost of doing business. That is precisely what K N Energy has done.

There is no merit, therefore, to Reimer's first assignment of error. That determination renders unnecessary any consideration of the class action issue presented by the second assignment of error.

The judgment of the district court, being correct, is hereby affirmed.

AFFIRMED.

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DOUGLAS HUTMACHER AND BARBARA HUTMACHER, APPELLANTS, V. CITY OF MEAD, NEBRASKA, APPELLEE.

430 N.W.2d 276

Filed October 7, 1988. No. 87-065.

1. **Trial: Pleadings: Pretrial Procedure.** On a motion for judgment on the pleadings, the court may consider all the pleadings and give judgment for the party entitled thereto.
2. _____: _____: _____. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted.
3. **Pleadings: Actions.** A petition should not leave uncertainty as to the theory on which the pleader wishes to proceed.
4. _____: _____. In actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.
5. **Limitations of Actions.** The point at which a statute of limitations commences to run must be determined from the facts of each case and the language of the governing statute.
6. **Political Subdivisions Tort Claims Act: Limitations of Actions.** For the purposes of Neb. Rev. Stat. § 23-2416(1) (Reissue 1983), a cause of action accrues, and the period of limitations begins to run, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligent act or omission.
7. **Summary Judgment.** Summary judgment is proper 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 material facts, and when the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Reversed and remanded for further proceedings.

Jeffrey W. Meyers, of Frost, Meyers, Guilfoyle & Westover, and Richard K. Lydick for appellants.

James L. Rold, of Rold, Peppard & Piccolo, P.C., for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and MORAN and BROWER, D. JJ.

CAPORALE, J.

In this action brought pursuant to the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983 & Cum. Supp. 1986), now Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987), the plaintiffs-appellants, Douglas Hutmacher and his wife, Barbara Hutmacher, claim to have suffered damages caused by defendant-appellee, City of Mead. The city moved for summary judgment on the grounds (1) that the Hutmachers allege the damages resulted from a misrepresentation for which the city is exempted from liability and (2) that, in any event, the cause is time-barred. The district court sustained the city's motion, and this appeal followed. The Hutmachers claim the district court erred in accepting either of the city's asserted bases for the dismissal of their action. We reverse and remand for further proceedings.

The first ground for seeking dismissal of the action rests on the provision of § 23-2409(5) (Reissue 1983) which exempts a political subdivision such as the city from liability arising out of claims based on misrepresentation. Thus, in this connection, the city in effect claims that it is entitled to judgment because the Hutmachers' petition fails to state a cause of action. Therefore, for the limited purpose of this issue, the city's motion is in reality one for judgment on the pleadings rather than one for summary judgment, as erroneously denominated. *White v. Ardan, Inc., ante* p. 11, 430 N.W.2d 27 (1988); *Wood v. Tesch,* 222 Neb. 654, 386 N.W.2d 436 (1986).

On such a motion the court may consider all the pleadings and give judgment for the party entitled thereto. Moreover, a motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been

controverted. *White v. Ardan, Inc., supra*; *Wood v. Tesch, supra*; *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985). Consequently, we turn our attention to the allegations contained in the relevant pleadings, which consist of the Hutmachers' petition and the city's answer; the Hutmachers' reply in effect denies the allegations made in the city's answer.

The petition alleges that the Hutmachers had directed the city to shut off the water service to their building "at the street"; that the city represented it had done so when it "knew, or should have known," that the shutoff valve was damaged and incapable of being shut off; that they relied on the city's representation that the water had been shut off; that the water pipe within their building "ruptured causing severe . . . damage"; and that the city's failure "to properly shut off the street valve or to disclose . . . that said valve was not shut off as represented" constituted the "sole and proximate cause of the damage."

The city's answer denies each of the material allegations contained in the Hutmachers' petition; asserts the city violated no duty owed the Hutmachers, as the water supply could not be shut off without digging "down several feet to the actual physical location of the curbside shutoff"; alleges the Hutmachers were contributorily negligent and assumed the risk; and further asserts that any cause of action the Hutmachers may have had is time-barred because they failed to present their claim to the city until more than "one (1) year after the allegedly-negligent act."

It is true the petition in part sounds in misrepresentation, but the allegation that the city failed "to properly shut off the street valve" sounds in negligence. Although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, see *B. C. Christopher & Co. v. Danker*, 196 Neb. 518, 244 N.W.2d 79 (1976), we have held that in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. See, *Gilbert v. Vogler*, 197 Neb. 454, 249 N.W.2d 729 (1977); *George Rose Sodding & Grading Co., Inc. v. City of Omaha*, 187 Neb. 683, 193 N.W.2d 556 (1972), *appeal after remand* 190 Neb. 12, 205 N.W.2d 655

(1973). Moreover, by alleging in its answer that the Hutmachers were contributorily negligent and had assumed the risk, the city made clear that it interpreted the Hutmachers' petition as claiming the city was negligent in failing to shut off the water supply. Under the circumstances, we judge the petition to plead a cause of action in negligence, and therefore must conclude that the city's first ground for dismissal of the Hutmachers' action is not well founded.

That determination does not, however, end our review, for if, as the city claims in its second ground, the action is time-barred, then the district court's judgment is nonetheless correct and must be affirmed. Resolution of this issue depends on the contents of the depositions, answers to interrogatories, and the affidavit received in evidence, as well as on the allegations in the pleadings. Thus, the city's motion in this regard is one seeking summary judgment. See, *Glen Park Terr. #1 Homeowners Assn. v. M. Timm, Inc.*, *ante* p. 48, 430 N.W.2d 40 (1988); *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988); *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988).

The record establishes that the Hutmachers' building contains an apartment on the second floor and commercial space on the first floor. The commercial space had been rented to and was occupied by Hoots Inc., a business enterprise owned by Douglas Hutmacher's mother, Joan Anderson, which enterprise is engaged in the manufacture of fishing buoy markers.

Because Anderson was responsible for the payment of the utility bills, she, apparently not being in need of water, contacted the city in January of 1984 and requested discontinuance of water service to the building. A shutoff valve located inside the building had previously been turned off, so the city needed only to turn the water off at the "curb" valve. Such is accomplished by inserting a "key," a metal rod with a slot at one end designed to fit into a notch on the valve, into an opening located outside the building and then turning the valve within said opening to the "off" position.

The city's maintenance superintendent testified that the manner of installation of this particular valve required that the

key be "ground down" in order to shut the valve off. He claims to have done what was required and then reported to Anderson that the water had been shut off.

Anderson testified that although a portion of the raw materials for the buoys was kept in the dirt basement, she did not make frequent trips to that area because she was afraid of snakes. Her husband was in the basement in July of 1984, but saw no signs of water or moisture. No one connected with the building noticed any marked changes in the property between January and April 1985, except that the doors in the commercial area were more difficult to open and close than normal.

In April of 1985, it became necessary to restore water service to the building, as Douglas Hutmacher had obtained a tenant for the apartment. He then discovered that the basement was "three-quarters full" of water. After thousands of gallons of water were pumped from the basement, it was determined that the building had been structurally damaged as the consequence of a shift in the foundation and collapse of the soil support. The curb valve was dug up and found to be in the "open" position. The investigation into the source of the water also revealed that a pipe had burst.

Section 23-2416(1) (Reissue 1983) provides in relevant part that every negligence claim against a political subdivision "shall be forever barred, unless within one year after such claim accrued, the claim is made in writing to the governing body." The Hutmachers concede that they did not make their claim within 1 year of the city's failure to shut off the water, but urge that under the circumstances they were not required to do so. They contend that they were only required to make their claim within 1 year of the date on which the city's failure was discovered, as they did.

Thus, the question becomes: When does a cause of action "accrue" within the context of the foregoing statute? In applying a statute requiring that an action "be commenced within two years next after the alleged act or omission," this court, in *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984), ruled that the plaintiff's cause of action accrued upon the violation of his legal right; that is, upon the defendant

lawyer's failure to file the required pleading on plaintiff's behalf. In *Rosnick*, the court reasoned that the Legislature's choice of "occurrence" language prohibited delaying the start of the limitations clock until the plaintiff suffered damages.

Six months earlier, in *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984), this court ruled that a statute requiring commencement of an action "within four years next after the date on which the death, injury, or damage complained of occurs" delayed the running of the period of limitations until a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the existence of "death, injury, or damage." The *Condon* court reasoned that predicating the cause of action on the manifestation of at least one of the three specified events meant that a potential plaintiff was not required to institute suit until death, injury, or damage had materialized. Thus, the *Condon* court read the statute then before it as an "accrual" statute such as was involved in *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962). The *Spath* court ruled that the period of limitations under a statute requiring an action for malpractice to be brought within 2 years "after the cause of action shall have accrued" did not begin to run until the patient discovered, or in the exercise of reasonable diligence should have discovered, the presence of a part of the broken needle left in her body while being sutured.

The suggestion, during oral argument, that this court's recent decision in *Ward v. City of Alliance*, 227 Neb. 306, 417 N.W.2d 327 (1988), somehow bears upon the present inquiry is ill founded. The plaintiff Ward delayed filing his action, not because he in the exercise of reasonable diligence could not know the cause of his injury but because he had been unsuccessful in his efforts to develop expert evidence to establish the existence of the cause he claimed. Thus, the *Ward* court, in discussing its reasons for finding the cause time-barred, correctly observed that in certain circumstances 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 party may be ignorant of the existence of the cause of action. The focus of the opinion, however, was on the fact that a statute of limitations runs when

a potential plaintiff has some awareness or imputed awareness that his injuries resulted from some wrongdoing on the part of the potential defendant, notwithstanding that the potential plaintiff's knowledge of the wrongdoing does not rise to the level of certainty. Saying that a cause of action may accrue though the aggrieved party is ignorant of its existence does not say that a cause of action necessarily accrues when an aggrieved party cannot, in the exercise of reasonable diligence, be aware of its existence. Indeed, under some circumstances we have said that a cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *Georgetowne Ltd. Part. v. Geotechnical Servs., ante* p. 22, 430 N.W.2d 34 (1988); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). Neither, however, does our recent decision in *Georgetowne, supra*, that suit under the professional negligence statute was time-barred bear upon the present inquiry, for the essential concern in *Georgetowne* was when, as a factual matter, plaintiff knew of the defendant's negligence. In the final analysis, the point at which a statute of limitations commences to run must be determined from the facts of each case and the language of the governing statute. See, *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985); *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984).

We therefore conclude that for the purposes of § 23-2416(1), a cause of action accrues, and the period of limitations begins to run, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligent act or omission. In the context of this case the cause of action accrued and the period of limitations began to run when the Hutmachers discovered, or in the exercise of reasonable diligence should have discovered, the city's failure to turn off the water supply to their building.

Whether the difficulty experienced in opening and closing the building doors should have provided the Hutmachers cause, in the exercise of reasonable diligence, to discover the city's

negligent omission presents a fact question. Summary judgment is proper 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 material facts, and when the moving party is entitled to judgment as a matter of law. *Glen Park Terr. #1 Homeowners Assn. v. M. Timm, Inc., ante* p. 48, 430 N.W.2d 40 (1988); *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988); *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988). Since there here exists a genuine issue as to the ultimate inferences to be drawn from the material facts, it cannot be said the city is entitled to judgment as a matter of law. Accordingly, the district court erred in summarily dismissing the Hutmachers' action.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## STATE OF NEBRASKA, APPELLEE, V. DONALD G. McDONALD, APPELLANT.

430 N.W.2d 282

Filed October 7, 1988. No. 87-631.

1. **Arson: Proof.** In order to sustain an arson conviction, the State must prove beyond a reasonable doubt both that the property in question was burned and that it burned as the result of the accused's criminal act.
2. **Arson: Evidence: Presumptions.** The mere fact that property was burned and that the origin of the fire is unknown does not constitute evidence that the fire was the result of a criminal act; indeed, there is a presumption that a fire is not of criminal origin.
3. **Arson: Evidence.** Evidence of motive alone is not sufficient to sustain an arson conviction.
4. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
5. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal 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.

6. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt.
7. **Circumstantial Evidence.** In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt.
8. **Aiding and Abetting: Jury Instructions.** It is not error to give an aiding and abetting instruction where the evidence indicates that a second person might be involved.
9. **Aiding and Abetting.** One who participates with another in committing an unlawful act is as responsible for the act as the one who actually performs it.
10. **Jury Misconduct: New Trial.** In order for jury misconduct to form the basis for a new trial, it must have prejudiced the defendant.
11. **Jury Misconduct: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
12. **Jury Misconduct: Proof.** Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.
13. **Jury Misconduct: Trial.** When a showing of serious jury misconduct has been made, the trial court is to conduct an evidential hearing to determine whether the alleged misconduct actually occurred; if so, the trial court must then determine whether the misconduct was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed.
14. _____: _____. The determination as to whether jury misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court, which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case.
15. _____: _____. Under the provisions of Neb. Rev. Stat. § 27-606(2) (Reissue 1985), a juror may testify as to whether "extraneous prejudicial information was improperly brought" to his or her attention, but no evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith.

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

Kirk E. Naylor, Jr., for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Donald G. McDonald, was, pursuant to verdicts, adjudged guilty of arson in the second degree in violation of Neb. Rev. Stat. § 28-503(1) (Reissue 1985), and of burning with the intent to defraud an insurer in violation of Neb. Rev. Stat. § 28-505 (Reissue 1985), and sentenced accordingly. He asserts the trial judge erred in (1) finding the evidence sufficient to support the verdicts, (2) instructing the jury with respect to aiders and abettors, and (3) failing to grant a new trial because of juror misconduct. We affirm.

## THE RECORD

In November of 1985, McDonald leased a building at Emerald, Lancaster County, Nebraska, from Daniel Lynch, out of which he did business as D & D Auto Supply. The following January, McDonald insured his business inventory against loss by fire through a $50,000 policy issued by Allstate Insurance Company. On March 22, 1986, he insured the contents of the building against loss through an all-risk policy of insurance, in a like amount, issued by Farm Bureau Insurance Company. McDonald caused this second policy to be issued in his son's name. Two days later, McDonald applied to AID Insurance Company, now known as Allied Group Insurance Company, for a third policy insuring his inventory against risk of loss in the amount of $46,000, and his business fixtures in the amount of $7,000. At approximately 1:45 a.m. on Monday, April 7, 1986, the building from which McDonald did business was destroyed by a fire, resulting in the loss of such inventory and fixtures as were in the building.

After the conflagration, McDonald told J. Bradley Kline of Allstate and Lon Dyer of Farm Bureau he had no insurance coverage other than with their respective companies. When interviewed by Jack Malicky, an investigator for the Nebraska State Fire Marshal's office, McDonald said "he had no insurance on any of the contents nor would he have insurance on the structure." Later, McDonald told Malicky that his current wife had "found two insurance policies at his residence," one issued by Farm Bureau and the other by Allstate.

According to Kline, when McDonald reported the fire, his

demeanor "was very calm. He acted like it was just no big deal." McDonald represented to Kline that there was no other insurance on the building and asked Kline to delay reporting or filing the claim with the claims office.

McDonald's former wife, Janice Maxwell, testified that about 3 weeks before the fire, McDonald owed her approximately $10,000 in past-due child support payments. According to McDonald, his total indebtedness at the time of the fire was approximately $130,000. Furthermore, a number of finance-related lawsuits were pending against him. Additionally, McDonald had drawn a number of insufficient-fund checks on three separate accounts. McDonald was also in arrears on the lease payments due Lynch and had been asked by Lynch to quit the premises. Yet, when Malicky asked McDonald about his financial status, McDonald advised that "there was [sic] some bills to be paid on some of the contents but they were small bills."

About 3 weeks before the fire, McDonald had tried to sell Maxwell his business for $1 "to take care of the child support that he owed." According to Maxwell, McDonald "said he thought it would be a good idea for [her] to do it because it might be a good opportunity because something was going to happen to the business." Additionally, McDonald "mentioned insurance" and said he did not want Maxwell to "know what he was talking about."

Lori Myers, McDonald's employee, testified that when she left work on Friday, April 4, two three-drawer file cabinets and a typewriter were in the office, and that basic office supplies were in the drawers of two desks which were also in the office. However, Malicky testified that when he looked in the desk drawers after the fire, he could find "no type of paper or paperclips or pens or pencils or anything in there," not even ashes. Malicky's testimony in this regard was corroborated by another State Fire Marshal investigator, Brad Hoppe, and also by Robert O'Halleran, Allied's claim manager, and Ken Kempenaar, Allied's investigations supervisor. Furthermore, no charred remains of a typewriter or of a three-drawer file cabinet were found.

On the Saturday preceding the fire, April 5, a neighbor saw

two pickup trucks in front of the building, loaded with "some cardboard boxes." A search, made after the fire, of the house and farm McDonald's present wife owns and which she and he occupy disclosed the presence of more than 50 boxes marked D & D Supply. Some contained a variety of office supplies, part of which bore D & D Supply's designation. Also found were statements directed to D & D and a file labeled D & D insurance. The search also disclosed the presence of two tire machines, an air compressor, and a trailer full of new merchandise which included starters, tires, air filters, oil filters, solvents, and miscellaneous automobile parts. However, Doug Oltman, who rented land and buildings from McDonald's present wife, testified he had stored an air compressor, a tire machine, tools, and other supplies in a trailer at the farm occupied by the McDonalds.

Malicky and Hoppe considered the fire unusual or suspicious in nature. Malicky testified he made an inspection of the furnaces and found the lower floor furnace to have been "severely damaged by heat." This was suspicious "[b]ecause fire rises and it was unusual to find the overhead furnace to be in a fairly decent condition as compared to the lower furnace. When fire burns, fire burns up side down . . . . The heat should have [risen] instead of lowered." Malicky said he "would have expected the damage to be just the opposite of what [he] found." Malicky opined that "the first explosion that occurred in the parts building would have been from liquid propane" which came through "the liquid propane gasline," more than likely "through the furnace area."

Hoppe corroborated Malicky's testimony, saying that

> [f]ire burns upside down and so does the heat. The heat goes up to the sides if it can't escape and slowly works down to the floor.
>
> . . . .
>
> When you have high heats that [are] doing the damage at the floor level, something is keeping the heat burning at a high intense heat at the floor level which is unusual. . . .
>
> . . . .
>
> . . . You should have two-thirds more damage at the ceiling than you do at the floor.

Kempenaar found spalling ("popping, flaking off and breaking" of concrete flooring which can indicate the use of flammable liquid, accelerant, or gasoline) on the floor in the office portion of the building. He detected the odor of a fuel oil but did not observe any means of communication between any of the oil stored in the building and the spall in the office. Finally, he found a diesel fuel barrel with a missing cap in the building; however, the threads onto which the cap screwed were not damaged, indicating the cap had not blown off in an explosion. As a result of these findings, Kempenaar concluded that some product was used to cause an explosion, that "a flammable liquid was trailed throughout the structure to aid in the spread of the fire after" the explosion, and that the fire was "incendiary in origin," having been "intentionally set."

McDonald presented no expert opinion concerning the fire but established he was home in Firth, Nebraska, the day and evening before the fire and was in bed at the time of the fire. While the operator of a business near the premises in question reported that at approximately 1:35 on the morning of the fire he saw an automobile parked outside the burned premises, the record establishes no connection between this automobile and McDonald.

## EVIDENCE SUFFICIENT

The first assignment of error challenges the sufficiency of the evidence to support the convictions. In that connection McDonald correctly observes that in order to sustain an arson conviction, the State must prove beyond a reasonable doubt both that the property in question was burned and that it burned as the result of the accused's criminal act. *State v. Workman*, 213 Neb. 479, 329 N.W.2d 571 (1983); *State v. Keeton*, 199 Neb. 405, 259 N.W.2d 277 (1977). He also correctly observes that the mere fact that property was burned and that the origin of the fire is unknown does not constitute evidence that the fire was the result of a criminal act. *State v. Workman, supra.* Indeed, there is a presumption that a fire is not of criminal origin. Moreover, evidence of motive alone is not sufficient to sustain a conviction. *State v. Workman, supra.*

Before moving on to a consideration of whether the evidence establishes the elements of arson, we recall that a verdict in a

criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Bewley*, 229 Neb. 293, 426 N.W.2d 286 (1988). Moreover, in determining the sufficiency of the evidence to sustain a criminal 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. *State v. Anderson,* 229 Neb. 427, 427 N.W.2d 764 (1988). See, also, *State v. Bewley, supra.*

As to the arson conviction, there is more than ample direct evidence to establish that the property in question burned. Therefore, the crucial question becomes whether the evidence, evaluated in light of the rules set forth above, supports the finding inherent in the verdict that the property burned as the result of McDonald's criminal act. Again, there is competent evidence that the fire was set intentionally. Thus, the question refines itself into whether the evidence supports the further inherent finding that McDonald set or caused the fire to be set. There is no question that McDonald had access to the building and the contents which burned; he leased the building and owned, or at least had control over, the contents. The evidence further supports a finding that he had a motive. He was in financial difficulty, had procured two policies insuring the inventory and fixtures he owned or controlled, and had attempted to procure a third policy. Moreover, the comments he made to his former wife were such as to justify a finding that he contemplated arson as a means of solving his financial problems. The trucks seen loaded with boxes such as were later found at his home containing items of his business inventory and office supplies, together with the insurance file, combined with his motive and other circumstances, justify a finding that he knew a fire was about to consume whatever was in the building and that he wanted to preserve some inventory and supplies and have proof of insurance.

It is true that all of the foregoing evidence is circumstantial in nature, but circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable

doubt. *State v. Anderson, supra.* In such a case the State is not required to disprove every hypothesis but that of guilt. *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

McDonald's reliance on *State v. Workman, supra*, in arguing that the evidence is insufficient to sustain his conviction for arson, is misplaced. The *Workman* holding that the trial court should have sustained Workman's motion for a directed verdict at the close of the State's case rests on the fact that the State had utterly failed to connect Workman to the fire at his brother's unoccupied house; the only evidence which in any way related to Workman was that an automobile registered to him was seen near the burned premises shortly before the fire. That is not the situation in this case. McDonald is tied to the fire by the numerous circumstances detailed earlier; those circumstances are sufficient to support the verdict finding McDonald guilty of arson.

Under the facts of this case, that determination necessarily means that the evidence is sufficient to support the verdict finding him guilty of burning with the intent to defraud an insurer. Thus, we must conclude that the first assignment of error is without merit.

## INSTRUCTION PROPER

McDonald claims in the second assignment of error that he was, in any event, prejudiced by the trial judge's error in instructing the jury. He urges there was no evidence to support the instruction that in order to find McDonald guilty, the State need not prove McDonald himself committed the unlawful acts in question. In summary, and to the extent relevant, the jury was told it was sufficient for the State to prove beyond a reasonable doubt that he aided and abetted others to so do by having (1) engaged others to commit the unlawful acts, (2) engaged with others in common, concerted unlawful acts, or (3) incited or encouraged others to commit the unlawful acts. McDonald maintains that not only is there no evidence persons other than he were involved, but the instruction assumed the fire was set intentionally and further relieved the State of the burden to establish that McDonald had the opportunity to set the fire, as the State needed only to convince the jury he aided

and abetted another.

However, it is not error to give an aiding and abetting instruction where the evidence indicates that a second person might be involved. *State v. Garza*, 193 Neb. 283, 226 N.W.2d 768 (1975). Contrary to McDonald's contention, there is, as established by our earlier analysis, evidence from which the jury might reasonably infer that McDonald attempted to provide himself with an alibi by being away from the premises at the time of the fire and caused the fire to be set through another. The fact that two pickup trucks were seen loaded with boxes such as were later found at McDonald's home supports an inference, should the jury choose to draw it, that some other person was involved. The fact that one of the insurance policies was placed in the name of McDonald's son does likewise, as does McDonald's statement to his former wife that something was going to happen to his business and that he did not want her to know what he was talking about.

McDonald's contention that the aiding and abetting instruction assumed the fire was set intentionally is equally without factual foundation. Quite the contrary, it requires the jury to find beyond a reasonable doubt that there was an unlawful act.

It is of course true, as McDonald contends, that the questioned instruction made it unnecessary for the State to prove McDonald himself had the opportunity to set the fire. That fact, however, does not make the instruction faulty; the legal principle involved is that one who participates with another in committing an unlawful act is as responsible for the act as the one who actually performs it. See *State v. Schreck*, 224 Neb. 650, 399 N.W.2d 830 (1987). Thus, the second assignment of error is also meritless.

## MISCONDUCT NOT PREJUDICIAL

This brings us to the question as to whether there was, as McDonald urges in the third and last assignment of error, such jury misconduct as requires a reversal of his convictions.

There is evidence that, contrary to the trial judge's repeated admonitions to the jurors not to discuss the case among themselves until finally submitted, two jurors did so during a time when the jury was assembled in the courtroom and the trial

judge and counsel were occupied in chambers. During the course of the hearing on McDonald's motion for new trial, defense trial counsel's wife testified she overheard two jurors discuss the location of the capless barrel and the spalling. What exactly the two jurors said to each other is not reflected by the record, but McDonald points out that this evidence was crucial to the foundation of Kempenaar's opinion that the fire had been set intentionally.

McDonald recognizes that in order for jury misconduct to form the basis for a new trial, it must have prejudiced the defendant. *State v. Rust,* 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987). See, also, *State v. West,* 217 Neb. 389, 350 N.W.2d 512 (1984); *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978); *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976). We have ruled that in a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome. See, *State v. Polinski, ante* p. 43, 429 N.W.2d 725 (1988); *State v. LeBron,* 217 Neb. 452, 349 N.W.2d 918 (1984); *Simants v. State,* 202 Neb. 828, 277 N.W.2d 217 (1979). However, where the jury misconduct in such a case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. See, *State v. West, supra* (burden placed on defendant to show that reading of news article by certain jurors prejudiced him); *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982) (burden placed on defendant to show certain jurors' unauthorized view of crime scene resulted in prejudice to him). Accord *Phillips v. State*, 157 Neb. 419, 59 N.W.2d 598 (1953).

While McDonald does not question that he bears the burden of proof, he, relying on *State v. Steinmark, supra*, contends that the hearing afforded him by the trial judge was inadequate. Steinmark was retried on charges that he unlawfully delivered controlled substances, for which he had already served a year in prison. At the hearing on his motion for new trial, the court received the affidavit of a juror which declared that during deliberations, one of the jurors said Steinmark had previously been convicted and served a year in prison for the same

offenses; another juror mentioned he had heard that the bar at which Steinmark worked " 'was a place . . . where illegal drugs were readily available for purchase,' " 201 Neb. at 203, 266 N.W.2d at 753; and several jurors said that the presence of Steinmark's name on the evidence tags attached to the drugs was evidence the drugs had been obtained from him. The State presented no evidence. In vacating the denial of a new trial and remanding the cause for further proceedings, this court said the matters alleged in the affidavit were a sufficient showing in support of the allegations of misconduct as to warrant an evidential hearing to determine whether misconduct occurred and whether it was prejudicial to the extent Steinmark was denied a fair trial. Based upon *United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970), the *Steinmark* court said at 204-05, 266 N.W.2d at 754:

> When an allegation of misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.
>
> The matter of whether the misconduct occurred is largely a question of fact and the jurors may be questioned as to what happened during their deliberations. The determination as to whether the misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case.

The *Steinmark* court also noted that under the provisions of Neb. Rev. Stat. § 27-606(2) (Reissue 1975), now found at § 27-606(2) (Reissue 1985), a juror might testify as to "whether 'extraneous prejudicial information was improperly brought to the jury's attention.' No evidence may be received as to the effect of any statement upon a juror's mind, its influence one

way or another, or the mental processes of a juror in connection therewith." *Steinmark, supra* at 204, 266 N.W.2d at 754. Accord *State v. Roberts*, 227 Neb. 489, 418 N.W.2d 246 (1988).

There is nothing in *Steinmark* which suggests that the evidential hearing required cannot be conducted as a part of a hearing on a motion for new trial, as was done in this case. Unlike the situation in *Steinmark,* wherein the allegations of jury misconduct were "resolved in a summary manner," 201 Neb. at 205, 266 N.W.2d at 754, McDonald was permitted to adduce such evidence as he had developed. The trial judge then stated on the record: "[E]ven if we assume that there was juror misconduct, which certainly the evidence falls far short of showing that, there is absolutely no evidence that the — that this alleged misconduct was prejudicial to [McDonald]."

The trial judge's suggestion that the premature discussions fall "far short" of establishing misconduct is incorrect; the offending jurors' violation of the admonitions they were given did indeed constitute misconduct. However, the trial judge's determination that there was no prejudice to McDonald is adequate, under the circumstances of this case, to enable us to review the basis on which the trial judge concluded that the misconduct did not warrant a new trial.

In making that review, we are guided by *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976), which involved a situation remarkably similar to that presented by the present case. The evidence in *Isley* showed that during the course of trial, the jurors had discussed the witnesses during recesses and expressed opinions relating to their credibility and the conflicts in the testimony, all against the judge's admonishings. This court said that if such discussions did take place, it was misconduct, but held that because no prejudice to the defendant was shown, his motion for new trial was properly denied, as there was "no indication that any of the jurors had made up their minds as to the defendant's guilt or innocence prior to the conclusion of the trial." *Id.* at 541-42, 239 N.W.2d at 265.

There being no evidence that the misconduct resulted in any juror making up his or her mind as to McDonald's guilt or innocence prior to the completion of the trial, we cannot say the trial judge's finding a lack of prejudice is erroneous. Thus, the

last assignment of error is as devoid of merit as were the first two.

## DECISION

That being so, the judgment of the trial court must be, and hereby is, affirmed.

AFFIRMED.

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JOHN J. WILLIAMS, APPELLANT, V. VERNON HJORTH, SHERIFF OF MADISON COUNTY, NEBRASKA, ET AL., APPELLEES.
430 N.W.2d 52

Filed October 7, 1988. No. 87-651.

1. **Moot Question: Appeal and Error.** Appellate courts do not sit to give opinions on moot questions, and an appeal will ordinarily be dismissed where no actual controversy exists between the parties at the time of the hearing. This general rule, however, does not necessarily apply to appeals or error proceedings involving matters of public interest.
2. **Statutes: Legislature: Appeal and Error.** This court will not resort to interpretation to determine the meaning of statutory words which are plain and unambiguous; however, if the statutory language is ambiguous, the legislative history surrounding the enactment of the statute will be examined.
3. **Sentences.** Neb. Rev. Stat. § 47-502 (Reissue 1984), establishing good time credit in the county jail system, is applicable to time spent in the county jail awaiting sentencing.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed.

Steven M. Lathrop, of Lathrop & Lathrop, for appellant.

Robert M. Spire, Attorney General, Lynne R. Fritz, and Lisa D. Martin-Price for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from a decision by the district court for

Madison County denying the appellant "good time" credit for time served in the county jail before sentencing and time served as a mentally disordered sex offender (MDSO) at the Lincoln Regional Center. Because Neb. Rev. Stat. § 29-2915 (Reissue 1985) regarding incarceration as an MDSO was amended to mandate good time credit for time spent in the regional center, only the issue of good time credit for presentence confinement, pursuant to Neb. Rev. Stat. § 47-502 (Reissue 1984), remains.

The facts in this case are not contested. John J. Williams was arrested and confined in the Madison County jail on September 4, 1986. On January 9, 1987, the appellant was sentenced to the 1-year maximum for third degree sexual assault and was transferred to the Lincoln Regional Center on February 5. Credit was granted for 128 days of presentence confinement. Appellant violated no rules of discipline while incarcerated. No good time credit was given to the appellant for the time spent in county jail prior to sentencing.

Because the appellant was released from the regional center on August 26, the issue of mootness arises in this appeal. Counsel for both appellant and appellee request that this court reach the merits of this appeal by finding that the issues involved are within an exception to the mootness doctrine, either as a wrong "capable of repetition yet evading review" or as a matter affecting the public interest.

As a general rule, appellate courts do not sit to give opinions on moot questions on abstract propositions, and an appeal will ordinarily be dismissed where no actual controversy exists between the parties at the time of the hearing. *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978). However, this general rule is subject to some exceptions. One notable exception recognized by this court concerns cases involving matters of public interest. *State ex rel. Coulter v. McFarland*, 166 Neb. 242, 88 N.W.2d 892 (1958). In *McFarland*, this court held that the issues involved matters of public interest because they affected all county courts of the state. Similar questions of public interest are presented in this case. In the context of good time credit for presentence confinement when sentenced to a county jail term, because confinement is necessarily 1 year or less, no case could reach this court for review before it became

moot. Additionally, the issues involved in this action are similar to those presented in *McFarland*, as they affect all county jails in the state. Therefore, this appeal must be decided on the merits under the public interest exception to the mootness doctrine.

This court has never decided whether good time credit is available for time served in jail awaiting sentencing, pursuant to § 47-502. To determine whether good time credit is authorized for presentence confinement, the plain language of the statute must first be examined. This court will not resort to interpretation to ascertain the meaning of statutory words which are plain and unambiguous. *Lawson v. Ford Motor Co.*, 225 Neb. 725, 408 N.W.2d 256 (1987). In the absence of anything indicating the contrary, statutory language is to be given its plain and ordinary meaning. *Lawson v. Ford Motor Co., supra; Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986). Section 47-502 provides:

> Any person sentenced to a city or county jail shall have his or her term reduced seven days for each twenty-one consecutive days during which he or she has not committed any breach of discipline or other violation of jail regulations. The reductions authorized by this section shall be granted at the end of each period of twenty-one days, with such periods to run consecutively from the date of confinement following sentencing.

The language "with such periods to run consecutively from the date of confinement following sentencing" is ambiguous. As stated in appellant's brief, it is difficult to determine whether this portion of § 47-502 limits good time to postsentence confinement or whether it grants an inmate good time credit for every 21 consecutive days, including presentence confinement, with credit for confinement given only after sentencing. Because of the inherent ambiguity in the statutory language, recourse must be had to the legislative history surrounding the enactment of § 47-502 to determine the intent of the Legislature. *County of Lancaster v. Maser*, 224 Neb. 566, 400 N.W.2d 238 (1987). Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation. *Spence v. Terry*, 215 Neb.

810, 340 N.W.2d 884 (1983).

The history of the enactment of § 47-502 is fairly simple. Section 47-502 was the result of 1983 Neb. Laws, L.B. 180, and 1982 Neb. Laws, L.B. 231. These bills were presented to provide a county jail counterpart to the state penitentiary good time statutes, Neb. Rev. Stat. §§ 83-1,106 and 83-1,107 (Reissue 1987). The committee statement on L.B. 231 states that the purpose of the bill is to provide for good time in county jails "similar" to that applicable to confinement in state institutions. One distinction between the state and county good time statutes, however, is that § 83-1,107 specifically provides for good time credit to be given for presentence confinement: "The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment . . . ." § 83-1,107. Section 47-502 contains no such language.

The omission of this language in § 47-502 is not conclusive. The legislative history surrounding the enactment of § 47-502 evinces a strong legislative intent on behalf of the Legislature to provide a county good time statute closely synonymous to the state good time statute. Much of this intent is evidenced in Senator Fowler's statement in support of L.B. 231. Senator Fowler emphasizes an "equity argument" in support of adopting a county jail counterpart to the state good time statute. He compares Class II felonies with Class I misdemeanors and notes that convictions under either class may result in a 1-year sentence—the felony sentence to be served in the state penitentiary where good time credit is allowed, the misdemeanor sentence to be served in county jail where, before the passage of § 47-502, no good time credit was available. The crimes classified as felonies are, presumably, more serious than the crimes classed as misdemeanors. Yet, as stated by Senator Fowler, "in our effort to try and establish a certain hierarchy of penalties, we may have built in an inequity because people who go to state institutions could serve less time for a higher crime than the people that went to the county institutions." Judiciary Committee Hearing, L.B. 231, 87th Leg., 1st Sess. 43 (Feb. 25, 1981).

Evidently, the Legislature was concerned about those in

county institutions serving longer sentences for lesser offenses than those in state prison serving time for more serious offenses. Because good time credit for presentence confinement is available in the state system and is utilized in those institutions to reduce the sentence actually served, presumably the Legislature intended credit to be given for presentence confinement in the county jail system to eliminate the "inequities" between the two jail systems.

Finally, by interpreting § 47-502 as authorizing good time credit for presentence confinement, good time provisions for both state and county jails will be harmonized. Additional support for inferring that the Legislature intended consistent treatment for all prisoners in regard to good time credits can be found in the recent amendment to § 29-2915 regarding MDSOs. This amendment provides, "If the defendant is sentenced to a county jail as a misdemeanant, he or she shall be entitled to have his or her jail sentence reduced while in the county jail or regional center pursuant to § 47-502." § 29-2915 (Cum. Supp. 1988). This extension of good time credit to incarceration in the regional center evinces an intent to provide a cohesive, consistent sentencing system throughout the state's detention facilities.

Accordingly, we hold that § 47-502, establishing good time credit in the county jail system, is applicable to time spent in the county jail awaiting sentencing.

The judgment of the district court is therefore reversed.

REVERSED.

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STATE OF NEBRASKA, APPELLEE, V. KENNETH DEGROOT, APPELLANT.
430 N.W.2d 290

Filed October 7, 1988. No. 87-935.

1. **Trial: Evidence: Motions for Mistrial.** In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.

2. **Trial: Motions for Mistrial: Juries.** Even in the case of error, declaring a mistrial is not necessarily required if the resulting prejudice can be cured by an admonition to the jury.
3. **Trial: Motions to Strike.** An objection followed by admonition or instruction is typically presumed to be sufficient to dispel prejudice.
4. **Trial: Motions for Mistrial: Due Process.** The test for determining whether an inadvertent remark by a witness necessitates the granting of a mistrial is whether the remark which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so tainted the entire proceedings that the accused did not have a fair trial.
5. **Trial: Witnesses: Appeal and Error.** In order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice.
6. **Juries: Verdicts: Time.** There is no rule which requires the jury to deliberate any particular length of time, and the fact that the jury returned a guilty verdict in a relatively short period of time does not establish that the jury acted with passion and prejudice.
7. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence on the ground of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion.
8. **Trial: Evidence: Perjury.** Evidence of a defendant's attempts to suborn perjury or otherwise to prevent a fair trial is relevant and admissible as evidencing a consciousness of his guilt.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Charles F. Fitzke, Scotts Bluff County Public Defender, for appellant.

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

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

HASTINGS, C.J.

Following a trial by jury, the defendant was convicted of forcibly breaking and entering a residence with the intent to steal. He has appealed and assigns as error that (1) the court failed to declare a mistrial when the State's witness volunteered inadmissible evidence; (2) the court allowed witnesses to testify who had violated the sequestration order; and (3) the court allowed evidence of the defendant's attempt to persuade a witness to testify falsely for him. We affirm.

On April 8, 1987, Terry Metcalf and her family had retired for the evening at their Scottsbluff residence. The doorbell rang, but she saw no one at the door. Shortly thereafter, she observed a man smoking a cigarette on her front porch. She notified her husband, but by the time they returned to the front of the house, the man was gone. Mrs. Metcalf then walked toward her kitchen and saw a man walking out of her bedroom. Both she and the man screamed, the man apparently left, and she called the police.

After a chase, the police found the defendant under some evergreen bushes in a fenced yard some blocks away from the Metcalf residence. The defendant was taken to the Metcalfs' residence, where Mrs. Metcalf identified him as the man who had broken into their home.

The defendant's appearance matched the description given by Mrs. Metcalf before the defendant was arrested. A cigarette butt was found outside the Metcalfs' home the night of the crime. A serologist testified that the cigarette butt contained evidence of body fluids secreted by 31 percent of the caucasian population, and that defendant was a member of that percentage grouping. The bedroom window screen had been cut, and the defendant had a large butterfly knife with him when he was caught. Also, a footprint at the scene appeared to match the tread on the defendant's shoe.

At trial, the court granted defendant's motion to sequester the witnesses. The court instructed the witnesses that such an order

> means the witnesses remain out in the hall until they are called to testify, after they are called in to testify one by one. Since witnesses are sequestered that means one witness after he has testified should not go out and tell everybody what they said. The idea of sequestration of the witnesses is so that one witness does not know what another said and each are [sic] testifying fresh.

After Mrs. Metcalf testified, she apparently remained in the courtroom. Her husband then testified, followed by a police officer. The State then recalled Mrs. Metcalf, over objection by the defense, to identify the piece of screen about which the previous witness had testified as having come from her

bedroom window.

The defendant sought to establish an alibi to the effect that he was in the neighborhood to collect a debt from a friend and was only resting in a yard when he was found by the police. The State called a witness who offered a letter, written to him by the defendant, asking the witness to testify falsely about the alibi. The defense objected to admission of this letter.

The State also called an investigator from the county attorney's office to testify as to how she had first found out about the above-mentioned letter. When asked how she had happened to first see that letter, she began to testify, "About 20 minutes before that I had been talking to Larry [the person having the letter] about his knowledge of who could have - - -" and at that point a defense objection was sustained. She was then asked, "You were investigating or acting in your capacity as an investigator for the county attorney's office while you were talking to Larry Coleman; is that right?" The witness answered:

> I was showing Larry Coleman a copy of a threatening letter that had been sent to a witness in this case and he was looking at it to see if he could recognize the handwriting from someone in the jail. So he pulled out a piece of paper from his pocket - - -

at which point defense counsel objected and asked that "the testimony be stricken as unresponsive and as a surprise testimony." The objection was sustained and the answer ordered stricken, and the jury was admonished to disregard the testimony. At the next recess, the defendant's motion for a mistrial based on the foregoing testimony was overruled.

The jury was out but 30 minutes before returning with a verdict of guilty. A motion for a new trial was heard by the court, at which time the defense offered testimony by the defendant's girlfriend that she had seen some police officers together in the hallway, visiting with one another, at various times following the testimony of one or more of the officers and before one or more of the officers was yet to testify. The conversations which she heard were in no way connected with any testimony that any of the officers had previously given. The three officers themselves were called to testify, but denied

conversing about their testimony.

As to the first assignment of error, the trial court found that the testimony of the investigator was not "a purposeful effort on the part of the State to inject this evidence before the jury but resulted from inadvertence and from the witness preparation, and resulted from the witness not the prosecuting attorney." The court also noted that the evidence had been stricken and the jury admonished to disregard it.

The standard for determining whether declaring a mistrial is appropriate was spelled out in *State v. Archbold*, 217 Neb. 345, 351, 350 N.W.2d 500, 504 (1984), wherein this court stated:

> In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process. Some examples are an egregiously prejudicial statement by counsel . . . or *the introduction of incompetent matters to the jury, to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury.*

(Emphasis supplied.)

Thus, even in the case of error, declaring a mistrial is not necessarily required if the resulting prejudice can be cured by an admonition to the jury. As Justice Brennan said in his concurrence and dissent to *United States v. Young*, 470 U.S. 1, 24, n.2, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), cited in *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985), "an objection followed by admonition or instruction is typically presumed to be sufficient to dispel prejudice."

According to *State v. Borchardt*, 224 Neb. 47, 56, 395 N.W.2d 551, 557-58 (1986):

> A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. . . . Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.

As stated in *State v. O'Kelly*, 193 Neb. 390, 391, 227 N.W.2d 415, 417 (1975), "When the jury is admonished to disregard objectionable questions and answers a mistrial ordinarily will not be granted."

Also, in *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986), the court held that sustaining the defense's motion to strike, as well as giving an instruction to the jury to disregard the improper testimony of the witness, was sufficient to remove the damaging effect, if any, of the testimony. The court found that although the witness' statement was unsubstantiated, the prejudice resulting was slight when considered in the context of all of the evidence.

According to *State v. Dittrich*, 191 Neb. 475, 478, 215 N.W.2d 637, 639 (1974), " '[t]he test is this: Did the inadvertent remark, which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so taint the entire proceedings that the accused did not have a fair trial?' " Quoting *State v. Johnson*, 60 Wash. 2d 21, 371 P.2d 611 (1962). We do not believe that it did, and it was properly cured by the court's order striking it and directing the jury not to consider it. The first assignment of error is without merit.

The defendant next argues that the sequestration order was violated, and, therefore, certain testimony of one or more police officers should have been stricken. Although perhaps the spirit of the sequestration order was violated, technically, witnesses were not ordered to refrain from visiting with each other, but only not to talk about any matters to which they had previously testified. The trial court, in determining a factual question, concluded that there was no evidence of an actual violation of its order. The record supports such a finding. Furthermore, the testimony of Mrs. Metcalf was simply foundational for other testimony previously given. Certainly, there can be no error in allowing a witness to identify a piece of screen taken from her screen window.

Furthermore, "[w]e have held that in order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice." *State v. Cottingham*, 226 Neb. 270, 274, 410 N.W.2d 498, 501 (1987). "[D]efendant has made no showing of prejudice, which is

necessary to constitute reversible error due to a violation of a sequestration order." *State v. Hess*, 225 Neb. 91, 92, 402 N.W.2d 866, 867 (1987). See, also, *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

The defendant acknowledges that he must show prejudice, and, as evidence of the prejudicial effect on the jury, he points to the fact that the guilty verdict was returned after only 30 minutes of deliberation.

In *State v. Brown*, 174 Neb. 387, 118 N.W.2d 328 (1962), this court held that the fact that the case was submitted to the jury at 4:11 p.m. and the jury returned a guilty verdict at 5:25 p.m. did not establish that the jury had acted with passion and prejudice. In the opinion, the court recognized that "[t]here is no rule which requires the jury to deliberate any particular length of time." *Id.* at 392, 118 N.W.2d at 331. See, also, 23A C.J.S. *Criminal Law* § 1368 (1961).

The defendant has offered no evidence, other than the relatively speedy verdict, of how he was prejudiced by the conduct of the witnesses, and no prejudice appears in the record. That assignment of error is also without merit.

Finally, the defendant argues that the court erred in allowing evidence of his attempt to procure false testimony. The defendant argues that this evidence was not relevant, that is, that it did not tend to prove or disprove that the defendant committed the burglary.

Larry Coleman was called as a witness for the State. He testified that the defendant, whom he knew as "Red," asked him to testify for him. He testified about the letter previously referred to, which was identified as having been written by the defendant. In substance, the defendant told the witness to testify that he, the witness, saw the defendant at a certain time and a certain place looking for a certain person, all of which would perhaps support defendant's alibi. Coleman testified that if he had testified in the way that the defendant had requested, he, the witness, would have been lying.

It is within the trial court's discretion to admit or exclude evidence on the ground of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Hinn*,

229 Neb. 556, 427 N.W.2d 791 (1988); *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988).

There was no abuse of discretion in the trial court's decision that evidence of the defendant's attempt to procure false testimony was relevant. In *Jarecki v Ford Motor Company*, 65 Mich. App. 78, 83, 237 N.W.2d 191, 193 (1976), in which the defendant gave erroneous information to the police regarding an accident, the court said:

> Where relevancy is in issue, the question we must decide is whether the evidence is sufficiently probative of a fact in issue to offset the prejudice that the evidence produces. A party may properly argue and introduce evidence relating to the opposing parties' attempts to suppress evidence or otherwise avoid the fair adjudication of a dispute.

See, also, 31A C.J.S. *Evidence* § 179 (1964) (evidence that a party attempted to prevent a fair trial, as by the fabrication of evidence, is admissible to show that he is conscious of the weakness of his case); and *Parsons v. Ryan*, 340 Mass. 245, 248, 163 N.E.2d 293, 295 (1960), wherein the court said: "There can be no doubt of the relevance of the evidence of [defendant's] evasive conduct and false statements to the issue of liability."

Defendant argues that permitting evidence of his attempt to suborn perjury violates his constitutional right to be presumed innocent. The court in *State v. Adair*, 106 Ariz. 4, 6, 469 P.2d 823, 825 (1970), touched on this point, holding that evidence that the defendant threatened witnesses if they would not testify for him was "admissible as being in the nature of an extra-judicial admission of guilt by the defendant's conduct evidencing a consciousness of guilt." See, also, *Church v. Tersigni*, 202 N.Y.S.2d 489 (1960); *Osborne v. Purdome*, 250 S.W.2d 159 (Mo. 1952); and *Great American Insurance Company v. Horab*, 309 F.2d 262 (8th Cir. 1962).

The State may properly argue and introduce evidence relating to the defendant's attempt to suppress evidence or otherwise avoid the fair adjudication of a dispute.

The judgment of the district court was correct, and it is affirmed.

AFFIRMED.

# IN RE INTEREST OF WALTER ADAMS, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON.
# STATE OF NEBRASKA, APPELLEE, V. WALTER ADAMS, APPELLANT.

430 N.W.2d 295

Filed October 7, 1988. No. 87-1055.

1. **Jurisdiction: Venue: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised.
2. **Mental Health: Venue.** Neb. Rev. Stat. § 83-1025 (Reissue 1987) is a venue statute, expressing the correct site for proceedings before a county board of mental health pursuant to the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1987).
3. **Venue: Waiver.** Unlike jurisdiction, venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law.
4. **Mental Health: Pleadings.** Under Neb. Rev. Stat. § 83-1025 (Reissue 1987), a commitment petition must state facts or a description of the behavior which is the basis for the conclusion that the person sought to be committed to a mental health facility is a mentally ill dangerous person, but need not recite the evidence for the conclusion that commitment is warranted.
5. **Mental Health: Rules of Evidence.** The Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985), apply to proceedings under the Nebraska Mental Health Commitment Act.
6. **Evidence: Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
7. **Mental Health: Appeal and Error.** In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, the Supreme Court will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Randall L. Lippstreu, of Harris & Lippstreu, for appellant.

Jean Rhodes, Morrill County Attorney, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and SPRAGUE and THOMPSON, D. JJ.

SHANAHAN, J.

The Morrill County Mental Health Board found Walter Adams to be a mentally ill dangerous person within the purview of the Nebraska Mental Health Commitment Act, Neb. Rev.

Stat. §§ 83-1001 et seq. (Reissue 1987), and ordered Adams' commitment to a mental health facility. The district court for Morrill County affirmed the mental health board's commitment order. We affirm.

Section 83-1009 of the Nebraska Mental Health Commitment Act defines "mentally ill dangerous person":

> Mentally ill dangerous person shall mean any mentally ill person, alcoholic person, or drug abusing person who presents:
>
> (1) A substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or
>
> (2) A substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety.

The act further provides:

> The petition provided for in section 83-1024 [county attorney's petition alleging that an individual is a mentally ill dangerous person] shall be filed with the clerk of the district court of any county within the judicial district where the subject is found. Upon a showing of good cause therefor, a district judge, of the judicial district where the subject is found, may authorize such petition to be filed in another judicial district within the State of Nebraska with the clerk of the district court of a county within such other judicial district, and in such event all proceedings before the mental health board shall be conducted by the mental health board serving such other county. . . .

§ 83-1025.

Pursuant to the act, on June 23, 1987, the Morrill County attorney filed a petition with the Morrill County board of mental health, asserting that Adams was a mentally ill dangerous person and "presents a substantial risk of serious harm to himself and others . . . as manifested by evidence of inability to provide for his basic human needs, including food,

clothing, shelter, essential medical care, or personal safety, and by reason of making threats on other people . . . ." The county attorney also alleged that Adams, a Morrill County resident, was taken into custody in Lancaster County and that, because less restrictive methods would be ineffective, the mental health board should conduct a hearing to determine whether Adams was a mentally ill dangerous person.

When the petition was filed on June 23, Adams was in official custody at the Lincoln Regional Center in Lancaster County. As soon as the petition was filed, the district court for Morrill County appointed a lawyer to represent Adams in the mental health proceedings, and the mental health board scheduled Adams' hearing for June 29. On June 25, the Morrill County sheriff transported Adams from the regional center to Morrill County. On arrival in Morrill County, the sheriff personally served Adams with notice of the time and place of the hearing before the mental health board, a copy of the petition, and a list of rights accorded one who is a "subject of a petition" before a county board of mental health. See §§ 83-1047 to 83-1067.

At commencement of the June 29 hearing before the mental health board, Adams' lawyer stated:

> I would like to object to this board's jurisdiction over Mr. Adams and over the subject matter of this hearing for the reason that Mr. Adams was located in Lancaster County at the time this petition was filed in Morrill County. . . .
>
> . . . .
>
> . . . I think that the petition has to be filed in the county where the defendant or the subject is found. And in this case, at the time the petition was filed, Mr. Adams was to be found in Lancaster County. Therefore, I question the jurisdiction of this board over Mr. Adams or over the subject matter of the petition.

Taking Adams' jurisdictional objection under advisement, the mental health board then heard testimony from Drs. Allan Roehl and Michael Slosnerick, psychologists at the Panhandle Mental Health Center, and Roger Sterkel, sheriff of Morrill County.

Dr. Roehl testified that, pursuant to the mental health

board's request, he had examined Adams, conducted a clinical interview, and administered the Rorschach, or inkblot, test to Adams. Based on information obtained in that examination and information contained in Adams' files, Dr. Roehl concluded that Adams suffered from paranoid schizophrenia and explained:

> The responses to the Rorschach or ink blot test were typical of a person with constricted personality, poor judgment, lack of empathy and other things consistent with the diagnosis of paranoid schizophrenia. My conversation with him revealed a person with very flattened affect, guarded and defensive attitude toward responding to the questions, and that ties in with the file which carries several diagnoses, paranoid schizophrenia is one of them . . . .

Dr. Roehl expressed the opinion that Adams was dangerous to himself or others and based his opinion

> [u]pon dangerous incidents in the past involving his children, base it upon from the type of mental disturbance which includes delusions, hallucinations, threats against the president, bizarre processes of thinking, supported by testing today, which indicates that those bizarre processes are still ongoing indicating continuing lack of control and poor judgment.

Dr. Slosnerick, a witness for Adams, testified that he had examined Adams in 1984 and 1985 and had concluded that "Adams' behavior was very unusual and bordering on psychotic and . . . likely to continue to deteriorate," but felt that Adams "at that time" was not a danger to himself or others. Dr. Slosnerick explained that his previous evaluations of Adams were based on somewhat limited data and that he had recommended further evaluation of Adams. However, after considering information derived in his current examination of Adams and clinical records for Adams, Dr. Slosnerick testified that "Mr. Adams does present a danger to others."

As sheriff of Morrill County, Roger Sterkel had known Adams for 6 or 7 years and had first come in contact with Adams relative to a child neglect problem involving the Adams children, which necessitated removal of the children from the

Adams home in Morrill County. When Adams threatened the life of the President of the United States in 1984, the Secret Service came to Morrill County and interrogated Adams, but no arrest was made on account of the threat.

Over Adams' objection (relevance), the mental health board received documentary evidence, exhibits 4 and 5, concerning Adams' 1986 convictions for attempted incest and third degree sexual assault.

Exhibit 4 was the amended two-count information which was filed against Adams on February 11, 1986. Count I charged that Adams attempted sexual intercourse with his daughter in 1984. Count II charged that, in 1984, Adams, in violation of Neb. Rev. Stat. § 28-320 (Reissue 1985), subjected his 6-year-old daughter to sexual contact, using force or the "threat of force" to accomplish the criminal sexual contact. Section 28-320(1) defines the crime of third degree sexual assault: "Any person who subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied . . . is guilty of sexual assault [in the third degree if the actor shall not have caused serious personal injury to the victim. § 28-320(3)]." The sexual contact condemned in a third degree criminal sexual assault is the actor's touching the victim's sexual or intimate parts or, conversely, the victim's touching the actor's sexual or intimate parts. See Neb. Rev. Stat. § 28-318(5) (Reissue 1985).

Exhibit 5 was a copy of the district court's journal entry on February 11, 1986, reflecting entry and acceptance of Adams' guilty plea to each charge in the amended information.

At the conclusion of the hearing, the mental health board overruled Adams' objection to jurisdiction and, having found that Adams was a mentally ill dangerous person, ordered Adams' commitment to the Hastings Regional Center. On Adams' appeal to the district court, the commitment order was affirmed.

Adams contends first that the board of mental health lacked jurisdiction over Adams and the subject matter; second, the board received inadmissible evidence; and, third, the State failed to present clear and convincing evidence that Adams was a mentally ill dangerous person.

## JURISDICTION

Adams' jurisdictional claim is based on § 83-1025, which states that a mental health petition must be filed in the judicial district in which the subject is "found." According to Adams' interpretation of § 83-1025, to confer jurisdiction on a county board of mental health, the person to be committed must be physically present within the judicial district where the mental health board is located when the mental health petition is initially filed with the board which will hold the commitment hearing. Because Adams was in Lancaster County, outside the judicial district in which Morrill County is situated, Adams argues that the Morrill County board of mental health lacked jurisdiction in the proceedings for Adams' commitment.

"Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised." *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 759, 340 N.W.2d 431, 433 (1983). See, also, *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988); *Chicago Lumber Co. v. School District No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988).

> "Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong; the power to deal with the general subject involved in the action; and means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs . . . ."

*Lewin v. Lewin*, 174 Neb. 596, 599-600, 119 N.W.2d 96, 99 (1962) (quoting 21 C.J.S. *Courts* § 23 (1940)).

Section 83-1025 bears a striking resemblance to the statute involved in *State ex rel. Bauersachs v. Williams, supra*. In *Bauersachs*, the plaintiff filed a paternity action in Sarpy County, in spite of the fact that both the plaintiff and her child were domiciled in Douglas County. According to Neb. Rev. Stat. § 43-1411 (Reissue 1984), a proceeding to establish paternity "may be instituted in any district court of the district where the child is domiciled or found . . . ." In rejecting Williams' claim that the Sarpy County District Court lacked jurisdiction, we noted that, generally speaking, Nebraska's

district courts are empowered to hear paternity cases and concluded:

> Williams' question concerning the proceedings relates to venue and not to jurisdiction in the strict sense of the term. District Courts in Nebraska have general jurisdiction regarding filiation proceedings . . . . The trial court had jurisdiction to adjudicate Williams' paternity of [the] child. After commencement of the action in Sarpy County, Williams did not request transfer of the proceedings . . . . Williams did not object to venue until conclusion of the evidence at trial. Unless prohibited by a venue statute, a defendant can waive the personal privilege to be sued in a particular county. See 92 C.J.S. *Venue* § 77 (1955). In the absence of the appropriate objection to venue or the timely motion to transfer the proceedings, Williams cannot now question venue of the proceedings in Sarpy County.

215 Neb. at 759-60, 340 N.W.2d at 433.

Beyond question, the Morrill County board of mental health, by virtue of the Nebraska Mental Health Commitment Act, is empowered to hear a mental health petition for commitment of a mentally ill dangerous person to an appropriate mental health facility. Therefore, in Adams' case, a board of mental health has subject matter jurisdiction.

In examining § 83-1025, we note that a district court, within the judicial district where the alleged mentally ill dangerous person is found at the commencement of the proceedings, may, on good cause shown, authorize the mental health proceedings to be filed in another judicial district, effectively transferring the mental health proceedings to another judicial district by a procedure somewhat similar to the transfer of civil proceedings from the district court of one county to the district court of another county. See Neb. Rev. Stat. § 25-410 (Reissue 1985). If § 83-1025 were literally construed, as suggested by Adams, the procedure authorized by § 83-1025 regarding refiling or transferring mental health proceedings would be tantamount to a district court conferring subject matter jurisdiction on another tribunal, which lacked jurisdiction. We have repeatedly stated that litigants cannot confer subject matter jurisdiction on

a judicial tribunal by acquiescence or consent. See, *Coffelt v. City of Omaha*, 223 Neb. 108, 388 N.W.2d 467 (1986); *Riedy v. Riedy*, 222 Neb. 310, 383 N.W.2d 742 (1986). Much of what we have expressed concerning litigants' inability to confer subject matter jurisdiction is analogously applicable in determining the nature of § 83-1025, that is, whether § 83-1025 prescribes jurisdiction or venue relative to mental health proceedings. If Adams' interpretation of § 83-1025 were correct, a district court might confer jurisdiction on another tribunal, which lacked jurisdiction in the first instance, inasmuch as jurisdiction, as a necessary conclusion of Adams' argument, is restrictively exercised only where the subject of a mental health petition is found when the petition is filed. However, the statutory procedure for refiling or transferring mental health proceedings, in accordance with the authority embodied in § 83-1025, indicates that the essence of § 83-1025 is venue, not jurisdiction. Therefore, we hold that § 83-1025 is a venue statute, expressing the correct site for proceedings before a county board of mental health pursuant to the Nebraska Mental Health Commitment Act.

Unlike jurisdiction, venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law. As we expressed in *Blitzkie v. State*, 228 Neb. 409, 421, 422 N.W.2d 773, 780 (1988):

> "Where the court has general jurisdiction of the subject matter, the right of a defendant to be sued in a particular county or district is a mere personal privilege which he may waive." 92 C.J.S. *Venue* § 77 at 774 (1955). See, also, *id.*, § 124 at 820: "Venue statutes are generally regarded as conferring a personal privilege which may be waived by the defendant."

See, also, *Peitz v. Hausman*, 198 Neb. 344, 252 N.W.2d 628 (1977); *Corn Belt Products Co. v. Mullins*, 172 Neb. 561, 110 N.W.2d 845 (1961).

Adams' objection to the proceedings was directed to the mental health board's jurisdiction, not Morrill County as the correct venue for the proceedings. Adams never requested that the proceedings be refiled or transferred to another judicial district. Consequently, Adams waived any question about

venue for the proceedings. We do not determine whether Lancaster County or Morrill County was the correct venue indicated by § 83-1025. Rather, as we have determined, the Morrill County board of mental health had jurisdiction for the proceedings, and Adams has failed to raise the question concerning the correct venue prescribed by § 83-1025. Hence, Adams' objection to jurisdiction is without merit.

## ADMISSIBILITY OF EVIDENCE

Next, Adams complains that documentary evidence concerning his sexual misconduct was improperly received in the proceedings. The petition alleged that Adams was a mentally ill dangerous person and "presents a substantial risk of serious harm to himself and others" because he was unable to provide for his basic human needs and threatened others. See § 83-1009.

Section 83-1025 provides: "The petition shall include a description of the behavior which constitutes the basis for the petitioner's concluding that the individual is a mentally ill dangerous person . . . ."

Under § 83-1025, a commitment petition must state facts or a description of the behavior which is the basis for the conclusion that the person sought to be committed to a mental health facility is a mentally ill dangerous person, but need not recite the evidence for the conclusion that commitment is warranted. *In re Interest of H.W.*, 220 Neb. 423, 370 N.W.2d 155 (1985).

The Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985), apply to proceedings under the Nebraska Mental Health Commitment Act. § 83-1059.

Regarding a third degree sexual assault, the gravamen of the criminal offense is a nonconsensual sexual contact, namely, sexual touching achieved by force or "threat of force." See §§ 28-320(1) and 28-318(5). The information filed against Adams alleged that he subjected his 6-year-old daughter to sexual contact after overcoming her by "threat of force." Under the circumstances, "threat of force," as a necessary element for a third degree criminal sexual assault in violation of § 28-320(1), qualifies as the threat of violence to another person, see § 83-1009(1), which is embodied in the phrase

"threats on other people" contained in the petition for Adams' commitment. The threatened force or violence, charged against Adams and admitted by his guilty plea, is Adams' admission as a party to the proceedings. See Neb. Evid. R. 801(4)(b)(i) (§ 27-801(4)(b)(i)). Existence of a threat of force, which Adams admitted by his guilty plea to the criminal charge of third degree sexual assault, is relevant to prove that Adams is a mentally ill dangerous person, manifested by a recent threat of violence. See § 83-1009(1). Therefore, documentary evidence regarding Adams' conviction for third degree sexual assault was admissible. See Neb. Evid. R. 401: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." § 27-401. There is no merit to Adams' contention that the board of mental health considered inadmissible evidence.

## SUFFICIENCY OF EVIDENCE

Addressing Adams' question concerning sufficiency of the evidence, we reiterate the principle employed in this court's review of a determination that an individual is a mentally ill dangerous person: In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, the Supreme Court will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing. *In re Interest of Kinnebrew*, 224 Neb. 885, 402 N.W.2d 264 (1987).

Without our again setting forth all the evidence adduced at the commitment hearing, evidence demonstrated that Adams was dangerous to himself and others. The evidence is sufficient for a finding that Adams is a mentally ill dangerous person within the meaning of § 83-1009. The psychologists' collective opinion was that Adams is dangerous to himself and others. Dr. Roehl characterized Adams' particular disorder as paranoid schizophrenia. Nothing rebutted the psychologists' opinions regarding Adams' mental condition. The county board of mental health's order and the district court's judgment are supported by evidence. As a matter of law, we cannot conclude that the evidence is not clear and convincing.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. CLIFFORD D. SNODGRASS, APPELLANT.

430 N.W.2d 55

Filed October 7, 1988. No. 88-057.

**Drunk Driving: Trial: Prior Convictions.** For enhancement purposes under Neb. Rev. Stat. § 39-669.07(4)(c) (Supp. 1987), the sentencing court shall make a finding on the record concerning the number of the defendant's prior convictions for drunk driving.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

David V. Chebatoris, of Clements, Svoboda and Chebatoris, for appellant.

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

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

SHANAHAN, J.

In its complaint filed in the county court for Sarpy County, the State charged that Clifford D. Snodgrass, on June 20, 1987, operated a motor vehicle while he was under the influence of alcoholic liquor and alleged that the offense was Snodgrass' third such infraction of the statute against drunk driving. See Neb. Rev. Stat. § 39-669.07 (Supp. 1987). After entry of his no-contest plea to the drunk driving charge on September 22, Snodgrass, accompanied by his lawyer, appeared before the county court for Sarpy County on October 23, 1987, for a sentence hearing on the enhanced penalty authorized on account of Snodgrass' prior convictions.

At the enhancement hearing, the State offered as exhibits the court records for Snodgrass' convictions in 1977 (exhibit 1), 1979 (exhibit 2), and 1982 (exhibit 3). Snodgrass objected to exhibits 1 and 2 (foundation), but did not object to exhibit 3. As reflected by the exhibits, Snodgrass, who was represented by counsel, pled guilty to drunk driving in 1977 and 1979 and entered his no-contest plea to the drunk driving charge in 1982. Before accepting Snodgrass' plea for each conviction in those

prior years, the court gave the appropriate admonitions and information required for a valid plea as a basis for a conviction. See, *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971); *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). Snodgrass did not contend at trial, and does not contend on appeal, that evidence of any of his prior convictions, utilized for enhancement purposes, was constitutionally impermissible. When the court received the three exhibits as evidence of prior convictions, Snodgrass' lawyer asked: "[C]ould I get the Court to make a specific finding as to the Exhibits 1 and 2?" Section 39-669.07(4)(c) provides in pertinent part: "For each such conviction under this section, the court shall as part of the judgment of conviction make a finding on the record as to the number of the defendant's prior convictions . . . ." To counsel's request, the court responded: "I don't think I have to do that and I decline to do so. There are three of them there and I find that he — Is third offense. So, it doesn't make any difference which two of the three are convicted. I am declining your request."

The trial court's docket notes contain: "Defendant is adjudged guilty as charged on [the complaint of] third offense. This is defendant's fourth conviction for driving under influence of alcohol in Nebraska." In the "journal entry" signed by the county court, the court noted that, for enhancement purposes, the 1987 conviction was Snodgrass' third offense of drunk driving. After consideration of a presentence report, the court sentenced Snodgrass to the county jail for 91 days, imposed a fine of $500, and suspended Snodgrass' driver's license for a period of 15 years from the date of conviction. The penalties and sanction imposed by the county court are authorized by § 39-669.07(4)(c) and Neb. Rev. Stat. § 28-106 (Cum. Supp. 1988).

Snodgrass appealed to the district court, which affirmed the county court's judgments.

Snodgrass claims that the county court erred by failure to make a specific finding on the record concerning the number of Snodgrass' prior convictions for drunk driving.

As we construe Snodgrass' contention, the county court's failure to specifically designate or identify the prior convictions

utilized for enhancement purposes vitiates the imposed penalty. However, § 39-669.07(4)(c) does not require Snodgrass' suggested specification, but only requires that the court make a "finding on the record as to the number of the defendant's prior convictions" for violation of the drunk driving statute. The county court's docket notes, as a part of the record, unquestionably demonstrate the county court's finding that the 1987 conviction is Snodgrass' "fourth conviction for driving under [the] influence of alcohol." If the county court found that the 1987 conviction for drunk driving was Snodgrass' fourth conviction for such offense, quite obviously the court found that there were three drunk driving convictions before Snodgrass' 1987 conviction. Moreover, because there were only three exhibits introduced concerning Snodgrass' prior convictions for drunk driving, and the court found the 1987 conviction was Snodgrass' fourth conviction, the court unquestionably found that Snodgrass had been convicted three times for drunk driving before his 1987 conviction, although the court did not expressly state the specific number of prior convictions used for the purpose of the enhanced penalty authorized by § 39-669.07(4)(c). To dispose of Snodgrass' contention that the court's judgment does not specifically and expressly state the number of prior drunk driving convictions, we simply respond that three and one are still four, and four less one are still three. No matter what apparently arduous arithmetical avenue is adopted, the county court found that Snodgrass had been convicted of drunk driving three times before his 1987 conviction. We find that the county court's record contains the court's finding regarding the number of drunk driving convictions preceding Snodgrass' 1987 conviction for that offense, a finding sufficient for imposition of the enhanced penalty permissible under § 39-669.07(4)(c). The county court's oversight or failure to make a specific and express finding that Snodgrass had three prior convictions was harmless error, for, on a review of the entire record, there is no conduct by the county court which materially produced a judgment adverse to a substantial right of Snodgrass. Cf. *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988): "Harmless error exists in a jury trial of a criminal case when

there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." See Neb. Rev. Stat. § 29-2308 (Reissue 1985) (no reversal by Supreme Court unless record discloses a "substantial miscarriage of justice").

Next, Snodgrass challenges the 15-year suspension of his driver's license, claiming that this sentence was excessive. Because, however, the 15-year license suspension is a mandatory minimum for DWI, third offense, see § 39-669.07(4)(c), Snodgrass' claimed error actually boils down to the county court's finding that Snodgrass was not a suitable candidate for probation.

"We have regularly and repeatedly held that a sentence imposed within the statutory limits will not be modified on appeal, absent an abuse of discretion on the part of the trial court." *State v. Bovill*, 223 Neb. 764, 767, 393 N.W.2d 715, 717 (1986). Furthermore, "An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge." *State v. Lane*, 227 Neb. 687, 692, 419 N.W.2d 666, 670 (1988) (citing *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985)).

As reflected in the presentence report and in addition to the three previous convictions for drunk driving, Snodgrass has been convicted of burglary, "giving alcoholic liquor to [a] minor," and twice convicted in 1984 for "refusal to submit to chemical test," as well as for various traffic offenses, including a 1976 conviction for "no driver's license" and a 1977 conviction for "leaving the scene of property damage accident." Between 1977 and 1987, Snodgrass was convicted seven times for speeding. Given Snodgrass' criminal history and driving offenses, the trial court did not abuse its discretion by the sentence imposed on Snodgrass.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. LISSA A. WILCOX, APPELLEE.
430 N.W.2d 58

Filed October 7, 1988. No. 88-570.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Richard C. Anderson, Buffalo County Attorney, for appellant.

Charles D. Brewster, Deputy Buffalo County Public Defender, for appellee.

HASTINGS, C.J.

Under the authority of Neb. Rev. Stat. § 29-824 (Reissue 1985), the county attorney for Buffalo County has appealed to a single judge of this court an order of the district court which had sustained the defendant's motion to suppress evidence. That order directed that the evidence would not be admissible at defendant's trial to commence on August 22, 1988.

In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Price*, 229 Neb. 448, 427 N.W.2d 81 (1988). However, regardless of the scope of its review, the Nebraska Supreme Court has an obligation to reach an independent conclusion with respect to questions of law. *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988).

In March of 1988, a confidential informant (CI) contacted the Kearney Police Department concerning the defendant's drug selling activities. He stated that the defendant had sold marijuana to him 70 or 80 times since June of the previous year; he described in detail the inside of the trailer house in which defendant lived and stated that marijuana, a scale, a bong pipe, and LSD were all located within the trailer; and he named specific locations within the trailer where those items could be found.

The police and the CI agreed to an arrangement wherein the CI would purchase drugs from the defendant while wired for sound and inform the officers by a code word when the

purchase was completed.

On March 30, 1988, the CI made the drug purchase from the defendant. The police, who were monitoring the CI's wire from outside the defendant's home, were notified by the code word that the purchase had been completed, and they then moved into the home and arrested the defendant.

One officer left the defendant's residence at that time in order to obtain a judge's signature on a search warrant. The affidavit in support of the search warrant contained the information set forth above and, in addition, explained the arrangements which were made for the "buy," and stated that as a result of that transaction, marijuana was purchased and the defendant was arrested.

The search warrant listed as property to be seized: "Marijuana, D-Lysergic acid diethylamide, scale, drug paraphernalia, other controlled substances or contraband for the use or distribution of illegal drugs." Property seized either as an incident of arrest, from a consent to search, or from the search by warrant included marijuana, cash in the approximate amount of $1,925, LSD, and methamphetamines.

The defendant was charged in a three-count information with possession of methamphetamine, possession of LSD, and delivering marijuana. Defendant then filed the motion to suppress which is the subject of this litigation. The district court, in sustaining the motion, relied on the fact that, although it was not known by the law enforcement officers at the time of the "buy," the CI was on probation for a criminal offense, which, the court ruled, prohibited use of the evidence obtained as a result of the CI's activities.

At all times during the period of conversations between the CI and the police, and at the time of the "buy" and arrest of the defendant, Neb. Rev. Stat. § 29-2262.01 (Reissue 1985) was in effect and provided as follows: "A person placed on probation by a court of the State of Nebraska . . . shall be prohibited from acting as an undercover agent or employee of any law enforcement agency of the state or any political subdivision." Section 29-2262.01 was amended by 1988 Neb. Laws, L.B. 670, which became effective July 9, 1988, by adding the following sentence: "Any evidence derived in violation of this section

shall not be admissible against any person in any proceeding whatsoever." See § 29-2262.01 (Cum. Supp. 1988). Although the hearing was had on the motion to suppress on June 16, and the order suppressing all of the evidence seized as set forth above was entered on July 5, 1988, it was effective only as to the trial to commence on August 22, after the effective date of the amendment.

The State argues that as a general rule, a legislative act operates only prospectively unless a contrary intent of the Legislature is clearly disclosed, and also claims the benefit of the good-faith exception. The defendant insists that this is a procedural rule and is effective immediately, and therefore applies to any proceeding had after the effective date of the legislation.

No serious argument is made that defendant's constitutional rights under the fourth amendment are involved in this case. In other words, no question is raised that the buy, the arrest following the buy, the search as an incident of a lawful arrest, or the issuance and execution of the search warrant were constitutionally suspect. Neither is the question raised whether the CI would be permitted to testify at a subsequent trial. In the final analysis, the only question squarely presented is whether evidence seized pursuant to the search warrant was admissible under the statute as amended.

It is literally impossible in this case to separate evidence which might have been obtained on the basis of a search warrant issued solely on the information furnished to the police in the first instance, and that obtained as a part of the arrest and verification obtained by the actions of the CI as an undercover agent of the State. The State concedes in its argument that the "buy" furnished verification of the information furnished by the CI. There is nothing in the record to otherwise indicate the reliability of the CI.

It is well established that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding, and not those in effect when the act or violation allegedly took place. *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977); *Durousseau v. Nebraska State Racing*

*Commission*, 194 Neb. 288, 231 N.W.2d 566 (1975).

The rule adopted in L.B. 670 is one of procedure, that is, the admission or exclusion of certain types of evidence. It is not a substantive rule of criminal law; it does not create any criminal act, alter the standard of proof necessary for conviction, nor alter the punishment prescribed for committing the crime. See *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

In *State v. Keithley*, 227 Neb. 402, 418 N.W.2d 212 (1988), the defendant committed a homicide in 1959. The statute in effect at the time of the crime provided that a spouse could testify against the other only in criminal proceedings involving rape, adultery, bigamy, incest, or a crime committed by one spouse against the other. The statute at the time of trial in 1986 provided that a spouse could testify against the other whenever the crime charged was a crime of violence. This court held that, as the crime was one of violence, the wife could testify against the defendant husband. Citing *State v. Palmer, supra*, the court held that "no one has a vested right in a procedure" and that procedural matters, including rules concerning the admission of evidence, "can be changed at any time before trial . . . ." *State v. Keithley, supra* at 406, 418 N.W.2d at 215. See, also, *Lovelace v. Boatsman*, 113 Neb. 145, 202 N.W. 418 (1925); *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974); *Haiar v. Kessler*, 188 Neb. 312, 196 N.W.2d 380 (1972); *Happy Hour, Inc. v. Nebraska Liquor Control Commission*, 186 Neb. 533, 184 N.W.2d 630 (1971).

Thus, it is clear that the provisions of L.B. 670, which went into effect prior to defendant's trial date, would serve to bar the use of the probationer-derived evidence at that trial.

The State argues that L.B. 670 should not be given effect in this case because (1) the bill conflicts with Neb. Rev. Stat. § 27-601 (Reissue 1985), and (2) the bill is subject to a "good faith" exception.

It is the State's position that L.B. 670 conflicts with Neb. Evid. R. 601, which provides that every person is presumed to be competent to be a witness, because

> [o]bviously, the confidential informant involved in the case at hand is presumed to be competent to testify at a proceeding of law and the evidence obtained pursuant to

> the issuance of a valid search warrant if otherwise properly obtained should be admissible in the Courts of the State of Nebraska.

Brief for appellant at 6. As its sole support for this argument, the State cites *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985). According to the State, this court in *Fletcher* indicated in dicta that § 29-2262.01 (Reissue 1985) was contrary to evidence rule 601. This contention by the State is incorrect. The court in *Fletcher* merely explained the defendant's argument that the witness was not competent to testify because of § 29-2262.01, stating, "See Rule 601," and then dismissed the defendant's argument because it was not raised at trial nor assigned as error. *Fletcher, supra* at 566, 378 N.W.2d at 862. In no way did this court state or imply that § 29-2262.01 was contrary to rule 601. The State's argument is without merit.

The State urges the recognition of a "good faith" exception to L.B. 670. No authorities are cited by the State in support of this position. Actually, the "good faith" exception applies to the fourth amendment exclusionary rule as articulated in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), *reh'g denied* 468 U.S. 1250, 105 S. Ct. 52, 82 L. Ed. 2d 942, and earlier cases. The exclusion applied by the court in this case was not constitutionally mandated but, rather, resulted from state statutory requirements.

It may be true that the Legislature created L.B. 670 for a purpose not applicable to the present case. However, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of the court to read anything plain, direct, and unambiguous out of a statute. In the absence of anything indicating to the contrary, statutory language will be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 229 Neb. 837, 429 N.W.2d 359 (1988); *Dieter v. State,* 228 Neb. 368, 422 N.W.2d 560 (1988); *Lawson v. Ford Motor Co.*, 225 Neb. 725, 408 N.W.2d 256 (1987).

The plain and ordinary language of L.B. 670 clearly dictates

that *no* evidence derived as the result of a probationer's working as an agent of the police shall be admissible at trial. The amendment does not differentiate between cases in which the probationer volunteered his help to the police and those in which the police coerced the probationer into cooperating, nor does it recognize any "good faith" exception. Rather, the bill simply states that the evidence shall not be used under any circumstances.

The order of the district court suppressing the evidence was correct and is affirmed.

AFFIRMED.

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## RODNEY G. ZWYGART, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA DEPARTMENT OF ROADS, APPELLEE AND CROSS-APPELLANT.

430 N.W.2d 301

Filed October 14, 1988. No. 86-507.

1. **Motions for New Trial: Evidence: Proof.** A failure of proof at the trial may not be cured or supplied by evidence on a motion for a new trial.
2. **Verdicts: Appeal and Error.** Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.
3. **Eminent Domain: Verdicts: Evidence.** Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider in connection with other competent evidence.
4. **Attorney Fees.** In the determination of a reasonable attorney fee there should be considered the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties.

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

John M. Gerrard, of Domina & Gerrard, P.C., for appellant.

Robert M. Spire, Attorney General, John E. Brown, and

Jeffery T. Schroeder for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

GARDEN, D.J.

This is an appeal by the landowner, Rodney G. Zwygart, from a jury verdict in favor of the landowner and against the State of Nebraska Department of Roads, for damages sustained by the plaintiff in the taking of real property in two condemnation proceedings.

The State condemned two separate parcels of land owned by the plaintiff in Pierce County, Nebraska. The board of appraisers appointed by the Pierce County Court awarded the plaintiff $4,680.10 for damages resulting from the taking of the eastern tract, sometimes called "Tract 2," and awarded the plaintiff $2,186.47 for damages resulting from the taking of the western tract, sometimes called "Tract 2A." The plaintiff duly perfected appeals from each award to the district court for Pierce County, Nebraska, wherein the appeals were consolidated for trial to a jury. The jury awarded the plaintiff $5,000 for the 2.09-acre acquisition and remainder damage to Tract 2 and further awarded the plaintiff $2,500 for the 1.37-acre acquisition and remainder damage to Tract 2A. Pursuant to a stipulation of the parties entered into prior to trial, the district court added $50 to each of the verdicts to compensate the plaintiff for abstracting expenses, and entered judgment in each case in favor of the plaintiff for the increased amounts. The plaintiff then filed a motion for the allowance of attorney and expert witness fees on the Tract 2A verdict. The trial court awarded plaintiff attorney fees and expenses in the total amount of $3,520, and expert witness fees and expenses in the total amount of $2,279.56.

The plaintiff filed a motion for new trial as to the verdict on Tract 2A, alleging irregularity in the proceedings by the defendant in substantially misrepresenting to the jury the potential reasonable cost of a frontage road, which irregularity prevented the plaintiff from having a fair trial, and alleging that the jury's verdict was not sustained by sufficient evidence. Plaintiff also alleged that the trial court abused its discretion

and argued that the award of attorney and expert witness fees was insufficient based on the evidence presented at the hearing on fees. The plaintiff also filed a motion for new trial as to the verdict on Tract 2 in substantially the same form. The motions for new trial were overruled, and the plaintiff perfected his appeal in both cases.

The State of Nebraska cross-appealed on the allowance of attorney and expert witness fees, claiming that the $50 abstracting expense should not be added to the verdict of the jury on Tract 2A for the purposes of determining whether that award exceeded the award of the board of appraisers by 15 percent, as required by statute for the allowance of fees.

The first issue for determination is whether the defendant misrepresented facts to the jury concerning the frontage road issue.

The plaintiff's expert on value, Darrell D. Smith, testified in substance that he is a licensed real estate appraiser, that he was employed to make an appraisal of the subject properties, and that he did make such an appraisal. In his opinion, the highest and best use of the property was for agricultural purposes, with a potential of selling off some frontage lots. He further concluded that since Tract 2A would have controlled access, damage would result to the remainder. Concerning a frontage road, Smith testified: "And my experience has been the cost of the frontage road would exceed basically the value of the difference between dry cropland and the value for residential lots so consequently I reverted the three residential lots back to dry cropland." Smith then gave his opinion as to the total damage sustained on each tract as a result of the taking. The following exchange took place on cross-examination:

> Q- Did you figure the cost of building a gravel frontage road on either one of those tracts?
>
> A- No, I've had costs figured at various times in doing other appraisal work but I didn't get an estimate in this.
>
> Q- Is it your testimony that the cost of building a frontage road exceeds the return from selling the remaining lots along that frontage road after the taking?
>
> A- Yes, it does.

The defendant's expert Dwight L. Johnson testified that he is

an independent fee appraiser licensed under the laws of the State of Nebraska and that he made an appraisal of Tracts 2 and 2A. He then gave his opinion as to the damage sustained by each tract as a result of the taking. He further testified that the control of access did not damage the subject property. In his opinion, the acreage sites could still be developed after the taking on the basis of a frontage road. The following testimony was received relating to cost:

> Q- . . . did you at my request investigate the cost of building such a frontage road?
>
> A- Yes.
>
> Q- Tell me, how did you go about doing that?
>
> A- I called Theisen Brothers and had them give me [an] estimated cost to build a 30-foot road with a 24-foot gravel strip and a shoulder for drainage. They've given me— He gave me an estimate to do that work.
>
> Q- Is that estimate as of the date of August 15, 1984?
>
> A- As of August 15, 1984.
>
> MR. GERRARD: Your Honor, I'm going to object at this point in time on grounds of relevancy as to the fair market value of the property.
>
> THE COURT: Overruled, you may answer.
>
> A- $2,179.
>
> Q- Okay. How long was that road?
>
> A- Quarter of a mile, which is the length of Tract 2A.

The plaintiff claims that he was prevented from having a fair trial because of the above testimony of defendant's appraiser. In support of his motion for new trial, plaintiff offered exhibit 1, the affidavit of John Theisen; exhibit 2, the defendant's response to interrogatories; exhibit 3, the appraisal by Johnson; and exhibit 4, the deposition of Johnson. The court sustained an objection to all items on the ground of relevancy.

Plaintiff's motion for new trial is based on Neb. Rev. Stat. § 25-1142 (Reissue 1985), which provides:

> The former verdict . . . shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party: (1) Irregularity in the proceedings of the . . . prevailing party . . . by which the

> party was prevented from having a fair trial . . . .

Neb Rev. Stat. § 25-1144 (Reissue 1985) sets forth the form of the motion for new trial and specifies which grounds must be sustained by affidavits. No provision, other than by affidavit, is made for the receipt of additional evidence upon the motion for new trial. Thus, the trial court was correct in rejecting plaintiff's offer of exhibits 2, 3, and 4. The trial court was also correct in refusing to receive exhibit 1, the affidavit of Theisen. Theisen, in his affidavit, confirmed the information given by him to witness Johnson. Theisen then attempted to counter his prior statements to Johnson based on a subsequent personal inspection of the subject property. This was an attempt by the plaintiff to inject new matter into an adjudicated case, which he could not do. "A failure of proof at the trial may not be cured or supplied by evidence on a motion for a new trial." 66 C.J.S. *New Trial* § 161 at 408 (1950). As stated in *Battiato v. Falstaff Brewing Corp.*, 212 Neb. 474, 476, 323 N.W.2d 105, 106 (1982):

> A motion for new trial may be granted on certain specified grounds listed in the statute. Neb. Rev. Stat. § 25-1142 (Reissue 1979). None of those grounds, with the exception of newly discovered evidence, include remedying defect of proof. The purpose of the motion for new trial is not to inject new matter into an adjudicated case, but is to complain of that which has already been done. It affords the trial court an opportunity to correct its own errors.

The record in the present case reflects that the trial court viewed the affidavit and other exhibits as an attempt by plaintiff to present additional evidence which could have been presented at trial. The trial court did not abuse its discretion in refusing to accept the exhibits offered by plaintiff in support of his motion for new trial.

Plaintiff's second assignment of error is that the verdict of the jury is not sustained by sufficient evidence. "Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong." *Wear v. State of Nebraska*, 215 Neb. 69, 76, 337 N.W.2d 708, 714 (1983). We have also said:

> [I]n determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably

> to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury's verdict will not be disturbed unless it is clearly wrong.

*Maloney v. Kaminski*, 220 Neb. 55, 62, 368 N.W.2d 447, 454 (1985).

The plaintiff's expert testified that the damages sustained by plaintiff on Tract 2A were $20,240. Defendant's two experts respectively said plaintiff was damaged $1,963 and $1,920. The jury verdict was $2,500.

The plaintiff's expert testified that the plaintiff sustained damages of $30,925 to Tract 2. Defendant's two experts respectively testified that just compensation was $3,975 and $4,033.50. The jury verdict was $5,000.

Both verdicts were within the range of the expert testimony presented at trial. "Ordinarily, a verdict or award in a condemnation case will be sustained if . . . it is within the range of the testimony of the amount of the value or damages." 27 Am. Jur. 2d *Eminent Domain* § 471 at 397 (1966).

The jury was taken to the site of the two tracts for its own observation of the properties. "[W]here a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider in connection with other competent evidence." *Bentz v. Nebraska P.P. Dist.*, 211 Neb. 844, 849, 320 N.W.2d 763, 767 (1982).

The record in the present case supports the verdicts. The jury resolved all conflicts as to damage to the tracts in favor of the defendant on both tracts. In *Vacek v. Ames*, 221 Neb. 333, 336, 377 N.W.2d 86, 89 (1985), we said: "A party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict."

Plaintiff's third assignment of error was that the award of fees and expenses was insufficient, based on the evidence presented at the fee hearing. The defendant cross-appealed on this issue, claiming that no fees and expenses should have been awarded.

Neb. Rev. Stat. § 76-720 (Reissue 1986) provides:

> If an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment is greater by fifteen per cent than the amount of the award . . . the court may in its discretion award to the condemnee a reasonable sum for the fees of his or her attorney and for fees necessarily incurred for not more than two expert witnesses.

The defendant argues that the verdict of the jury of $2,500 should be considered in determining the fees and expenses issue. The appraiser's award was $2,186.47. Absent the $50 for abstracting as stipulated by the parties, the verdict of the jury would not exceed the appraisers' award by 15 percent. This argument ignores the plain import of the statute. Section 76-720 refers to "the final judgment," and not to the verdict of the jury. In the present case, the parties by stipulation agreed that a $50 abstracting fee should be "added to the award which is returned in each case after the verdict." The verdict is the act of the jury in determining the amount of the recovery. See Neb. Rev. Stat. § 25-1119 (Reissue 1985). Neb. Rev. Stat. § 25-1301 (Reissue 1985) provides:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.
>
> (3) Entry of a judgment is the act of the clerk of the court in spreading the proceedings had and the relief granted or denied on the journal of the court.

The trial court was correct in adding the stipulated amount to the jury verdict prior to the entry of the judgment thereon. In so doing, the final judgment exceeded the award of the appraisers by 15 percent. As a result thereof, the plaintiff is entitled to fees and costs on Tract 2A. The defendant would have us apply *Schneekloth v. County of Sarpy*, 214 Neb. 618, 335 N.W.2d 296 (1983), to the case at bar. *Schneekloth* is distinguished on its facts, in that the stipulation in *Schneekloth* did not provide that the stipulated amount would be "added to the award . . .

returned . . . after the verdict."

The final matter for determination is whether the trial court abused its discretion in awarding $3,520 for plaintiff's attorney fees and expenses and $2,279.56 for expert witness fees and expenses.

The elements to be considered in awarding attorney and expert witness fees under § 76-720 were set out in *Prucka v. Papio Nat. Resources Dist.*, 206 Neb. 234, 237, 292 N.W.2d 293, 296 (1980).

> "We have said many times that in the determination of a reasonable attorney's fee there should be considered the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties."

In applying each of the above elements to the present case, we find no abuse of discretion on the part of the trial judge in the award of fees and costs.

The judgment is affirmed.

AFFIRMED.

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## EV. LUTHERAN GOOD SAMARITAN SOCIETY, DOING BUSINESS AS ST. LUKE'S GOOD SAMARITAN VILLAGE, APPELLEE, V. BUFFALO COUNTY BOARD OF EQUALIZATION ET AL., APPELLANTS.

430 N.W.2d 502

Filed October 14, 1988. No. 86-976.

1. **Taxation: Charities: Words and Phrases.** A charitable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons.
2. **Taxation: Presumptions.** The power and right of the state to tax property are presumed, and therefore tax-exemption provisions are strictly construed, and their operation will not be extended by construction.

3. **Taxation: Words and Phrases.** It is the use of the property as distinguished from the use of the income from the property that determines whether it is exempt from taxation. "Exclusively" means the primary or dominant use of the property, not an incidental use of the property.
4. **Taxation: Charities.** Property which is owned and used primarily for the purpose of furnishing low-rent housing is not entitled to exemption from taxation as property which is owned and used exclusively for charitable purposes.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions.

John L. Jelkin, of Duncan, Duncan & Jelkin, for appellant Buffalo County Board of Equalization.

Kenneth F. George, of State, Yeagley & George, and Eugene T. Hackler and Robert C. Londerholm, of Hackler, Londerholm, Corder, Martin & Hackler, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendants appeal a district court order granting charitable property tax exemption status to plaintiff and its eight apartment buildings near Kearney, Nebraska, pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Supp. 1985).

Plaintiff is a North Dakota corporation having a 63-year history of ministering to the aged in 26 states. Plaintiff's operation in Kearney is known as St. Luke's Good Samaritan Village (Village), which includes a 60-bed intermediate care facility (nursing home), 31 independent living apartments in 8 separate buildings located near the nursing home, a preschool, and 23 acres of farmland. Plaintiff describes the nursing home and the apartments as integrated-care facilities. This appeal relates only to the apartments, since plaintiff's other facilities continue to enjoy tax-exempt status.

Each apartment building is a two-story frame building, formerly an Army barrack, moved to its present location and improved for apartment living. Each building unit has four apartments, two on the first floor and two on the second floor, except one unit has three apartments and an activities area.

There is less demand for second floor apartments since access is by a stairway.

Plaintiff's Kearney facilities are managed by one administrator; generally, they have separate budgets, staff, book accounts, and administrative policies, except in those instances where staff cooperation and overlapping services provide efficient operation.

Prospective apartment tenants make an oral application to rent an apartment with plaintiff's administrator and its staff care team, who decide from the interview whether the applicant is physically and mentally capable of caring for himself or herself in an apartment. Applicants must be 55 years of age or older; however, some tenants have younger persons living with them and sometimes younger Village employees rent and occupy vacant apartments.

The monthly rental charge for the units was established by the administrator after considering comparable local rental charges and projecting future expenses, and then fixing the rental at a near break-even figure. In the event a profit is experienced, those funds are used for capital improvements and operations. At trial time, April 1986, the monthly rentals were lower level units, $220 (except three newly decorated units at $240), and upper level units, $215. Special services available to all tenants were included in the rental charge, including handibus, garden preparation, emergency call light, activity room, snow removal, lawn care, newsletter, weekly nursing calls, and preference for receiving health services at the nearby nursing home. Each renter pays for his or her own electricity for heating, cooling, and general use. Upon acceptance, each tenant must sign a written lease for a term certain, requiring, in addition to usual rental terms, that the tenant will vacate the apartment if the rent is not paid when due or when the tenant is no longer able to physically or mentally care for himself or herself. There have been no evictions for either cause. Sometimes the apartments are advertised in local media and are described as "supportive living environment for people 55 years of age and older." The apartments showed a loss of $2,713.32 in 1984 and a loss of $3,571.42 in 1985, after all expenses and depreciation had been deducted. An expense item for the

current year of $6,966.50 for attorney fees to prepare this exemption appeal was charged to the apartments. A part-time nurse visits the apartments once a week to provide limited health care services such as blood pressure testing and checking medication. Plaintiff is not affiliated with any church or religious denomination, and it does not claim a religious exemption. Of the tenants, only two or three regularly attend nursing home church services and activities. None of the tenants took the available meals at the nursing home costing $2 each.

Dr. James A. Thorsen, chairman of the gerontology program at the University of Nebraska, a program related to the social and psychological aspects of aging, testified on behalf of plaintiff. He gave his opinion that it is beneficial for a person to live in a sheltered environment particularly for frail and elderly people, such as that provided by the Village apartments as integrated with nursing home facilities, in order to be free from fear and anxiety, to have special services available at affordable prices, and to minimize possible transfer trauma in the event of involuntary removal from the apartment complex. There was no evidence that any prospective tenant, absent the availability of the apartment complex, would have had to experience substandard living conditions.

Prior to 1985, plaintiff had enjoyed tax-exempt status for all of its Kearney facilities located on a 35.19-acre tract under its exemption application describing the property as "Religious Non-Profit Long term care Facility." At a hearing on April 9, 1985, the Buffalo County Board of Equalization denied plaintiff's application to continue that exempt status for its eight apartment buildings. Plaintiff appealed that order to the district court, claiming that the apartments qualified for exemption under § 77-202(1)(c). After a full hearing in the district court, the trial judge made findings of fact and law, including: "The Petitioner is a charitable organization and is operated exclusively for the purpose of mental, social or physical benefit of the public." "The nature of the service is similar to the service provided in long term care but not as intensive and it is integrated into the general care center." "[T]he apartment units . . . constitute a reasonable and

necessary extension of the intermediate care facility and that when operated in connection with the care facility are for a charitable purpose as its dominant and primary use." The court order reversed the action of the board of equalization and granted to plaintiff tax-exempt status for the apartments for the tax years of 1985 and 1986.

Defendants assign five errors made by the trial judge in (1) finding that plaintiff had met its burden of proof, (2) failing to apply the "primary test" rule, (3) failing to find that the primary use of the apartments was for housing at cost and not for charitable use, (4) finding that the rental apartment units were exempt because they were operated in connection with a nursing home that was exempt, and (5) creating the "natural expansion" test to determine if the apartment buildings are used for charitable purposes.

Plaintiff describes its national corporate status and purposes as those of a nonprofit corporation generally enjoying federal and state exemptions as a nonprofit entity because of its policy not to deny anyone admission, and, once admitted, its policy not to remove anyone from any home for financial inability to pay. Its motto is "In Christ's Love, Everyone Is Someone." Its primary mission to society is to provide shelter and supportive services to older persons, the handicapped, and others in need. Plaintiff's major support comes from gifts and donations, averaging, in recent years, $2,659,500 annually. Concerning plaintiff's Kearney Village, its primary purpose is to operate integrated, multilevel care facilities to maintain aging, feeble, and infirm elderly persons in a sheltered living environment including the independent living units.

"An appeal from a judgment of the district court concerning action by a county board of equalization is heard as in equity and reviewed de novo." (Syllabus of the court.) *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988).

The burden of proving the right to an exemption is upon the claimant, *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983), to prove (1) that the subject property is owned by a charitable, educational, religious, or cemetery organization; (2) that the subject property is not being used for

financial gain or profit to the owner or user; and (3) that the subject property is being used exclusively for charitable, educational, religious, or cemetery purposes, *Immanuel, Inc. v. Board of Equal.*, 222 Neb. 405, 384 N.W.2d 266 (1986).

In 1984, the Legislature amended § 77-202(1)(c) by L.B. 891, which included the definition that a "charitable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons." This amendment gives some guidance to the first element in *Immanuel, Inc.*

We are not called upon to decide whether or not plaintiff met its burden to prove element one in *Immanuel, Inc.*, i.e., the eight apartment buildings were owned by a plaintiff qualifying as a charitable organization as defined in § 77-202(1)(c). Further, the evidence shows that the apartments are not operated for financial gain or profit. Rather, this appeal is focused on whether the apartments are used exclusively for charitable purposes.

Concerning the fifth assignment of error, there was some language in the court's order about "natural expansion of the services"; however, the court did not rely on it but, rather, made its findings in terms of "a reasonable and necessary extension of the intermediate care facility . . . ."

The first four claimed errors, being related, are considered together.

> Charity and charitable use are familiar terms in both lay and legal parlance, but they are not capable of exact definition. It may well be said that whether or not an act or a use of property is charitable must in each instance be determined upon its own facts. In the light of this uncertainty of definition and the exclusory exaction of the Constitution and the statute it appears that the determination may depend appropriately upon disclosed incidents of operation. *In short and in particular, does or does not the undisputed evidence disclose a use or uses which are exclusively charitable*?

(Emphasis supplied.) *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 706-07, 111 N.W.2d 719, 725 (1961).

Charity is defined as being something more than mere almsgiving or the relief of poverty and distress, and it has been given a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits. A nursing home or home for the aged and infirm operated on a nonprofit basis is exempt from taxation as a charitable institution. The fact that patients who are able to pay are required to do so does not deprive a charitable institution of its eleemosynary character. *Evangelical Lutheran Good Samaritan Soc. v. County of Gage*, 181 Neb. 831, 151 N.W.2d 446 (1967).

> The power and right of the state to tax property are presumed, and therefore tax exemption provisions are strictly construed, and their operation will not be extended by construction. The subject property which is claimed to be exempt must clearly come within the provisions granting tax exemption. However, this does not mean that the statutory language should not receive a liberal construction to carry out the express legislative intent. See *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986).

*Immanuel, Inc., supra* at 407, 384 N.W.2d at 268.

It is the use of the property as distinguished from the use of the income from the property that determines whether it is exempt from taxation. "Exclusively" means the primary or dominant use of the property, not an incidental use of the property. *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965).

Property which is owned and used primarily for the purpose of furnishing low-rent housing is not entitled to exemption from taxation as property which is owned and used exclusively for charitable purposes. *County of Douglas v. OEA Senior Citizens, Inc., supra*. See, also, Annot., 37 A.L.R.3d 565 (1971).

"In extending tax exemption to a hospital, only those facilities which are reasonably necessary for the competent operation of the hospital should receive tax-exempt status." *Immanuel, Inc. v. Board of Equal.*, 222 Neb. 405, 409, 384 N.W.2d 266, 269 (1986).

After considering the record, the statutes, including § 77-202(1)(c), and the authorities, we conclude for reasons hereafter stated that plaintiff failed to meet its burden of proof to establish by the evidence that its use of the apartment complex was exclusively for charitable purposes; that plaintiff was not entitled to property tax exemption status for its eight apartment buildings; and that the order of the district court setting aside the order of the board of equalization was error.

The primary use of the apartments was low-cost housing. See *County of Douglas v. OEA Senior Citizens, Inc., supra.* Rentals were fixed at a near break-even cost, including the expense of special services allocated among the tenants. Plaintiff sometimes advertised for tenants. Prospective tenants are first interviewed by staff persons to determine their ability to care for themselves. There was no showing that all persons age 55 years or older having a need would be favorably considered as tenants; to the contrary, all applicants must be (1) physically and mentally capable of caring for themselves and the rented space, and (2) able to climb stairs if the available space was on the second floor. The lease required the tenant to regularly pay the agreed cash rental, subject to eviction if either the rental is not paid when due or he or she is unable to care for himself or herself. Although the location of the apartments near the nursing home, the availability of some nursing home services, some mutual staff personnel, and the modest cost of the apartment accommodations including services were all favorable and beneficial to the tenants, as described by Dr. Thorsen, nevertheless, those benefits in themselves do not change the low-cost-housing character of the apartments.

The order of the district judge is set aside; judgment for the defendants-appellants is entered; and, upon remand, the order of the Buffalo County Board of Equalization, dated April 9, 1985, denying property tax exemption on plaintiff's eight two-story apartment buildings shall be reinstated.

REVERSED AND REMANDED WITH DIRECTIONS.

BUCKLEY, D.J., dissenting.

I cannot agree with the majority opinion that the primary use of the independent living units (apartments) was low-cost housing. Hospitals and nursing homes which have tax-exempt

status house their residents while performing their primary purpose of caring for the sick and elderly. Here, the independent living units are used to care for the elderly who do not require the more institutionalized care of the adjacent nursing home, but who nonetheless are in need of a sheltered environment, and many of whom alternatively would have to be placed in a nursing home. The village moved eight former Army barracks units onto its campus, located them close to its nursing home, and converted them into apartment units, with the combined nursing home and living units designed to be an integrated multilevel facility offering supportive services to all its residents.

The majority opinion describes many of the health care facilities available to the apartment residents and further acknowledges the testimony of gerontologist Dr. James A. Thorsen that the apartment units provide a sheltered environment, that they are integrated with the nursing home facilities, and that in addition to the medical services provided, they help the senior citizen to be free from fear and anxiety.

Dr. Thorsen specifically stated:

> The research in the field of gerontology supports the contention that living in such a setting [i.e., St. Luke's Good Samaritan Village] is of positive benefit in a variety of ways to older people. Especially frail, elderly people. You see the point of such a facility is to try to keep [them] as independent as possible so long as possible and essentially as an alternative to nursing home placement. *Being situated such as it is*, this facility is able to provide a range of services integrated into a continuum of care. And the research would indicate that this does in fact have a positive value in terms of both social well being and in terms of their morale and psychological well being, in terms of being a positive predictor [of] mental health.

(Emphasis supplied.)

He considered the village as an integrated facility for the care of the elderly.

There is ample evidence that many of the residents, though able to care for themselves in a physical sense, would not be able to function independently but for the support and proximity of

the nursing center nearby.

The majority opinion describes the services to the residents as "favorable and beneficial," but concludes that they do not change the primary use of the units as providing low-cost apartments. I am compelled to the opposite conclusion. The units are a part of the multilevel integrated facility of the Village. I agree with the trial court's finding that the units were operated in connection with the care facility and were a "logical extension" of the purpose of the care facility.

The trial court's decision was correct, and I would affirm.

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## LOREN E. GRONE, APPELLANT, V. LINCOLN MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

430 N.W.2d 507

Filed October 14, 1988. No. 86-1085.

1. **Appeal and Error.** As a general rule, the Supreme Court will dispose of a case on appeal on the theory on which it was presented in the trial court.
2. **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.
3. **Equity: Fraud.** A person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.
4. **Courts: Judgments: Appeal and Error.** Where the record demonstrates that the decision of a trial court is correct, although such correctness is based on a ground different from that assigned by the trial court, the Supreme Court will affirm.
5. **Principal and Agent: Fraud.** An agent and the principal are in a fiduciary relationship. This relationship places special burdens on the agent, including the duty to disclose material facts to the principal, and failure to so disclose constitutes fraud.
6. **Contracts: Rescission: Fraud.** To rescind a contract for failure to disclose amounting to a misrepresentation, the evidence must show that such facts were within the knowledge of the person charged, that a duty to speak existed, that such information was material, and that the suppression of the information tended to induce action which the other party would not otherwise have taken.

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

Edward F. Carter, Jr., of Barney, Carter & Johnson, P.C., for appellant.

James M. Bausch, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

WHITE, J.

This action was brought as an action in equity in the district court for Lancaster County by the appellant, Loren E. Grone, seeking (1) an order determining whether Grone had any right to commissions on renewal premiums under the terms of a general agent's main contract between Grone and Lincoln Mutual Life Insurance Company (Mutual), (2) an accounting and a declaration of the commissions allegedly due under the contract, and (3) a determination of whether the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1984), was applicable.

Trial in the district court was bifurcated, and evidence was received on the issues of whether Grone had a right to commissions and, if so, whether these commissions can be defined as "wages" within the Nebraska Wage Payment and Collection Act. Trial for an accounting of renewal premiums upon which commissions were claimed due was reserved to a later date.

The specific issues presented to the district court were (1) whether Grone performed all obligations required by the contract, thereby entitling him to commissions in renewal premiums; (2) whether the parties had a valid retroactive resignation agreement or whether the agreement to accept Grone's retroactive resignation was induced by fraud, making Mutual's subsequent termination for cause in 1983 effective; (3) whether Grone's claim for commissions was barred by the doctrine of unclean hands; and (4) if Grone was entitled to commissions, whether those commissions were covered by the provisions of the Nebraska Wage Payment and Collection Act.

In an order dated August 1, 1986, the district court dismissed Grone's petition, finding that Grone came into court with unclean hands, thereby barring any equitable relief.

The procedural posture of this case is somewhat confusing. Both parties refer to this as an action in equity, and the case was tried as an equitable action. However, it is not at all clear that this action should be in equity. In actuality, the case appears to be no more than a proceeding brought to recover commissions allegedly due under an employment contract. Nonetheless, because the parties tried the case in the district court as an action in equity, we follow the general rule that we will dispose of the case on appeal on the theory on which it was presented to the trial court. *Cimino v. W. A. Piel, Inc.*, 227 Neb. 196, 416 N.W.2d 505 (1987); *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

In an appeal of an equity action, the Supreme Court tries factual questions de novo and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court heard and observed witnesses and accepted one version of the facts rather than another. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988); *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988); *Ames v. George Victor Corp.*, 228 Neb. 675, 424 N.W.2d 106 (1988).

The facts in this case are fairly complex. On February 1, 1964, Grone and Mutual entered into a contract whereby Grone became a general agent of Mutual. Grone was apparently a very successful agent for Mutual and was satisfied with working exclusively for Mutual until sometime in 1983.

The Mutual employment contract expressly forbids, in paragraph 2, a general agent from selling insurance for another company. In practice, however, general agents for Mutual are authorized to act as agents for other companies because many insurance products exist that Mutual does not offer. However, this authorization does not extend to competing directly with Mutual for policyholders and deliberately rolling over Mutual's policies to another insurance company to the detriment of Mutual.

In the early 1980s some insurance companies began offering a product called universal life. Universal life policies permit the policyholders to pay in cash over the required premium so that the excess cash will earn interest. This excess is often obtained by "rolling over" the built-up cash values in any policy being canceled into the new universal life policy. Mutual did not sell universal life, nor did it intend to do so in the future. By 1983 Grone was becoming concerned that he was losing business to companies which sold universal life.

On June 2, 1983, Grone submitted an application to Lincoln National Life Insurance Company (National) seeking to become an agent for National. National sold universal life insurance. The application was approved, and in June of 1983 National took the steps necessary to have Grone licensed as its agent in Nebraska, effective July 1. At the time he applied for a position with National, Grone had decided to resign as a general agent for Mutual.

In June of 1983 National provided Grone with training, a computer, and other materials to assist him in selling National insurance policies. On June 28 Grone began utilizing the computer to prepare personalized printouts to present to Mutual's policyholders, intending to use these printouts to induce Mutual's policyholders to replace their Mutual policies with policies written by National.

On June 30 Grone prepared and signed a letter of resignation addressed to Mutual. The letter was delivered to National but not to Mutual at that time.

Starting July 5, 1983, Grone began making personal calls on Mutual's policyholders, and successfully induced them to cancel their Mutual policies and convert the cash values from them to policies written by National. To gain access to the cash values that had accumulated in the Mutual policies, Grone had the policyholders sign a letter addressed to Mutual requesting a loan on the existing Mutual policies. These loan request letters were not received by Mutual until after Grone's resignation had been submitted. Between July 5 and 7, Grone had sold over $1 million of life insurance to Mutual policyholders by getting them to agree to cancel their Mutual policies and switch to National.

On July 7, William Hawkins, vice president of agency for Mutual, telephoned Grone in order to determine Grone's need for Mutual calendars for 1984. Although Grone knew at that time he would not be working for Mutual in 1984 and had just sold over $1 million of National life insurance to Mutual policyholders, he merely told the vice president he was undecided as to the number of calendars he would need.

On or about July 16, Grone typed a postscript on his resignation letter to Mutual, and Mutual received the letter of resignation from Grone on July 18, 1983. After receipt of Grone's resignation, Mutual agreed to accept it in a letter dated July 19. When Mutual sent its letter accepting Grone's resignation, Grone's agency was deemed terminated as of July 1, 1983. At the time this resignation was accepted, Mutual knew nothing about Grone's activities on behalf of National. After Grone's resignation was accepted and the records of Mutual policyholders were requested, Grone retained copies of these records for his own use in convincing policyholders to replace Mutual policies with National universal life policies.

Grone's conduct in July regarding switching Mutual policies to National policies finally came to light in August of 1983. On September 7, Mutual sent Grone a letter rescinding the acceptance of the retroactive resignation and terminating him for cause effective September 7. Under the employment contract a termination for cause effectively bars any right to future renewal commissions.

The district court found Grone's claim barred by the doctrine of unclean hands. According to the doctrine, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. 27 Am. Jur. 2d *Equity* § 136 (1966). See *Lewis v. Gallemore*, 175 Neb. 279, 121 N.W.2d 388 (1963).

The actual controversy in issue in this case is not the amount of commissions due Grone, or even the fact of whether, under the contract, Grone is entitled to these commissions. Instead, the controversy centers around the effectiveness of the acceptance of Grone's resignation retroactive to July 1, 1983. If the resignation is found to be effective, any conduct of Grone after July 1 cannot be examined to determine whether such

conduct was inequitable, as no duty was owed by Grone to Mutual after July 1. Therefore, Grone would be entitled to the renewal commissions due him as provided for in the contract. However, if instead the resignation is seen as ineffective, the termination for cause issued in the letter from Mutual dated September 7 will be effective, and Grone's right to any renewal commissions will likewise be terminated.

Although the doctrine of unclean hands could be said to apply and bar Grone's claim for renewal commissions in light of his conduct in obtaining the retroactive termination agreement, we believe other more appropriate grounds exist to bar Grone's 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, 375 N.W.2d 129 (1985).

We believe that the more appropriate ground for barring Grone's claim is that the contract for termination allowing Grone to resign retroactive to July 1, 1983, was induced by fraud. Because we find that the agreement to accept Grone's resignation effective July 1 was obtained by fraud, this agreement was ineffective, and the termination of Grone for cause on September 7 is operative, thereby precluding Grone from obtaining any renewal commissions under the general agent contract.

An agent and the principal are in a fiduciary relationship. *Walker Land & Cattle Co. v. Daub,* 223 Neb. 343, 389 N.W.2d 560 (1986). The existence of a fiduciary relationship places special burdens on the agent to refrain from acts harming the principal. Although appellant Grone is generally correct when he states he did not affirmatively lie to Mutual regarding his activities with Mutual, he did fail to disclose certain information. " '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.' " *State ex rel. NSBA v. Douglas,* 227 Neb. 1, 23, 416 N.W.2d 515, 529 (1987); *Midland Nat. Bank, etc. v. Perranoski,* 299 N.W.2d 404, 413 (Minn. 1980). When a relationship of confidence and trust

exists, the fiduciary has an obligation to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud. *Douglas, supra.*

In this case Grone failed to tell Mutual that he had been working as an agent for National since July 1, 1983, when he mailed his resignation to Mutual on July 16. More importantly, Grone failed to tell Mutual that he was inducing Mutual's clients to switch to National policies while he was still believed to be working as an agent for Mutual. In his testimony Hawkins stated that he would not have accepted a retroactive resignation on July 19, 1983, if he had known what he had found out by September 7: that Grone was purposefully inducing Mutual policyholders to switch to National before resigning as an agent for Mutual.

It is evident that Grone attempted to conceal facts from Mutual until he could be assured of receiving his June commissions from it. Additionally, Grone needed to be certain Mutual did not know of his conduct, otherwise he would have been terminated for cause and would lose all rights to renewal commissions, as finally happened on September 7 when Mutual discovered what Grone had been up to. The specific instances of concealment and conduct adverse to his fiduciary's interest include: (1) The use of Mutual's data and information on its policyholders in a concentrated effort to sell those Mutual policyholders on the idea of canceling their Mutual life insurance policies and buying life insurance policies issued by National; (2) after Grone had had the Mutual policyholders he contacted sign the letter addressed to Mutual requesting a loan on their then-existing Mutual policies, the letters were not received by Mutual until after Grone's resignation had been submitted, and Grone had held his letter of resignation until July 16, 1983, for the purpose of ensuring that he would receive his June 1983 commission check from Mutual before Mutual had notice of his resignation and the loan requests which had been signed by Mutual policyholders; (3) Grone did not actually submit his resignation to Mutual until July 16, 1983, and it was not accepted until July 19, and, therefore, prior to July 19 when he was selling National policies and converting Mutual policies over to National, he was acting as if he was no longer an agent

of Mutual, even though prior to July 19 Mutual was entitled to his loyalty; (4) Grone's conduct in converting Mutual policies to National prior to July 19 amounted to Grone's taking unfair advantage of Mutual to Mutual's financial detriment; and (5) after he had submitted his resignation and it had been accepted, Grone retained copies of Mutual policyholder records for his own use to the detriment of Mutual's business interests.

These facts are sufficient to support a finding that the retroactive resignation agreement was obtained by fraud. Grone's acts meet the standard set out in *Richardson v. Waterite Co.*, 169 Neb. 263, 99 N.W.2d 265 (1959), where it was held that silence constitutes a misrepresentation sufficient to support rescission of a contract where the "facts were within the knowledge of the person charged, that a duty to speak existed, that such information was material, and that the suppression of the information tended to induce action which the other party would not otherwise have taken." *Id.* at 269-70, 99 N.W.2d at 271. The retroactive termination agreement was therefore validly rescinded, and the September 7 termination of Grone for cause is operative, terminating any right to future renewal commissions under the general agent's contract.

The judgment of the district court is therefore affirmed.

AFFIRMED.

HASTINGS, C.J., and GRANT, J., not participating.

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ROBERT TOPIL ET AL., APPELLANTS, V. HUB HALL COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

430 N.W.2d 306

Filed October 14, 1988. No. 87-108.

1. **Motions to Dismiss.** In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. Moreover, in considering the evidence for the purpose of ruling on such a motion, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn

from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.

2. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
3. **Contractors and Subcontractors: Master and Servant: Negligence.** Where two or more independent contractors, or a general contractor and one or more subcontractors, are engaged in work on the same premises, it is the duty of each contractor, in prosecuting his work, to use ordinary and reasonable care not to cause injuries to the servants of another contractor.
4. **Invitor-Invitee: Negligence.** Generally, there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury.
5. **Negligence.** One who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.

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

Clarence E. Mock, of Johnson and Mock, for appellants.

Jack G. Wolfe, of Wolfe, Anderson & Beverage, for appellee Kearns.

Douglas L. Kluender, of Healey, Wieland, Kluender, Atwood & Jacobs, for appellee Shearer.

Randall L. Goyette and Gail S. Perry, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Hub Hall Co.

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

BOSLAUGH, J.

The plaintiff Robert Topil was injured on March 8, 1983, when he fell from a false ceiling joist while helping to install heating ducts in a house under construction in Lincoln, Nebraska. At the time of the accident, the plaintiff was a part-time employee of Arctic Air Conditioning & Heating Inc., the heating and cooling subcontractor. Arctic was joined as a plaintiff because of workers' compensation that had been paid to the plaintiff Topil.

The property under construction was owned by the

defendant Hub Hall Company, which was acting as the general contractor. The defendants Larry Shearer and Michael Kearns were the framing subcontractors.

The defendant Hall had notified Arctic that the house was ready for the installation of the heating system.

Topil and another Arctic employee, Tom Staack, were working in the garage area when the accident happened. The garage, which was to be a two-car garage, was below a bedroom. The ductwork had been brought up to the bottom of the bedroom floor joists, which were 2-by-10 lumber, and the plaintiff and Staack were fastening the ductwork to the bedroom floor joists.

A false ceiling was to be constructed in the garage several feet below the bedroom floor joists. A 2-by-6 "ribbon board" had been nailed to the inside of the garage wall studs, and the 2-by-6 false ceiling joists were then toenailed into the ribbon board. The false ceiling joists were supported in the center by a 2-by-6 "nailer" hung from a steel beam which was a part of the support for the bedroom floor. There was no access or "scuttle hole" in the false ceiling, and its joists were intended to support only themselves and the drywall which later would be fastened to them. Kearns estimated the vertical distance between the bedroom floor and the false ceiling joists as "approximately 24 inches or maybe even a little less than that." According to the plaintiff, the vertical distance between the false ceiling joists and the bedroom floor joists was approximately 3 feet, and was sufficient so that he could sit on a false ceiling joist and the bedroom floor joists would be above his head.

According to Kearns, the framing in the garage area was not complete because the framing anchors had not yet been installed on the false ceiling joists. All that remained there was to install the anchors, which were not available at that time, "[c]heck them over and make sure everything was nailed up, you know."

Shearer testified, in a deposition, that he had used a plank across the false ceiling joists to support himself while nailing the cross-bridging between the bedroom floor joists.

At the time of the accident, the plaintiff, who weighed approximately 210 pounds, was sitting on a false ceiling joist.

He was supporting his weight entirely on the joist. Staack was working from a stepladder.

The plaintiff had crawled across approximately eight false ceiling joists before he reached the one which caused him to fall. Some planks to hold tools and supplies had been placed across the false ceiling joists, but were not being used as support for the plaintiff. The accident occurred when the plaintiff crawled onto a false ceiling joist that had only one nail in it to hold it to the ribbon board. The false ceiling joist pulled away from the ribbon board, causing the plaintiff to fall to the dirt floor of the garage and to fracture his ankle.

At the close of the plaintiffs' evidence, the trial court sustained the defendants' motion for a directed verdict and dismissed the action. The plaintiffs have appealed.

"In reviewing a directed verdict the Supreme Court assumes the truth of material and relevant evidence presented by the nonmoving party." *Greening v. School Dist. of Millard*, 223 Neb. 729, 731, 393 N.W.2d 51, 54 (1986). The proper standard for the trial court in considering a directed verdict or motion to dismiss is also well settled in Nebraska law.

> [I]n sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. . . . Moreover, in considering the evidence for the purpose of ruling on such a motion, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.

(Citations omitted.) *Tiede v. Loup Power Dist.*, 226 Neb. 295, 299, 411 N.W.2d 312, 316 (1987). "For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty." *Id.*

The plaintiffs alleged that the defendant Hall was negligent in failing to provide safety nets, safety belts, and scaffolding;

failing to properly inspect, control, and supervise the work of Shearer and Kearns; representing to the plaintiff that the false ceiling joists were sufficiently secured to allow them to be used for support; and failing to warn the plaintiff of the defectively secured false ceiling joist. Most of these allegations had no support in the evidence. There was no evidence of any duty on the part of Hall to furnish safety nets, safety belts, or scaffolding to the plaintiff. There was no evidence that Hall represented to the plaintiff that the false ceiling joists would support his weight. And there was no evidence of a duty on the part of Hall to warn the plaintiff that one false ceiling joist was defectively secured to the ribbon board.

The plaintiffs argue that Hall, by the exercise of reasonable care, should have discovered the defectively secured false ceiling joist and should have expected that the plaintiff would not discover the danger. The plaintiffs assume that Hall should have anticipated that the plaintiff Topil would use the false ceiling joists to support himself. The evidence is that the joists were not intended for any purpose other than to support the drywall which would be attached to them and, as distinguished from floor joists, were not intended to support heavy loads.

> "Where two or more independent contractors, or a general contractor and one or more subcontractors, are engaged in work on the same premises, it is the duty of each contractor, in prosecuting his work, to use ordinary and reasonable care not to cause injuries to the servants of another contractor . . . ."

*Raile v. Toews*, 165 Neb. 184, 189, 84 N.W.2d 199, 202 (1957); *Rumsey v. Schollman Bros. Co.*, 156 Neb. 251, 55 N.W.2d 668 (1952).

As owner of the premises and general contractor, the defendant Hall owed the plaintiffs a duty of exercising ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation. However, "[G]enerally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury." *Tiede, supra* at 300, 411 N.W.2d at 316.

*McKenzie v. Cost Bros., Inc.*, 487 Pa. 303, 409 A.2d 362

(1979), cited by the plaintiffs, is distinguishable on its facts. In the *McKenzie* case, the plaintiff was injured when he stepped on an unstable lintel while laying ceiling/floor planks. The distinction lies in the fact that the lintel was intended to support precast concrete planks which would act as the ceiling of the level below *and the floor* of the next story, and the defendant knew or should have known that the plaintiff would be walking upon the walls, of which the lintel was a part, while laying the precast concrete planks. Unlike the false ceiling joists in this case, which were intended to support only a false ceiling, the lintel in the *McKenzie* case was intended to support the floor of the next story of the building.

There was nothing about the attachment of the false ceiling joists to the ribbon board which was concealed. The butt joint where each false ceiling joist was nailed to the ribbon board was exposed, and its method of attachment was open and obvious to everyone, including the plaintiff.

It would be an intolerable burden to require a general contractor to each day inspect in detail the work of every person working on the job, so that in the event some work was defective a warning could be given immediately to everyone on the job. The general contractor's duty was only to exercise reasonable care. The plaintiffs' evidence in this case failed to show a breach of that duty.

As to the defendants Shearer and Kearns, the plaintiffs alleged that the defendants were negligent in failing to install joist hangers, in failing to properly secure horizontal joist hangers in a workmanlike manner, in failing to inspect, in failing to warn, and in representing that the false ceiling joists were sufficiently secured.

So far as the joist hangers are concerned, the evidence is that they were unavailable and yet to be installed. There is no evidence that Shearer and Kearns represented to Topil that the false ceiling joists were sufficiently secured or that they would support the plaintiff's weight. The fact that the one false ceiling joist was held by only one nail would be evidence of negligence if it could be said that Shearer and Kearns should have anticipated that the plaintiff would use a false ceiling joist to support himself instead of using a ladder, scaffolding, planks across the joists, or other device as support.

The plaintiffs offered no expert testimony to establish the skill and knowledge of framing carpenters, such as the defendants Shearer and Kearns, normally possessed by members of that trade in good standing in similar communities. As we stated in *Doupnik v. Usher Pest Control Co.*, 217 Neb. 1, 346 N.W.2d 699 (1984), their performance must be measured against that which would have been made by members of their trade in good standing in similar communities. One who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities. See, also, *Zimmer v. Brandon*, 134 Neb. 311, 278 N.W. 502 (1938).

The record in this case fails to show a breach of any duty owed to the plaintiffs by the defendants. The judgment is, therefore, affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. PATRICK L. FRASER, APPELLANT.
430 N.W.2d 512

Filed October 14, 1988. No. 87-1081.

1. **Judgments: Motions for Mistrial: Juries: Trial: Appeal and Error.** Reversal of a judgment may be ordered for failure of the trial court to grant a mistrial when a proper admonition or instruction to the jury, capable of removing the damaging effect of the event, is not given.
2. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
3. **Prosecuting Attorneys.** Whether misconduct on the part of a prosecutor is prejudicial to the defendant depends largely on the facts of each case.
4. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** The general rule is that remarks made by the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde 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. The defendant-appellant, Patrick L. Fraser, was charged by information with first degree sexual assault and use of a weapon to commit a felony. He pled not guilty to both counts.

The case was tried before a jury. Defendant admitted that he had sexual intercourse with the complainant on the date in question, but alleged that he had done so with her consent. During the State's closing argument, defense counsel moved for a mistrial based on statements made by the prosecutor. That motion was overruled. The jury returned verdicts of guilty on both counts, and the defendant's subsequent motion for new trial was overruled. He was sentenced to a term of 6 to 9 years' imprisonment on count I and 2 to 3 years' imprisonment on count II, with the sentences to run consecutively. Defendant appeals to this court, assigning as error the action of the district court in denying his motion for a mistrial based on the improper statements made by the prosecutor during final argument. We reverse and remand for a new trial.

The record discloses the following. On August 6, 1986, at approximately 4:15 a.m., the victim called the Douglas County sheriff's office and reported that she had just been sexually assaulted in her trailer home in Elk City, Nebraska. She told the investigating officers that although she could not see her assailant because it was too dark, he had threatened her with a serrated knife during the incident, and she believed he had driven away in a U-Haul van.

The officers first made contact with the defendant at his residence in rural Elkhorn, after observing a U-Haul van

parked at that location. A serrated knife was found near the van. Defendant was arrested on an outstanding traffic warrant and taken to the Douglas County sheriff's office for questioning.

The victim subsequently made a voice identification of the defendant. She later recognized him as the delivery man for a local florist and as a patron in the Ponderosa Bar, her place of employment, a few weeks after Mother's Day in 1986. Although the victim testified she did not otherwise personally know the defendant, he testified that they met in the Ponderosa Bar during January or February 1986; that he and the victim developed a "friendship"; and that they had engaged in sexual intercourse twice (once in the victim's trailer home, where she lived with her husband and daughter, and once in the defendant's truck) before the August 6 incident. The defendant also admitted he had sexual intercourse with the victim on August 6, 1986, but claimed it was a consensual act.

The error alleged in this appeal stems from the testimony of witnesses called by the State. Defendant's mother testified that in the late evening of August 6, she had gone to the Ponderosa Bar "[t]o see what that was all about" and do some investigating. She then met Gena Anderson, the defendant's girlfriend, at the bar, and the two went to the Kwik Shop in Elkhorn, where the victim's husband worked at night. In response to the prosecutor's question as to whether she made any allegations to the husband, defendant's mother testified, "Based on the opinion I had formed at the bar, I told him that she [the victim] was a tramp."

Anderson then testified that she had lived with defendant for approximately 5 years and was living with him in Anderson's home in rural Elkhorn on August 6, 1986. She was the owner of Fawn Hollow Floral & Antiques in Elkhorn and had on occasion employed the defendant as a delivery man. On August 5, 1986, the defendant had moved furniture to Council Bluffs, Iowa, for Anderson, in a U-Haul van. Anderson stayed in Council Bluffs, and defendant testified he returned to the Elk City area that night. Anderson's testimony generally contradicted a statement given by defendant to the sheriff's office.

She also testified that she met defendant's mother at the Ponderosa Bar on August 6; that the two then went to the Kwik Shop in Elkhorn, where the victim's husband worked; and that there defendant's mother created a scene and made derogatory accusations about the victim and her conduct.

On cross-examination of Anderson, on the subject of the confrontation of the victim's husband, defendant elicited the following testimony:

> Q. Did you personally say anything to the clerk at the Kwik Shop?
>
> A. Yes.
>
> Q. Without relating what he said, what did you tell him?
>
> A. I told him that he knew that this whole thing was utterly ridiculous, that he had to know that his wife was having an affair before this, and that this was not the first one, therefore, he knew that there could be no rape involved.

The subject of the victim's conduct was again inquired into by the prosecutor on his redirect examination of Anderson. During the redirect examination, defense counsel objected to a question asked by the State as leading, and the court stated that the prosecutor had, in effect, requested "the Court to declare the witness in legal terms a legally hostile witness. The Court has so declared and the objection is overruled." The court was following the requirements of Neb. Rev. Stat. § 27-611(3) (Reissue 1985). The record then shows the following:

> Q. Didn't you just tell us earlier that you told him that there was an ongoing affair going on between his wife and-
>
> A. No, I did not, I said that I had heard that she had been having affairs with other people. I did not say ongoing affair with Mr. Fraser.
>
> . . . .
>
> Q. . . . Let's assume for the sake of argument that what you are saying, these rumors, let's say it was true that she had had an affair with Mr. A, B and C, but not with the defendant, how does that clear the defendant of a rape charge?
>
> A. It doesn't . . . .

The defendant's assignment of error relates directly to the prosecutor's remarks, relating to the foregoing testimony, made during the State's rebuttal argument to the jury. The record contains defendant's argument to the jury and the rebuttal portion of the State's closing argument. No contention is made by the State that the prosecutor's remarks hereinafter set out were in response to anything said by defendant's counsel in his argument. The doctrine of invited response does not apply. See *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

In the statement complained of, the prosecutor said to the jury:

> She [the victim] has to sit up there and have every tiny aspect of her background gone over with a microscope. And what came out, that she got up and goofed around on a stage one time in April of 1986, and that was it. That was it. So that's the scarlet letter, that's what they are trying to paint for you. That is ridiculous, absolutely absurd.
>
> *The best became my witness, declared hostile by the judge, there were rumors, rumors. Well I can guarantee you if rumors had any substance to them, we would have had witnesses.*
>
> MR. RILEY: I'm going to object to that and move for a mistrial. . . .
>
> THE COURT: . . . [Y]our objection is sustained, your motion for mistrial is overruled. The defendant doesn't have to prove anything, the jury has been told before and will be told again in written instructions.

(Emphasis supplied.)

The emphasized statement was improper. The defense in this case was consent. Neb. Rev. Stat. § 28-321(2) (Reissue 1985) provides:

> Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair . . . .

Although no actual evidence was offered, both the State and the defendant, without objection by the adverse party, elicited hearsay testimony, which did not rise past the level of rumor or innuendo, as to the victim's past sexual behavior. In view of § 28-321, such testimony was improper. Prejudice to defendant, however, did not occur until the prosector chose to "guarantee" that if witnesses were available to prove the rumored conduct, "we would have had witnesses." The prosecutor knew, or should have known, that such specific evidence would not be admissible under the circumstances of this case.

The trial judge attempted to cure the error resulting from the prosecutor's statement when he immediately told the jury that "[t]he defendant doesn't have to prove anything" and when he told the jurors he would again so inform them in written instructions. The problem was, in this case, that the defendant, whether he desired to or not, could not properly adduce evidence to prove the facts that the prosecutor said defendant could prove. The prosecutor misled the jury when he so stated.

The remaining issue before us is whether this impropriety denied the defendant a fair trial. A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury, and would thus result in preventing a fair trial. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). On review, reversal of a judgment may be ordered for failure of the trial court to grant a mistrial when a proper admonition or instruction to the jury, capable of removing the damaging effect of the event, is not given. See, *Wamsley v. State*, 171 Neb. 197, 106 N.W.2d 22 (1960); *Lybarger v. State*, 177 Neb. 35, 128 N.W.2d 132 (1964). We recognize that the decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987); *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987).

Whether misconduct on the part of a prosecutor is prejudicial to the defendant depends largely on the facts of each case. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). The

general rule is that remarks made by the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial. *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985). In this case, the prosecutor's remarks did rise to the level necessitating a reversal. The prosecutor called the defendant's mother and the defendant's girlfriend as witnesses. Although those witnesses first testified on other matters, the witnesses introduced testimony as to rumors concerning "affairs" of the victim with other men. The State thus indicated such testimony was relevant and admissible. The prosecutor then identified one person who testified to such rumors as the witness "declared hostile by the judge," further pinpointing her testimony. The prosecutor left the impression with the jury that the proof of such rumors would amount to a defense of the charge against defendant and that defendant could not furnish such proof. Such an impression is obviously wrong, and the prosecutor's guarantee that such testimony could be elicited, if it existed, was improper. The defense was consent, and the prosecutor's statement was misleading.

There was ample evidence before the jury to sustain the conviction. Defendant does not contend to the contrary. There was some evidence, however, which, if believed, could have resulted in verdicts of not guilty. The evidence, although legally sufficient, did not compel verdicts of guilty. In those circumstances, we cannot say the prosecutor's remarks were harmless error. The trial court erred in not granting defendant's motion for a mistrial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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## STATE OF NEBRASKA, APPELLEE, V. JOHN EDWARD BERKMAN, APPELLANT.

430 N.W.2d 310

Filed October 14, 1988. No. 88-133.

1. **Trial: Witnesses.** In a bench trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony.

2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the 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 finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Evidence: Intent.** The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
4. **Sexual Assault: Proof.** In proving "sexual contact," as defined in Neb. Rev. Stat. § 28-318(5) (Reissue 1985), the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose.
5. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Affirmed.

Robert A. Ide, of Aten, Noble & Ide, for appellant.

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

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

GRANT, J.

On February 18, 1987, the defendant-appellant, John Edward Berkman, was charged in the district court for Phelps County with sexual assault of a child in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1985). Following a bench trial, the court found defendant guilty as charged and ordered a presentence investigation. The court determined the defendant was not a mentally disordered sex offender and sentenced him to the Nebraska Penal and Correctional Complex for a term of 16 months to 3 years, with credit for 191 days served pending trial. Defendant appeals, contending that the district court erred in finding that there was sufficient evidence to establish his guilt beyond a reasonable doubt and in abusing its discretion by imposing an excessive sentence. We affirm.

In a bench trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the

weight to be given to their testimony. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the 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 finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988); *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988).

Viewing the evidence in the light most favorable to the State, the record shows that the incident in question occurred on the night of November 4, 1986, in Holdrege, Phelps County, Nebraska, in an apartment occupied by the victim, her two brothers, and her mother. On that date, the victim was 13 years old and the defendant was 24 years old. The defendant lived in the apartment across the hall and had been dating the victim's mother.

The victim testified that on the night of November 4, 1986, she had been downstairs in her grandmother's apartment. She returned to her own apartment at about 9 p.m. to get her pajamas from her bedroom. At that time, the defendant was in the living room of the victim's apartment with an 11-year-old brother of the victim. The victim went into the bedroom, and defendant and the younger brother followed her. Defendant told the brother to leave the room, and he did so. As the victim stood facing the dresser, defendant approached her from behind. He hugged her around the shoulders and then, while asking her what kind of pop she wanted, touched her, as the victim testified, "In the boobs and the Suzy Q." Defendant rubbed her on the breasts and genital area and kissed her neck.

The victim told defendant to stop, but he did not do so until the younger brother returned to the bedroom about a minute and a half later. The younger brother testified that the defendant quickly moved away from the victim when he saw the brother. The victim reported the incident the next day to her older sister and her mother, and on November 14, 1986, to Officer Valerie Miller of the Holdrege Police Department.

Officer Miller testified that the defendant told her he probably touched the victim on the breasts but that he did not mean anything by it and that he had kissed the victim. Defendant also told the victim's mother that he might have accidentally touched the victim on the breast.

The defendant testified that in 1984 he had been convicted of a third degree sexual assault involving his 7-year-old sister, placed on 2 years' probation, and ordered to undergo counseling.

Defendant contends that the State failed to produce sufficient evidence of criminal intent. Specifically, he argues the State did not prove that his touching of the victim was intentional or for the purpose of sexual gratification.

The crime of sexual assault of a child is defined in § 28-320.01(1): "A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." "Sexual contact" is defined in Neb. Rev. Stat. § 28-318(5) (Reissue 1985) as

> the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. . . . Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

We held in *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987), that in proving "sexual contact," as defined in § 28-318(5), the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose. The defendant admitted to the victim's mother and to Officer Miller that he came up behind the victim in her bedroom, kissed her, and touched her on the breast, albeit by accident. The victim and her younger brother testified to defendant's actions in the

bedroom. This testimony and the acts of hugging and kissing the victim and rubbing her breasts and genital area for approximately 1 1/2 minutes are circumstances from which the trial court could find the defendant's conduct was intentional and for the purpose of his sexual arousal or gratification. Accordingly, defendant's contention that the evidence did not establish his criminal intent is without merit.

In his other assignment of error, defendant claims the trial court abused its discretion in sentencing him to a term of 16 months' to 3 years' imprisonment. The penalty for violation of § 28-320.01 is a maximum sentence of 5 years' imprisonment, a $10,000 fine, or both. There is no minimum sentence. A sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge. *State v. Thomas,* 229 Neb. 635, 428 N.W.2d 221 (1988); *State v. Ladehoff,* 229 Neb. 111, 425 N.W.2d 352 (1988). We find no abuse of discretion, particularly in view of defendant's prior conviction.

The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. DOUG ANTHONY HARTON, APPELLANT.

430 N.W.2d 313

Filed October 14, 1988. No. 88-446.

1. **Effectiveness of Counsel: Pleas.** The voluntariness of a plea entered upon the advice of counsel depends on whether the advice was within the range of competence demanded of attorneys in criminal cases.
2. **Effectiveness of Counsel: Pleas: Proof.** To assert a successful claim of ineffective assistance of counsel, a criminal defendant must prove (1) that his or her attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that the defendant's interests were not conscientiously protected; and (3) that if the defendant's attorney had been effective, there is a reasonable probability that the results would have been different. In order to satisfy the third, or prejudice, requirement in the context of a plea, the defendant must show that there is a reasonable probability that,

but for counsel's errors, defendant would not have pled and would have insisted upon going to trial.

3. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the finding of the postconviction hearing court will not be disturbed unless clearly erroneous.

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

Craig D. Wittstruck, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Doug Anthony Harton, pursuant to his plea, was adjudged guilty of second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 1985), and was thereafter sentenced to imprisonment for a period of 35 years. More than 5 years later, he moved for vacation of the judgment and sentence under the provisions of the Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Following an evidentiary hearing, the motion was denied. In this court, Harton assigns as error the postconviction hearing court's determination that the evidence fails to establish his plea was invalid because of the ineffective assistance of counsel. We affirm.

The record reveals that Harton and the victim shared living quarters and certain possessions. On the night in question, Harton, after spending some time consuming alcohol, went to the apartment the victim occupied and asked for the return of a radio he had loaned to the victim. Harton claims that during the course of the altercation which ensued, the victim came at him with a knife. Harton admitted that he had stabbed the victim more than once; in point of fact, the victim's body displayed multiple penetrating stab wounds, including wounds into the heart, left lung, left hip, and right forearm. Examination of

Harton showed no signs of physical violence; not only did he not display any stab wounds, he displayed no abrasions.

Harton was originally charged with felony murder, in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1985), by killing while perpetrating or attempting to perpetrate a robbery. Such an offense constitutes murder in the first degree and is punishable by life imprisonment or death. Neb. Rev. Stat. §§ 28-105 (Reissue 1985) and 28-303. Harton's attorney persuaded the State that it could not prove such a charge, inasmuch as the radio which precipitated the altercation and killing belonged to Harton. The State capitulated to that argument and filed an amended information charging Harton with first degree murder, in violation of § 28-303(1), by killing purposely and with deliberate and premeditated malice, an offense also punishable by life imprisonment or death. Ultimately, Harton pled guilty to second degree murder by killing intentionally but without premeditation in violation of § 28-304. Such an offense is punishable by imprisonment for a period ranging from 10 years to life. §§ 28-105 and 28-304.

Harton claims his attorney coerced the plea by stating that he had discussed the sentence with the prosecutor and judge and by promising that the sentence would not exceed 15 years or, according to another of Harton's versions, 20 years. Harton also claims that his attorney instructed him to answer in the negative any question put to him by the judge as to whether any promises were made to him to induce his plea. Harton argues that by representing he had discussed the sentence to be imposed with the prosecutor and judge, by making the aforedescribed promise, and by instructing him as aforesaid, his attorney was ineffective, thereby rendering his plea involuntary and thus invalid.

The voluntariness of a plea entered upon the advice of counsel depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). We have said that to assert a successful claim of ineffective assistance of counsel, a criminal defendant must prove (1) that his or her attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2)

that the defendant's interests were not conscientiously protected; and (3) that if the defendant's attorney had been effective, there is a reasonable probability that the results would have been different. *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988); *State v. Propst*, 228 Neb. 722, 424 N.W.2d 136 (1988); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to satisfy the third, or prejudice, requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, defendant would not have pled and would have insisted upon going to trial. *Hill v. Lockhart, supra*. A reasonable probability consists of a probability sufficient to undermine confidence in the outcome. *State v. Broomhall*, 227 Neb. 341, 417 N.W.2d 349 (1988).

Assuming, but not deciding, that if Harton's claim were proved his attorney would be shown to have been ineffective, the fact of the matter is that the attorney denies he made the statement, gave the promise, or instructed Harton as the latter claims. The attorney further testified that in view of the lack of defensive wounds on Harton, he was "not especially optimistic" about the successful use of a self-defense claim and that he so advised Harton. The attorney also testified that because of Harton's past violent criminal history, he thought a conviction for first degree murder carried with it the potential of a death sentence, and that such a potential did not exist with a conviction for second degree murder. The range of penalties for second degree murder was explained to Harton, and he was only assured that the very best would be done to persuade the court to not impose the maximum sentence of life imprisonment. The attorney also advised Harton that it was not possible to plead to a charge of manslaughter as Harton desired because efforts to persuade the prosecutor to so amend the charge had been unsuccessful.

The disposition of this case is controlled by the rule that a criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief and that the finding of the hearing court will not be disturbed unless clearly erroneous. *State v. Painter, supra*; *State v. Propst, supra*.

The hearing court resolved the evidentiary conflicts against

Harton, and there is nothing in the record which permits us to say that resolution was wrong. That being so, the record fails to support Harton's claim that his attorney was ineffective. Thus, the decision of the hearing court must be, and hereby is, affirmed.

AFFIRMED.

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HAROLD DUNN, APPELLANT AND CROSS-APPELLANT, V. EDWIN J. HEMBERGER ET AL., APPELLEES, EUGENE HEMBERGER, APPELLANT AND CROSS-APPELLEE.

430 N.W.2d 516

Filed October 21, 1988. No. 86-661.

1. **Judgments: Motions for New Trial: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-1142(6) (Reissue 1985), a motion for new trial is authorized after a judgment notwithstanding the verdict and, during pendency of such motion, suspends or tolls the time limit to comply with requirements for an appeal to the Nebraska Supreme Court in accordance with Neb. Rev. Stat. § 25-1912 (Reissue 1985).
2. **Judgments: Verdicts: Directed Verdict: Trial.** A motion for judgment notwithstanding the verdict may be sustained and a judgment entered in accordance with a previous motion for directed verdict only where at the close of all the evidence a motion for a directed verdict was made, which motion should have been sustained but was overruled and the case submitted to the jury, which returned a verdict adverse to the movant.
3. **Judgments.** On a motion for judgment notwithstanding the verdict, the movant is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
4. **Agency: Words and Phrases.** An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act.
5. **Partnerships: Joint Ventures.** The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint venture does not exist.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Affirmed in part, and in part reversed and remanded with direction.

D. Steven Leininger, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellant Dunn.

John A. Wagoner and Robert W. Wagoner for appellant Hemberger.

James D. Smith, of Brock, Seiler & Smith, for appellee Norbert Hemberger.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WARREN, D.J.

SHANAHAN, J.

When the truck-pickup collision occurred, Edwin Hemberger was driving a truck owned by his parents, Norbert and Madeline Hemberger, and was hauling grain harvested from fields of his uncle, Eugene Hemberger. While transporting grain, Edwin ran a stop sign and struck a pickup driven by Harold Dunn, resulting in Dunn's bodily injury. Dunn sued Edwin (driver), Eugene (uncle), and Edwin's parents, Norbert and Madeline. Dunn based his claims on Edwin's negligent operation of the truck; an agency relationship between Eugene and Edwin; the family purpose doctrine regarding the truck supplied by Edwin's parents; and a farming joint venture between Eugene and Norbert, brothers who have separate farms in addition to their jointly leased farmland.

## HARVESTING

At the time of the accident, Norbert owned 240 acres of farmland, Eugene owned 400 acres, and together they leased 300 acres from Louise Blind. Although each raised some cattle, Norbert and Eugene primarily grew corn, wheat, and other grain crops. Each planted his personally selected crop on his own land, individually bore the expenses of growing and harvesting those crops, and separately received any profit from his crop. Norbert and Eugene mutually determined what crops were planted on the rented tract and jointly owned a combine and grain wagon used for harvesting both their individually owned fields and their jointly leased land. The brothers equally shared income and expenses in farming their rented land.

At harvest time, Norbert, Eugene, and members of their

families worked together to harvest each brother's fields and the rented property. Dryness determined the priority of harvesting the fields. Generally, Norbert drove the combine, which Eugene followed with the grain wagon. Other family members drove trucks in hauling grain from the fields to storage bins or the local elevator. Grain from Eugene's fields was taken to storage bins on his farm, while the harvest from Norbert's fields was hauled to bins on Norbert's farm or taken to the local elevator. Grain from the leased land was usually taken to the local elevator.

On November 10, 1982, the Hemberger families were involved in harvesting. As usual, Norbert was running the combine, and Eugene was following with the grain wagon. Norbert's wife, Madeline, was not taking part in the harvest. However, Edwin and Eugene's wife and son were helping to haul corn from the harvested field to storage facilities. Edwin, age 22, had been away at college and, thus, was taking part in the family harvest for the first time in several years. Although Edwin had been working for a seed corn company during the summer, his job ended around the middle of October, allowing Edwin to participate in the harvest.

In the morning of November 10, Hembergers had been harvesting corn from one of Norbert's fields. After their noon meal, the family moved to Eugene's fields. Using a truck owned by Norbert and Madeline, Edwin was hauling corn from Eugene's field to a bin on Eugene's farm. Edwin knew the location of Eugene's grain bins and had not been given any specific instruction about hauling from the field to the bin. In hauling grain, Edwin had been traveling the same route all afternoon. Although Eugene could have dictated the route or destination for the grain, he did not explicitly direct Edwin's hauling the harvested corn. After several trips, Edwin was again on his way from the field to Eugene's bin with a load of corn, when he failed to halt the truck at a stop sign and collided with Dunn's pickup.

## THE TRIAL

On the basis of the theories characterized above, Dunn sued Edwin, Eugene, and Edwin's parents, Norbert and Madeline.

The court granted Madeline's motion for a directed verdict,

removing her from the action, and granted Dunn's motion for a directed verdict against Edwin on liability. The court refused to submit the question of a joint venture between Norbert and Eugene, and refused to direct a verdict for Dunn on the family purpose doctrine to impose liability on Norbert but submitted that question to the jury. The court also submitted the agency question, notwithstanding Dunn's request for a directed verdict on that question. On May 23, 1986, the jury returned its verdict against Edwin alone for $115,000.

On May 28, Dunn filed a motion for judgment notwithstanding the verdict (judgment n.o.v.), namely, judgment against Norbert on account of the family purpose doctrine and judgment against Eugene as the result of a principal-agent relationship with Edwin. As an alternative, Dunn requested a new trial against Norbert and Eugene, contending that the court erred by its refusal to submit the question of a joint venture between Norbert and Eugene. On July 10, the court granted judgment n.o.v. to Dunn, stating: "It now appears . . . that the court was in error" in denying a directed verdict for Dunn on the agency question involving Eugene and Edwin. The trial court expressed that, as a matter of law, the agency relationship had been evidentially established for imputation of Edwin's negligence and, therefore, Eugene's liability to Dunn. The court entered judgment for Dunn and against Eugene for $115,000, corresponding to the verdict against Edwin. The court then refused to grant judgment against Norbert or a new trial pursuant to Dunn's motion.

On July 16, Eugene moved for a new trial, alleging that the court's setting aside the verdict was not "supported by law" and that judgment n.o.v. against Eugene was "contrary and lacks support from the evidence." As an alternative to a new trial, Eugene asked the court to reinstate the verdict favorable to Eugene, which the court had vacated in conjunction with entry of the judgment n.o.v. for Dunn and against Eugene.

On August 11, Dunn filed his notice for appeal to this court. After Eugene's motion for new trial or reinstatement of the verdict was overruled on August 20, Eugene filed his notice of appeal to this court on August 25. Although, generally,

according to our rules, Eugene would be designated as an appellee, under the somewhat unusual circumstances of this appeal, we have permitted him to be shown as an appellant.

## JURISDICTION OF EUGENE'S APPEAL

In seeking dismissal of Eugene's appeal, Dunn contends that Eugene has not filed a notice of appeal within the time allowed by Neb. Rev. Stat. § 25-1912(1) (Reissue 1985), which provides:

> The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal [and] by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court.

In 1986, § 25-1912 was amended, effective January 1, 1987, by changing "one month" to "thirty days" in reference to the time for filing the notice of appeal and appellate docket fee. See § 25-1912(1) (Cum. Supp. 1986). The 1986 amendment also provided for suspension of judgment, pending disposition of a timely filed motion for new trial or a judgment n.o.v. See § 25-1912(2) (Cum. Supp. 1986). Those changes by the 1986 amendments of § 25-1912 are irrelevant to disposition of the jurisdictional question at hand in view of the effective date of the amendments after Eugene Hemberger had complied with statutory requirements of § 25-1912 (Reissue 1985) for an appeal to the Supreme Court of Nebraska.

Neb. Rev. Stat. § 25-1142 (Reissue 1985), which has not been amended since enactment in 1867, defines a new trial as "a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court," and provides eight specific bases or grounds for a new trial, including: "(6) that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law."

We are aware that in 1982 the Legislature, by enacting Neb. Rev. Stat. § 25-1912.01 (Reissue 1985), dispensed with the

necessity of a motion for new trial as a prerequisite to appellate review in certain situations. See, also, *Caro, Inc. v. Roby*, 215 Neb. 897, 342 N.W.2d 182 (1983).

Eugene's motion for new trial was filed July 16, within 10 days from the judgment n.o.v. for Dunn on July 10. Eugene filed his notice of appeal on August 25, within 5 days after his motion for new trial was overruled but more than 1 month after judgment n.o.v. had been entered for Dunn. The crucial question is: Was Eugene entitled to file a motion for new trial concerning the judgment n.o.v., thereby suspending the 1-month time limit for notice of appeal from the judgment n.o.v.?

Dunn points to the statutes governing entry of a judgment n.o.v. and the finality of a judgment n.o.v. for the purpose of an appeal to the Supreme Court. Neb. Rev. Stat. § 25-1315.02 (Reissue 1985) authorizes entry of a judgment n.o.v. if the appropriate motion is filed within 10 days after reception of the verdict to be set aside. Neb. Rev. Stat. § 25-1315.03 (Reissue 1985) relates to an appeal from a judgment n.o.v.:

> An order entering judgment, as provided in section 25-1315.02, or granting or denying a new trial, is an appealable order. The time for and manner of taking such appeal shall be as in an appeal from a judgment, decree, or final order of the district court in a civil action. . . .

In substance, Dunn argues that a motion for new trial does not suspend or toll the time limit for an appeal from a judgment n.o.v.

To support his argument, Dunn directs our attention to *Krepcik v. Interstate Transit Lines*, 151 Neb. 663, 38 N.W.2d 533 (1949), which was decided when a motion for new trial was indispensable for appellate review of a case involving a question of fact. In *Krepcik*, at the conclusion of all evidence, the defendant moved for a directed verdict, which was denied. After a plaintiff's verdict, the defendant timely filed a motion, seeking judgment n.o.v. or a new trial in accordance with § 25-1315.02 (Reissue 1948) enacted in 1947. Before 1947, a district court lacked authority for a judgment n.o.v. except in the case of judgment necessitated by the pleadings. However, § 25-1315.02 authorized a judgment n.o.v. or a new trial after

"determination of the legal questions raised by the motion" to vacate the verdict. Section 25-1315.03 (Reissue 1948) provided in pertinent part: "An order entering judgment as provided in section 25-1315.02, or granting or denying a new trial, is an appealable order, and the time for taking appeal shall commence to run from the date of entry of such order." After the court granted the defendant a judgment n.o.v., the plaintiff did not file a motion for new trial but filed a notice of appeal. In the appeal, the defendant moved for summary affirmance, contending that the Supreme Court's review was limited solely to the question whether the judgment n.o.v. was supported by the pleadings and that plaintiff's failure to move for a new trial precluded an appellate review on the merits of the judgment n.o.v.

The *Krepcik* court commented on the purpose underlying the statutory authority for appellate review of an order granting judgment n.o.v. or a new trial:

> The purpose of [statutory procedure for appellate review of judgment notwithstanding the verdict or new trial] was to eliminate needless costs and effort, and to simplify and expedite the final disposition of litigation. It was obviously not the intention of the lawmakers that this legislation should be understood or interpreted to create pitfalls or to complicate the judicial process. If the terms of the act will reasonably permit, it should be construed to avoid these results.

151 Neb. at 668, 38 N.W.2d at 536.

In *Krepcik*, the court expressed:

> The purpose of a motion for a new trial is to enable the court to correct errors that have occurred in the conduct of the trial. [Citations omitted.] . . .
>
> . . . In considering and passing upon a motion for a judgment notwithstanding the verdict, the court does not examine any issue of fact. The court, by the mandate of the statute, considers the record made on the trial and decides as a matter of law whether the evidence already in the record justified the submission of the case to the jury or whether the court on the trial should have sustained the motion for a directed verdict. The court cannot, in such a

> situation, weigh or consider any part of the evidence in the sense of deciding any issue of fact. The matter presented by the motion for a judgment is one of law. . . . The proceedings by the trial court on the motion of appellee for judgment was in the language of the statute only a "determination of the legal questions raised by the motion." . . .
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> . . . *The party against whom a judgment notwithstanding the verdict has been rendered does not want a new trial and should not be required to make application for a new trial, a ruling on which he might not be able to secure in the limited time permitted for an appeal. What he wants is the right of a review in this court of the correctness of the action of the trial court in setting aside the verdict and rendering a judgment adverse to him.*
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> . . .
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> . . . [N]o motion for a new trial should be required in reference to any order made by the court by virtue of the provisions of [statutes governing judgment notwithstanding the verdict or new trial and appellate review].

(Emphasis supplied.) 151 Neb. at 669-70, 672-73, 38 N.W.2d at 536-38.

The court in *Krepcik v. Interstate Transit Lines, supra*, then denied the defendant's motion for summary affirmance. Later, this court decided Krepcik's appeal on the merits. See *Krepcik v. Interstate Transit Lines*, 152 Neb. 39, 40 N.W.2d 252 (1949), *opinion after rehearing* 153 Neb. 98, 43 N.W.2d 609 (1950).

Two factors undermine the foundation for Dunn's premise that a motion for new trial does not suspend the time limit statutorily prescribed for an appeal from a judgment n.o.v., a premise based on *Krepcik v. Interstate Transit Lines*, 151 Neb. 663, 38 N.W.2d 533 (1949). First, in *Krepcik* a motion for new trial was not filed after the judgment n.o.v., while, in the case before us, a motion for new trial has been filed after the judgment n.o.v. in question. The court's statements in *Krepcik*, relative to the propriety of a motion for new trial after a judgment n.o.v., are dicta, and, therefore, do not control the present case. Second, § 25-1315.03 (Reissue 1948), which

included "the time for taking appeal shall commence to run from the date of entry" of the judgment n.o.v. or an order granting a new trial and which was construed in *Krepcik*, has been amended and now exists as § 25-1315.03 (Reissue 1985), which, in pertinent part, provides: "The time for and manner of taking [an appeal from a judgment n.o.v.] shall be as in an appeal from a judgment, decree, or final order of the district court in a civil action." Section 25-1912 (Reissue 1985), which controls the present appeal, prescribes the prerequisites for a timely appeal, that is, the filing of a notice of appeal and depositing the Supreme Court docket fee, both "within one month from the overruling of a motion for new trial." A motion for new trial is authorized to question whether a judicial decision, as a final order, is "contrary to law." See § 25-1142(6). Eugene Hemberger's motion for new trial sought the trial court's review of its decision that an agency existed, as a matter of law, between Eugene and Edwin. Therefore, Eugene's motion raised a question about the legal validity or correctness of the court's deciding the principal-agent relationship as a matter of law, notwithstanding the jury's determination of that issue as a factual conclusion. Consequently, by the procedure authorized in § 25-1142(6), Eugene's motion raised purely a question of law based on the evidence adduced at trial. In view of the express language of § 25-1142(6), we hold that a motion for new trial is authorized after a judgment n.o.v. and, during pendency of such motion, suspends or tolls the time limit to comply with requirements for an appeal to the Nebraska Supreme Court in accordance with § 25-1912. Because Eugene Hemberger has otherwise satisfied all the other requirements for a timely appeal, this court has jurisdiction to dispose of the assignments of error alleged in the present appeal.

## LIABILITY BASED ON A PRINCIPAL-AGENT RELATIONSHIP

Eugene Hemberger contends that a principal-agent relationship between Eugene and Edwin was a factual question, resolved favorably for Eugene by the verdict, and, therefore, was not determinable by the court as a matter of law and a basis for a judgment n.o.v. A motion for judgment n.o.v. may be sustained and a judgment entered in accordance with a previous

motion for directed verdict only where at the close of all the evidence a motion for a directed verdict was made, which motion should have been sustained but was overruled and the case submitted to the jury, which returned a verdict adverse to the movant. *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986).

On a motion for judgment n.o.v., the movant is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Kelly Klosure v. Johnson Grant & Co.*, 229 Neb. 369, 427 N.W.2d 44 (1988).

An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act. *Equilease Corp. v. Neff Towing Serv.*, 227 Neb. 523, 418 N.W.2d 754 (1988); *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434 (1976). See, also, Restatement (Second) of Agency § 1 (1958).

Consistent with our standard of review, we must view the evidence on the agency issue in a light most favorable to Eugene, for whom the jury found that Edwin was not Eugene's agent. It is uncontroverted that Eugene never actually gave Edwin directions for disposition of the harvested corn, such as the destination of the harvested grain (although one must reasonably infer that Eugene's corn would be transported to Eugene's bin at a site known to Edwin), the route to be traveled in hauling the grain, or any other step to be taken in conjunction with transportation and delivery of Eugene's corn. The evidence indicates that the Hembergers, in their mutual harvesting, had a common but general understanding of what needed to be done and how to accomplish their task. The evidence fails to show that Eugene exercised any control over Edwin's activities during the harvest. Although there was evidence that Eugene could have controlled or directed Edwin's activities in hauling Eugene's corn and that Edwin would have followed Eugene's directions, there was also testimony that

Edwin could have refused to follow Eugene's directions, which might be reasonably characterized as suggestions rather than directions. Regarding the question about an agency, the interpretation of the conflicting evidence on the aspect of control, or consideration of the lack of evidence, was a matter for the jury, which found that Eugene was not liable to Dunn.

In view of the conflicting evidence, which created factual questions to be answered by the jury, the issue of agency was properly submitted to the jury. See, *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 421 N.W.2d 766 (1988) (propriety of directed verdict); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). Consequently, the judgment n.o.v. for Dunn, which was based on a conclusion of law that Edwin was Eugene's agent, must be reversed with direction to reinstate the verdict in favor of Eugene Hemberger on the issue of his vicarious liability for Edwin Hemberger's negligence. See § 25-1315.03 (Reissue 1985).

## FAMILY PURPOSE DOCTRINE

In his appeal, Dunn assigns as error the district court's failure to enter judgment n.o.v. against Norbert on the basis of the family purpose doctrine, imposing liability on Norbert for Edwin's negligent operation of Norbert's truck. Our standard of review has been previously mentioned in our discussion regarding the judgment n.o.v. against Eugene.

> [W]here the head of the family purchases, owns, maintains, furnishes, or provides a motor vehicle for the general use, pleasure, and convenience of the family, and a family member is using the car with the express or implied consent or permission of the owner, the negligence of the family member driver is imputed to the head of the family. It is considered that the use of the vehicle for the pleasure and convenience of the family is in furtherance of the purpose of the head of the family in providing it, and under such circumstances it is treated as if it were being used in the conduct of the business of the head of the family. . . .
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> . . . .
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> . . . [T]o recover under the family purpose doctrine the

> essential elements which must be proved are (1) that the defendant who is sought to be charged with liability was the head of his family, (2) that he furnished the car for the use and pleasure of his family, (3) that the driver of the automobile was a member of his family and one for whose use or pleasure the car was furnished, and (4) that the driver was, at the time of the accident, using the car for [the purpose for] which it was furnished with the authority, expressed or implied, of the head of the family.

*Marcus v. Everett*, 195 Neb. 518, 524, 526, 239 N.W.2d 487, 491-92 (1976).

Elements 1 and 4, set out in *Marcus v. Everett, supra*, are conclusively established. Norbert Hemberger was the head of his family and furnished the truck which collided with Dunn's pickup. At the time of the accident, Edwin was using the truck in furtherance of the purpose for which the vehicle was furnished, namely, hauling harvested corn to Eugene's grain bin.

Under the state of the evidence, whether Edwin was a family member and whether Norbert's truck was being put to a family use at the time of the accident were questions for the jury to resolve. *Marcus v. Everett, supra*. The jury resolved those factual issues in favor of Norbert Hemberger. We will not reweigh the evidence but do conclude that the verdict reached on Norbert Hemberger's liability concerning the family purpose doctrine is justified. The district court correctly denied a directed verdict for Dunn on the issue of Norbert's liability on account of the family purpose doctrine, and, consequently, correctly denied a judgment n.o.v. or new trial for Dunn on that issue.

## JOINT VENTURE LIABILITY

Dunn claims that the district court erred in refusing to submit to the jury the question whether Norbert and Eugene were involved in a joint venture. Dunn contends that Norbert and Eugene were involved in a joint venture for harvesting and that Edwin was acting as agent of the joint venture at the time of the accident.

Elements of a joint venture are set out in *Fangmeyer v. Reinwald*, 200 Neb. 120, 131, 263 N.W.2d 428, 434 (1978):

> "[T]here must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other." The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship; there must be something more than mere sharing of profits, some active participation in the enterprise, and some control of the subject matter thereof or property engaged therein.

Quoting *Soulek v. City of Omaha*, 140 Neb. 151, 299 N.W. 368 (1941).

The evidence adduced at trial failed to show a joint venture. There was no indication that Norbert Hemberger had an equal voice in controlling the manner of harvesting Eugene's fields. Eugene decided if the corn should be picked and where it should be taken. Norbert received no part of Eugene's crop and was not entitled to a share of any profit from the harvested crop. The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint venture does not exist. *Soulek v. City of Omaha, supra.* The evidence does indicate that the Hemberger families pooled their labor and skill for the harvest. However, such pooled labor and skill is insufficient to establish a joint venture between Norbert and Eugene. See *Fangmeyer v. Reinwald, supra.* In the absence of evidence of a community of interest in the profits and equal control of the harvesting operations, the district court correctly refused to submit the issue of a joint venture between Norbert and Eugene.

For the reasons given, the judgment n.o.v. granted to Dunn against Eugene Hemberger is reversed with direction to reinstate the verdict in favor of Eugene Hemberger. In all other respects, the judgment of the district court is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

CLARENCE F. OBERMEIER AND ELNORA M. OBERMEIER, APPELLEES, V. KEITH M. BENNETT AND LINDA M. BENNETT, APPELLEES, DENNIS BENNETT AND DIANNE BENNETT, APPELLANTS.

430 N.W.2d 524

Filed October 21, 1988. No. 86-856.

1. **Foreclosure: Equity.** A suit in foreclosure is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equity action, the Supreme Court tries factual issues de novo on the record, subject to the rule that when credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of facts rather than the other.
3. **Appeal and Error.** As a general rule, this court will dispose of cases on appeal on the theory on which they were presented in the trial court.
4. **Records: Appeal and Error.** A brief may not expand the evidentiary record and should limit itself to arguments supported by the record.
5. **Contracts: Real Estate: Sales: Assignments.** A provision in a contract for the sale of land prohibiting an assignment of the contract without the consent of the other party is usually considered to be a provision to safeguard performance of the contract. Where the contract has been performed, or performance has been tendered, the provision is usually considered unenforceable.

Appeal from the District Court for Howard County: WILLIAM H. RILEY, Judge. Reversed and remanded for further proceedings.

John R. Hall, of Anderson, Vipperman, Hinman, Hall & Kovanda, for appellants.

Tom D. Briese, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellees Obermeier.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

GRANT, J.

This case arose out of an installment contract for the sale of land. On July 22, 1985, plaintiffs-appellees, Clarence F. and Elnora M. Obermeier (hereinafter Sellers), filed a "Petition in Foreclosure" against defendants Keith M. and Linda M. Bennett (hereinafter Buyers) and defendants-appellants, Dennis and Dianne Bennett (hereinafter Assignees). Keith and Dennis Bennett are brothers. The petition alleged material

waste to the real estate and breach of a contractual provision against assignment as grounds for default and foreclosure. Following a trial, the district court found that the Sellers had a first lien on the property in the amount of $34,100.97, that default had occurred in the nonassignment condition of the contract, and that the Sellers were entitled to have the contract foreclosed and the real estate sold to satisfy the lien. The court specifically found that "the purported assignment of the Real Estate Contract failed in that the agreement of sale between the parties prohibited assignment without prior written permission of the Plaintiffs, and that said prior written permission was not obtained or implied." The Assignees timely appeal. We reverse.

As a preliminary matter, we note that a suit in foreclosure is equitable in nature. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). In an appeal of an equity action, the Supreme Court tries factual issues de novo on the record, subject to the rule that when credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of facts rather than another. *Id.*

As to the Sellers' allegations of material waste to the real estate, the record reveals only that the Buyers demolished an old granary, a small henhouse, and a one-car garage that was "ready to fall down." They replaced those structures with a 26- by 30-foot milk barn. Although the district court made a general finding that all of the allegations of the petition were true, the record does not establish material waste to the property sufficient to warrant foreclosure of the land contract. As a basis for the foreclosure, the trial court found only that "the purported assignment of the Real Estate Contract failed in that the agreement of sale between the parties prohibited assignment without prior written permission of the Plaintiffs, and said prior written permission was not obtained or implied."

Assignees' sole assignment of error is that the district court erroneously entered its decree of foreclosure on that basis. As a general rule, this court will dispose of cases on appeal on the theory on which they were presented in the trial court. *Cimino v. W. A. Piel, Inc.*, 227 Neb. 196, 416 N.W.2d 505 (1987). Thus, we decline to consider the Sellers' argument, raised for the first

time in this appeal, that since the Assignees failed to establish at trial that the land contract had been assigned in writing, the Assignees have no appealable interest in this matter. The Sellers alleged in their petition the existence of an assignment and proceeded through the trial on the assumption that an assignment had been made. The evidence that there was an assignment was undisputed at trial, and the trial court found there was an assignment, as set out above.

Sellers further contend that because the property in question was sold pursuant to the foreclosure decree and the sale was confirmed by the trial court, this appeal presents only an abstract question and should be dismissed as moot. The only "evidence" of such a sale appears in the Sellers' brief. The record before us is silent as to any disposition of the property. A brief may not expand the evidentiary record and should limit itself to arguments supported by the record. *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987). We decline to consider this portion of the Sellers' argument.

The record shows that on September 8, 1978, the Sellers entered into a contract with the Buyers for the sale of land. The original purchase price was $55,000. The contract provided that after initial payments totaling $11,000 had been made, the remaining balance of $44,000 would be paid in installments of $2,200 plus interest on each January 1, starting January 1, 1980. The parties agreed that the deed to the property would be held in escrow and would be delivered to the Buyers upon their making full payment of the purchase price. The Buyers were required to insure the property and to pay the real estate taxes.

The contract also provided:

> BREACH AND ACCELERATION OF CONTRACT. In the event the Buyers shall fail or neglect to pay any installment of principal or interest when due and remains in default thereof for a period of 30 days or fails or neglects to pay the taxes and special assessments, if any, on said property for a period of one year after delinquent, or if Buyers commit waste on said premises, with respect to these items, time is of the essence of this agreement, then the Sellers shall have the option to declare the whole balance of this contract to be due at once, without notice,

and may proceed to foreclose this contract as provided by law.

Three paragraphs concerning taxes, ownership, and escrow arrangements followed, and the last paragraph of the contract states: "And it is further mutually agreed that all covenants and agreements herein contained shall extend to and bind the respective heirs, executors, administrators and assigns of said parties, but that no assignment shall be made of this contract without the written permission of Sellers."

The Buyers took immediate possession of the property and, evidently, the yearly installments were paid, pursuant to the contract, on or before January 1, 1980, through January 1, 1984. In late January 1984, Keith Bennett approached Clarence Obermeier, "inquiring about selling the property on a contract." Obermeier did not agree to that proposal but replied he "would let him sell it if he'd pay the balance on my real estate contract." Keith Bennett unsuccessfully attempted to sell the property at an auction on March 14, 1984.

Keith and Linda Bennett were divorced in May 1984. They had experienced financial difficulties during 1984 that affected their ability to perform under the land contract. On May 3, 1984, Keith Bennett and the Assignees entered into a "lease with option to purchase" the property described in the contract. The Assignees moved to the property in May 1984.

During 1984, Keith Bennett transferred his rights in the land contract to the Assignees for $15,000 plus "what [he] had already paid down on it." No witness knew the exact date of that assignment. Dennis Bennett testified that he and Dianne leased the land from Keith with an option to purchase it, but when Keith realized he "was going bankrupt," Dennis and Dianne took the contract "to protect ourselves on it." Keith Bennett testified he entered into a formal agreement with Dennis which was "the same agreement that I had with Clarence [Obermeier] on the insurance and the payments." No objection was made to this testimony. Neither the Buyers nor the Assignees produced a written copy of the assignment at trial, nor was one requested. A bankruptcy petition filed by Keith Bennett on January 21, 1985, states that in March of 1984, he made a transfer of the land contract to his brother,

Dennis Bennett, for $15,000 down, paid to the Cotesfield Bank, and that Dennis had assumed the land contract. Keith Bennett testified he had sold the land contract to Dennis. The disposition of the interest in the land contract of Linda Bennett, Keith's wife, is not shown in the record. Keith Bennett did not notify the Sellers of his bankruptcy proceeding.

It is clear that the Sellers did not consent to an assignment of the land contract. Clarence Obermeier testified that when Keith Bennett asked him about selling the property in March 1984, he told Keith he wanted the balance of the contract paid in full. The record shows no other communication between the Buyers and Sellers about a transfer of the property. Obermeier further testified that he "was really dealing with Keith and Linda Bennett" and was not interested in dealing with others with respect to the contract. The Buyers and Assignees made no attempt to notify the Sellers that the land contract had been assigned. Dennis Bennett did not inform the escrow agent of his interest in the property.

On December 28, 1984, Keith Bennett personally delivered a cashier's check to Clarence Obermeier in payment of the January 1, 1985, installment. Obermeier accepted the payment not knowing of the Assignees' ownership claim or that the money actually was supplied by the Assignees.

Clarence Obermeier first became aware "in a roundabout way" that the Assignees were occupying the property after Keith Bennett moved into Cotesfield in 1984. He became aware that the Assignees claimed an ownership interest in the property on January 18, 1985, when his copy of the insurance policy on the property showed the Assignees' names. On January 25, 1985, Obermeier saw a notice of Keith Bennett's bankruptcy published in the Omaha paper and, during the latter part of January 1985, discovered that Keith Bennett's name had been replaced on the Howard County property tax list with that of Dennis Bennett. He testified that he did not think it was his responsibility to contact either Keith or Dennis about his discoveries.

On December 31, 1985, the Assignees tendered payment of the January 1, 1986, installment to the escrow agent. That payment was refused. Clarence Obermeier refused to accept the

payment because "it wasn't coming . . . from the one that owned the contract." He considered that the contract had been breached. The Assignees had at all times paid property taxes and maintained an insurance policy on the property, pursuant to the terms of the contract, and all payments under the contract had been made or tendered.

The issue governing the outcome of this case involves the enforceability of the provision prohibiting assignment of the land contract without the written permission of the Sellers. We agree with the appellants Assignees that, under the facts presented here, foreclosure of the contract was an improper remedy for a breach of this provision.

Our decision is based on a line of cases originating with *Wagner v. Cheney*, 16 Neb. 202, 20 N.W. 222 (1884). In that case, Cheney entered into a written contract with Nancy King for the sale of land. The contract provided that upon timely payment of half the principal, Cheney would give a deed to King and take a mortgage to secure the rest of the purchase price. The contract further provided that no assignment of the contract "shall be valid unless with the written consent of said defendant Cheney . . . ." *Id.* at 203, 20 N.W. at 222. Nancy King subsequently assigned the contract to J.H. King, who assigned it to Wagner, the plaintiff. All payments were made when due, but when Wagner demanded the deed and mortgage upon payment of half the principal, Cheney refused on the ground that he had never consented to the assignment to Wagner. The court affirmed the trial court's decision in favor of Wagner, stating that no penalty was attached to the nonassignment condition. The court noted that Cheney's security had in no way been impaired by the assignment to Wagner and that under those circumstances, Cheney could not successfully defend the action by merely alleging he had not consented to the assignment.

In *Riffey v. Schulke*, 193 Neb. 317, 227 N.W.2d 4 (1975), the parties entered into an installment contract for the sale of land to be used as a golf course. The contract provided that neither party could sell or assign the contract without the written consent of the other. Schulke, the buyer, mortgaged his interest in the property and used the proceeds of the mortgage to

improve the property and make interest payments on the contract. Riffey subsequently brought an action for strict foreclosure and ejectment. The mortgagee intervened in the action, alleging Schulke had mortgaged his interest in the property to the intervenor, and offered to pay the balance due Riffey on the contract. Riffey alleged the mortgage was void under the provision of the contract prohibiting assignment without the written consent of the other party. We held:

> A provision in a contract for the sale of land prohibiting an assignment of the contract without the consent of the other party is usually considered to be a provision to safeguard performance of the contract. Where the contract has been performed, or performance has been tendered, as in this case, the provision is usually considered unenforceable. [Citations omitted.]
>
> The entire amount due the plaintiff was tendered to him by payment of more than that amount into court by the intervener [mortgagee]. Under these circumstances, the provision in the contract against assignment did not furnish a defense to the plaintiff against performance.

*Id.* at 320-21, 227 N.W.2d at 6-7.

In *Martin v. Baxter*, 198 Neb. 640, 254 N.W.2d 420 (1977), Martins agreed to sell a farm to Baxter pursuant to an installment contract. The contract provided that the agreement could not be assigned by the buyer without the written consent of the sellers. Baxter subsequently entered into a separate contract to sell the land to another for $195,600, subject to Baxter's land contract with Martins. At that time, all payments on the original contract had been made, but Martins elected to declare a forfeiture and refused tender of payments thereafter. The trial court refused strict foreclosure. This court affirmed, holding that the case was governed by the principles announced in *Riffey v. Schulke, supra*.

In *Panwitz v. Miller Farm-Home Oil Service*, 228 Neb. 220, 224, 422 N.W.2d 63, 66 (1988), we stated:

> We further note that a contract provision requiring a seller's consent to any future sale or assignment by the buyer is considered to have a limited application; namely that such provision is intended as security for the seller,

> and when such security is not at issue, the provision is not enforceable. The majority view is that a contract provision prohibiting assignment without the vendor's consent does not preclude such assignment or sale if the contract has been fully performed *or if assignee offers and is able to complete performance*. The reason for such rule is that such provision is intended merely to safeguard performance on vendee's part so that when performance has been rendered or is presently offered, the stipulation is of no consequence.

(Emphasis in original.) See, also, *First Bank & Trust v. Novak*, 12 Kan. App. 2d 407, 747 P.2d 850 (1987).

The land contract which is the source of this dispute provides for foreclosure under three circumstances only: (1) nonpayment of principal or interest, (2) nonpayment of taxes and special assessments, or (3) waste. We have already determined that the record does not support a finding of material waste to the property. The Buyers and Assignees paid all taxes on the property, purchased insurance, and properly tendered all payments of principal and interest until the Sellers refused to accept payment from the Assignees on December 31, 1985. The Sellers alleged only waste and the assignment of the contract without the written permission of the sellers as the bases for foreclosure. There is no foreclosure provision linked to the nonassignment clause, which is in the final sentence of the contract. For some reason the parties chose to treat the nonassignability provision in a different manner than other possible breaches of the agreement.

We reject the Sellers' contention that foreclosure was necessary in this case to protect their expectations that the Buyers "would not assign the contract so as to allow a stranger to the transaction to control the security for the debt . . . ." Brief for appellees Obermeier at 12. The Assignees performed the contractual duties of the Buyers for some time and properly tendered future performance to the Sellers. The record shows no concern on the part of the Sellers as to the Assignees' ability to perform, but only statements that the Sellers were not interested in dealing with anyone other than Keith and Linda Bennett. At the time of such statements, a divorce had taken

place between those parties and Keith Bennett had filed bankruptcy. Under the circumstances in this case, the provision of the contract prohibiting assignment of the contract without the permission of the Sellers is unenforceable.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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DANUEL D. MUNDT ET AL., APPELLANTS, V. NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, APPELLEE.

430 N.W.2d 530

Filed October 21, 1988. Nos. 86-957, 86-958, 86-959.

**Motions for New Trial: Appeal and Error.** The standard of review of an order granting a new trial is whether the trial court abused its discretion. A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Jim Zimmerman and Joy Shiffermiller, of Atkins Ferguson Zimmerman Carney, P.C., for appellants Mundt et al.

James R. Hancock, of Hancock & Denton, P.C., for appellant City of Alliance.

Ruth Anne Evans and Gregory H. Rhodes for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

WHITE, J.

This is a consolidated appeal from actions brought by plaintiffs in the district court for Box Butte County for personal injuries sustained when debris from a parapet wall that had

collapsed struck them. The defendant, Northwestern Bell, had anchored a self-supporting telephone cable to the wall, and plaintiffs alleged in their complaints that defendant's negligence caused the collapse of the wall and resultant injuries. In *Behm v. Northwestern Bell Telephone Co.*, case No. 86-959, the jury found the defendant negligent and awarded damages to plaintiff Dennis L. Behm. The doctrine of issue preclusion being applicable, the two remaining cases, *Mundt v. Northwestern Bell Telephone Co.*, case No. 86-957, and *Griffith v. Northwestern Bell Telephone Co.*, case No. 86-958, were tried on the issue of damages alone. The defendant filed motions for new trial, which were sustained by the trial court on October 21, 1986. Plaintiffs appeal from the district court's orders granting new trials and request that the judgments for the plaintiffs be reinstated.

In defendant's answers to plaintiffs' second amended petitions, Northwestern Bell alleged that the collapse of the wall was due solely to the negligence of the plaintiff City of Alliance because it was vicariously responsible for the alleged negligent acts of its employees.

The substance of the evidence adduced at trial is as follows. On June 9, 1983, Lloyd Prettyman and plaintiff Danuel D. Mundt, employees of the City of Alliance, were using a mobile aerial tower mounted on a truck, known as a cherrypicker, to paint the front of a building owned by the city. Prettyman was in the bucket of the cherrypicker, painting, and Mundt was on the ground below, operating the air compressor. The front of the building was capped by a parapet wall, which is a non-load-bearing wall above the roofline of the building designed only for ornamental purposes. Attached to the wall, Northwestern Bell had anchored one end of an 80-foot self-supporting cable. Though the record is unclear, it appears that the cherrypicker was positioned somewhere beneath the cable. Prettyman testified that he raised the bucket to the point where the boom of the cherrypicker touched the cable and raised it "Oh, quarter of an inch." He then motioned to Mundt for more hose for the spray gun. Mundt asked plaintiffs Lot Curtiss Griffith and Behm, two fellow City of Alliance workers who were in the area, for help in moving the air compressor.

Prettyman further testified that it took Mundt, Griffith, and Behm "five minutes or so" to move the compressor, and then he resumed painting. At a point some 5 to 7 minutes after Prettyman had moved the bucket, he felt the truck shake and saw that the wall had collapsed, injuring Mundt, Griffith, and Behm, who were standing next to the wall and were hit by falling debris. The record indicates that there were no witnesses who actually saw the wall topple.

Defendant called Rex Perrin, who arrived at the scene of the accident shortly after it had occurred, to testify. He stated that Prettyman turned to him and said, "I didn't see the wire and I must have caught it and that's what pulled it from the wall." Plaintiffs' counsel objected on hearsay grounds but was overruled.

Both plaintiffs and defendant put on expert testimony relating to the possible cause of the wall's collapse. Conflicting evidence was presented by each expert on the amount of load the cable put on the parapet wall, the amount of sag in the line and clearance above the road, and whether the cable had been properly anchored. In summary, plaintiffs' expert, relying in part on prior testimony that the mortar was crumbly, stated that the installation of the cable was improper since the parapet wall was not structurally sound. He further stated that the wall could have collapsed at any time and that Prettyman's contact with the wire would not have pulled the wall down if the wire had been properly anchored in the first place. Defendant's expert's opinion was that since the wall was made of brittle material, it had to experience a force greater than the force that was already on the wall in order to collapse, and that the only entity in the area that could apply that force to the cable was the aerial lift.

At the end of the trial, included in defendant's request for jury instructions was a request that NJI 3.43 on intervening cause be given. That instruction was not given, but NJI 3.41 on proximate cause was used, as well as an instruction to the effect that the defendant, Northwestern Bell, was exonerated in the event that the jury found the sole proximate cause was the actions of the City of Alliance employees. The jury returned verdicts for the plaintiffs, and defendant made motions for new

trials, citing as one of its various grounds for the motions the failure on the part of the district court to give NJI 3.43. The court sustained defendant's motions on that basis.

The first error assigned is that the district court erred in granting new trials for the reason the evidence and the law did not require, nor permit, the court to instruct on the issue of intervening cause.

> The standard of review of an order granting a new trial is whether the trial court abused its discretion. . . . A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict.

*Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 720-21, 335 N.W.2d 758, 762 (1983).

At issue in this case is the jury instruction given to the jury, based on NJI 3.41. The text of the instruction as given is as follows:

> By "proximate cause" is meant a moving or effective cause or fault, which, in the natural and continuous sequence, *unbroken by an intervening cause*, produces the occurrence, and without which the occurrence would not have taken place.
>
> A "proximate result" is that result brought about or produced by a proximate cause. It must have been a natural and probable consequence which was, or ought to have been reasonably foreseen or anticipated in the light of attendant circumstances. It is not required, however, that the particular injury, or the happening, was or should have been foreseen.

(Emphasis supplied.) Defendant argues that prejudicial error occurred when the jury was given this instruction without any other instruction defining "intervening cause." The present instruction on intervening cause, NJI 3.43, reads in part that "[a]n efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury." In

essence, Northwestern Bell's theory is that since the jury did not know what the legal term "intervening cause" meant, it therefore could not make a determination as to whether Prettyman's act of touching the cable was of sufficient character to break the chain of causation and insulate Northwestern Bell from liability.

The question presented is whether, under the state of the evidence, defendant Northwestern Bell was entitled to an instruction on efficient intervening cause.

An efficient intervening cause, now more commonly called a superseding cause, is an independent act of a third person or another force, which itself is the proximate cause of the injury in question. See *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). See, also, Restatement (Second) of Torts § 440 (1965) (defining "superseding cause"). However, an intervening act or force, which the defendant reasonably should have foreseen and guarded against, is not a superseding cause which precludes the defendant's liability. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984); *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982).

The evidence on the foreseeability of equipment's coming into contact with the line presents a close question. On the one hand, Northwestern Bell argues that a plainly visible cable approximately 20 feet above a street cannot be expected to be struck by a reasonably alert motorist or equipment operator. Plaintiffs, however, contend that the frequency of contact with wires over roadways in farm or industrial areas indicates the risk of contact was indeed foreseeable. Suffice it to say that we are not convinced, as a matter of law, that contact with the wire was or was not foreseeable, thus leaving the issue to the fact finder.

Having said this, it is apparent that the issue of an intervening (superseding) cause having been pleaded by Northwestern Bell, facts introduced justifying the instruction having been placed before the jury, and the instruction requested, it was prejudicial error for the trial court not to have given the instruction on an issue raised by the pleadings and evidence. *Reeder v. Rinne*, 183 Neb. 734, 164 N.W.2d 203

(1969).

It may well be that at an appropriate time and in an appropriate case, the intervening cause instruction will pass from the scene. It does not appear to us that this is either the appropriate time or case.

In this case we are faced with the fact that the phrase "intervening cause" is mentioned in the proximate cause instruction, but was never defined in any instruction given. We are unable to conclude that the absence of an instruction on intervening (superseding) cause did not affect the jury's deliberations. The trial court did not abuse its discretion in granting the motions for new trial. The judgments are therefore affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. MARK A. SLEZAK, APPELLANT.
430 N.W.2d 533

Filed October 21, 1988. No. 86-1100.

**Records: Appeal and Error.** Although, on appeal to this court, the obligation to request the preparation of a bill of exceptions falls in the first instance on the appellant, once that request has been made, the preparation of the bill of exceptions becomes an internal court matter and it is the duty of the reporter to prepare the same.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Remanded with directions.

George E. Brugh for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

HASTINGS, C.J., WHITE, and GRANT, JJ., and CORRIGAN, D.J., and BRODKEY, J., Retired.

PER CURIAM.

Defendant, Mark A. Slezak, was convicted of driving under a suspended license, second offense, in the county court for

Saline County on April 19, 1984. On that date testimony was taken, the defendant's motion to suppress was overruled, and the defendant was found guilty. Sentencing was set for May 3, but the defendant failed to appear and a warrant was issued for his arrest. He was arrested over 2 years later, on May 31, 1986, and sentenced on June 10 to 60 days in jail, a $200 fine, and loss of his license for 2 years.

The defendant filed his notice of appeal on July 7, 1986, requesting in his praecipe for transcript and bill of exceptions that all proceedings in the county court for Saline County be transcribed and filed with the district court for Saline County for review. The request for the bill of exceptions specifically requested a full transcript of the proceedings, including any and all exhibits and testimony offered during the hearings and/or trials held on March 6 and April 19, 1984, and June 10, 1986, before the county court for Saline County. However, the bill of exceptions submitted to the clerk of the district court contained only the transcript of proceedings on June 10, 1986. The district court affirmed the county court, and the defendant has appealed to this court, contending the district court erred.

The defendant argues that he was denied appellate review by reason of the incomplete record and that the district court should have remanded for new trial on the charges against him because he had no opportunity for appellate review.

It is not clear what rules of procedure apply in this case. The appellant filed his request for the bill of exceptions on July 7, 1986. At that time Neb. Rev. Stat. § 24-541.05 (Cum. Supp. 1986), which became effective July 1, 1986, was in effect. Section 24-541.05(4) applies to appeals from county court to district court, and states, "The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of a bill of exceptions shall be governed by rules of practice prescribed by the Supreme Court."

County court rule 52(II)E (rev. 1987) was finally adopted to govern appeals from county court to district court, and it clearly places the burden on a county court employee. However, this court did not prescribe rule 52(II)E until September 1, 1987. Therefore, at the time the request for the bill of exceptions was filed in this action, no rules specifically applied

to appeals from county court to district court. The only rules established by this court concerning the filing of the bill of exceptions in existence at the time the appellant requested the bill were the rules governing appeals from the district court to the Supreme Court. We believe those provisions are sufficiently analogous to be applicable in this case.

The appellant is required, pursuant to Neb. Ct. R. of Prac. 5A (rev. 1986), to file a request to prepare a bill of exceptions, specifically identifying each portion of the evidence and exhibits that he or she believes to be material. The appellant in this case complied with this requirement. After such a request is filed, the preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the reporter to prepare the original bill of exceptions. (Neb. Ct. R. of Prac. 5C(3) (rev. 1986).)

If the reporter is unable to prepare and certify a bill of exceptions, rule 5C(4) provides:

> If the reporter is unable to prepare and certify a bill of exceptions, or if a bill of exceptions cannot be prepared and certified under provisions contained elsewhere in these rules, the bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the District Court.

The record in this case does not disclose whether the reporter was unable to prepare and certify a bill of exceptions, thus triggering the applicability of rule 5C(4), or whether the bill of exceptions for the 1984 proceedings was inadvertently omitted. In any case, it is the duty of the reporter to ensure that a proper bill of exceptions is prepared for appellate review after one has been properly requested by the appellant.

Cases cited by the appellee placing the responsibility for filing the bill of exceptions on the appellant are not controlling in this case. (*State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986); *Collins v. Baker's Supermarkets*, 223 Neb. 365, 389 N.W.2d 774 (1986).) Those cases do not demonstrate whether a proper request in full compliance with rule 5 was given to the court clerk. In contrast, in this case the request was made in full compliance with our court rules.

Therefore, this action is remanded to the district court with directions to order the county court to prepare a proper bill of exceptions for appellate review.

REMANDED WITH DIRECTIONS.

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## DELORIS BEDROSKY AND TED DUNLAP, APPELLANTS, V. DOUGLAS E. HINER, DOING BUSINESS AS HINER PROPERTIES, APPELLEE.

430 N.W.2d 535

Filed October 21, 1988. No. 87-071.

1. **Summary Judgment: Appeal and Error.** In appellate review of summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Leases: Contracts.** A lease is to be construed as any other contract; thus, principles of contract construction will be applied to ascertain the meaning of a lease.
4. **Contracts.** Courts are not free to interpret contracts which are couched in clear and unambiguous language.
5. _____. A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; the fact that the parties urge opposing interpretations does not necessarily indicate that the contract is ambiguous.
6. _____. A party may not pick and choose among the clauses of a contract, accepting only those that advantage it; the contract's meaning is to be ascertained by reading the contract as a whole.
7. _____. A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
8. **Contracts: Presumptions: Intent.** There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.
9. **Contracts: Intent.** Parties are bound by the terms of the contract even though their intent may be different from that expressed in the agreement.
10. **Contracts.** Words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them.

11. _____. A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction.
12. **Contracts: Leases.** The practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself.
13. **Summary Judgment: Contracts.** When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact; in such a situation, summary judgment is improper.
14. **Contracts: Public Policy.** Courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy; to be void as against public policy, the contract should be quite clearly repugnant to the public conscience.

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

Mary Cannon Veed and Thomas L. Steele, of Matthews & Cannon, P.C., for appellants.

Gerald L. Friedrichsen, of Fitzgerald & Brown, for appellee.

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

HASTINGS, C.J.

Plaintiffs have appealed from the judgment of the district court which sustained the motion of the defendant for summary judgment. This was an action resulting from a fire in a building owned by the defendant, a portion of which was leased to the plaintiffs. Plaintiffs sought damages for destruction of their property.

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to

judgment as a matter of law. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988).

In November 1976, plaintiff Bedrosky leased the first floor of a building from defendant to house her art gallery. Plaintiff Dunlap became associated with Bedrosky in March 1984, and became a full partner in the gallery in September 1984. According to Bedrosky, the defendant orally assured her before she signed the lease that the sprinkler system was in working order. The lease contained the following language:

> 5. Lessee has examined said premises prior to his acceptance and the execution hereof and is satisfied with the physical condition thereof, including all equipment and appurtenances, and his taking possession thereof shall be conclusive evidence of his receipt thereof in satisfactory order and repair, except as otherwise specified hereon, and Lessee agrees and admits that no representation as to the condition or repair hereof has been made by the Lessor or his agent which is not herein expressed or indorsed hereon; and likewise agrees and admits that no agreement or promise to decorate, alter, repair, or improve said premises including all equipment and appurtenances, either before or after the execution hereof, not contained herein, has been made by Lessor or his agent.
>
> . . . .
>
> 10. All personal property in the leased premises shall be at the risk of the Lessee only and the Lessor shall not be or become liable for any damage to said personal property, to said premises or to said Lessee or to any other persons or property caused by water leakage, steam, sewerage, gas or odors or for any damage whatsoever done or occasioned by or from any boiler, plumbing, gas, water, steam or other pipes or any fixtures, equipment or appurtenances whatsoever, or for any damage occasioned by water, snow or ice, being upon or coming through the roof, sky-light, trap door, or otherwise, or for any damage arising from any act or neglect of other tenants, occupants, or employees of the building in which the leased premises are situated or arising by reason of the use of, or any defect in,

the said building or any of the fixtures, equipment or appurtenances therein, or by the act or neglect of any other person or caused in any other manner whatsoever.

On January 19, 1985, as alleged in plaintiffs' second amended petition, "a fire of uncertain origin began in the upper two floors of the six story building." The fire spread to the elevator shaft, as plaintiffs allege, fell to the basement, and spread to the first floor, which was the space leased to the plaintiffs.

The essence of plaintiffs' claim is that defendant, in violation of certain regulations of the State Fire Marshal's office, failed to enclose the elevator shaft and to install fire doors, and, in contravention of his representation, the defendant failed to keep the sprinkler system in proper working order. Plaintiffs also alleged a failure to secure the building against trespassers.

Defendant's answer denies generally the allegations in the plaintiffs' petition and alleges further that the provisions of the lease exclude recovery for loss of personal property.

Plaintiffs assign as error: (1) The court ruled that there were no genuine issues of fact; (2) the court ruled that the defendant's acts were within the scope of the lease's exculpation clause; and (3) the court upheld the validity of the exculpation clause as not opposed to public policy.

The sole issue for this court to determine is whether the exculpatory clause of the lease is effective to relieve the defendant from all liability in this instance.

Plaintiffs' arguments focus on paragraph 10 of the lease. Essentially, plaintiffs argue that the exculpatory language cannot be construed to relieve the defendant of liability and that even if such a construction was warranted, an unconscionable result would ensue.

Defendant, on the other hand, argues that the exculpation clause was plain and unambiguous. Therefore, he argues, there is no need to resort to between-the-lines interpretations or public policy to ascertain the true intent of the parties when they agreed upon and signed the lease contract.

Of particular concern to the plaintiffs is the language in paragraph 10 of the lease providing that the lessor shall not be liable for damage to personal property caused "by the act or

neglect of any other person or caused in any other manner whatsoever." This language follows a long list of other events, mostly natural hazards and damage caused by occupants, for which the lessor is not liable. The plaintiffs argue that the final clause must be read "to include only the general categories of injury previously enumerated" (brief for appellants at 11), and not negligence or intentional misrepresentation on the part of the defendant. Otherwise, argue plaintiffs, if the clause is read literally and includes a release from liability for damage occurring in *any* manner (including negligence or misrepresentation by the defendant), "the clause would negate every obligation or commitment of the landlord altogether, and entirely destroy the mutuality of the lease contract." *Id.*

A lease is to be construed as any other contract. *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987); *Omaha Country Club v. Dworak*, 186 Neb. 336, 183 N.W.2d 264 (1971). Thus, we apply principles of contract construction to ascertain the scope and meaning of the lease. The plaintiffs urge us to adopt a nonliteral, nonstrict construction of the lease. However, before we determine *how* to interpret the lease, we must first determine whether interpretation is even necessary. Courts are not free to interpret contracts which are couched in clear and unambiguous language. *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983).

A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties urge opposing interpretations does not necessarily indicate that the contract is ambiguous. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988); *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988); *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). A party may not pick and choose among the clauses of a contract, accepting only those that advantage it; the contract's meaning is to be ascertained by reading the contract as a whole. *Fisbeck v. Scherbarth, Inc., supra*; *Lueder Constr. Co., supra*; *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980). A

provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. *Luschen, supra*; *Shadow Isle, Inc. v. Granada Feeding Co.*, 226 Neb. 325, 411 N.W.2d 331 (1987); *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620 (1978).

We must also keep in mind that there is a strong presumption that a written instrument correctly expresses the intention of the parties to it. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988); *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985). Moreover, parties are bound by the terms of the contract even though their intent may be different from that expressed in the agreement. *Rumbaugh v. Rumbaugh,* 229 Neb. 652, 428 N.W.2d 500 (1988); *Bass v. Dalton, supra.*

On its face, the lease contract appears to clearly dictate the result reached by the trial court. The property was rented to the plaintiff "as is w/sign, A.C., 2 overhead space heaters, all of which is as is and not warrented [sic] or serviced by lessor." Paragraph 5, concerning the "Condition of Premises," provides that the lessee (plaintiff) has examined and is satisfied with the condition of the property and that no representations as to the condition of the property have been made by the lessor (defendant) to the lessee. The lease then provides in paragraph 10 that the lessor shall not be liable for damage to the lessee's personal property caused by "water leakage, steam, sewerage, gas or odors," or from "any boiler, plumbing, gas, water, steam or other pipes or any fixtures, equipment or appurtenances whatsoever," or from "water, snow or ice," or from "any act or neglect of other tenants, occupants, or employees of the building," or arising from "the use of, or any defect in, the said building . . . fixtures, equipment or appurtenances," or from the "act or neglect of any other person or *caused in any other manner whatsoever*." (Emphasis supplied.)

The plaintiffs' petition alleged that the defendant's negligence and intentional misrepresentation as to the fire safety of the building caused the damage to their property. The language in paragraph 5 plainly disposes of the misrepresentation claim. The language in paragraph 10 also

settles the misrepresentation question, as well as releasing the defendant from liability for his alleged negligence and breach of contract. The words used in the contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them. *Rumbaugh v. Rumbaugh, supra*; *Bass v. Dalton, supra*. Read in its plainest, clearest sense, the lease provides that the defendant is not responsible for damage arising from any defect in the building, fixtures, equipment, or appurtenances (which would include the sprinklers), or from any damage caused by the act or neglect of *any other person* (including himself) or caused in any other manner whatsoever. Read in this manner—that is, taking the language of the lease in its plain and ordinary meaning—the lease places no liability on the defendant for the damage to plaintiffs' property.

A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988); *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988); *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987); *Shadow Isle, Inc., supra*; *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983). The practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself. *Ames v. George Victor Corp.*, 228 Neb. 675, 424 N.W.2d 106 (1988).

Nevertheless, plaintiffs argue that the lease must be interpreted by this court. According to plaintiffs, the lease should be read so that the last clause in paragraph 10 ("by the act or neglect of any other person or caused in any other manner whatsoever") refers not to *any* event or act, but only to an event or act which belongs to the same general category of events and acts described in the remainder of paragraph 10.

If the plaintiffs' position is correct, of course, the order of the lower court must be reversed. When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact; in such a situation, summary judgment is improper. *Lueder Constr., supra*; *Luschen Bldg. Assn. v. Fleming Cos.*,

226 Neb. 840, 415 N.W.2d 453 (1987).

The plaintiffs do not specifically argue that the lease is ambiguous, however. Rather, they appear to urge a nonliteral interpretation, based on public policy. To construe the lease according to its plain language—that is, to exempt the defendant from liability in this case—would create an unconscionable result, according to plaintiffs.

This court has traditionally been reluctant to void contractual clauses on public policy alone. As in *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 479, 293 N.W.2d 843, 848 (1980), "The only remaining basis for declaring the questioned clauses invalid would be a finding that they are repugnant to public policy. This should not be done lightly or without sufficient compelling reason." The court then quoted 17 C.J.S. *Contracts* § 211 at 1022 (1963): "Persons should not be unnecessarily restricted in their freedom to make their own contracts; and, therefore, the court should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so." See, also, *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985); *Beaver Lake Assn. v. Beaver Lake Corp.*, 200 Neb. 685, 264 N.W.2d 871 (1978); *Brisbin v. E. L. Oliver Lodge No. 335*, 134 Neb. 517, 279 N.W. 277 (1938). (Courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy; to be void as against public policy, the contract should be quite clearly repugnant to the public conscience.)

The specific issue of whether the lessor may include a provision in a commercial lease exempting him from liability apparently has not been directly decided by the Nebraska court. The Uniform Residential Landlord and Tenant Act, which applies only to residential leases, contains an express prohibition against exculpatory clauses or limitations on the landlord's liability. (Neb. Rev. Stat. § 76-1415 (Reissue 1986).) However, no such statutory prohibition exists for commercial leases, presumably because while a residential tenant must be protected against unfair disparity in bargaining power, no such inequality of positions exists in the business setting. A lessee under a commercial lease, such as plaintiff Bedrosky here, has

the opportunity to "shop around" and negotiate for the terms of the arrangement, an opportunity which may not be available to the residential lessee.

Other state courts considering the issue of exculpatory clauses in commercial leases have varied in their responses, due to varying statutory schemes, ideas about public policy, and the language of the clauses themselves. See, *J. B. Stein & Co. v. Sandberg*, 95 Ill. App. 3d 19, 419 N.E.2d 652 (1981) (exculpatory clause in commercial lease which unambiguously exculpated lessor for his own negligence was valid); *Princeton Sportswear Corp. v. H & M Assoc.*, 335 Pa. Super. 381, 484 A.2d 185 (1984), *rev'd on other grounds* 510 Pa. 189, 507 A.2d 339 (1986) (exculpatory clause in commercial lease relieving lessor of liability for damage to personal property valid; clause did not violate public policy, commercial lease related entirely to parties' own private affairs, and no disparity in bargaining power between parties); *Rubin v. AMC Home Inspection & Warr. Serv.*, 175 N.J. Super. 315, 418 A.2d 306 (1980) (exculpatory clause will not absolve contractor from his own negligent conduct unless agreement clearly and plainly so provides); *Barnes v. Pearman*, 163 Ga. App. 790, 294 S.E.2d 619 (1982) (provision that lessee would release lessor from any and all damage to person or property was void as against public policy as enacted in statutes). See, also, 52 C.J.S. *Landlord & Tenant* § 423(2) (1968) (the parties may exempt the lessor from liability for damages to the tenant's property sustained through the negligence of the lessor and other persons, and in the absence of statutes providing otherwise, such agreements are not void as against public policy).

There is no indication in the evidence which was before the court on motion for summary judgment that Bedrosky fell victim to a disparity in bargaining power. She voluntarily entered into the lease agreement and signed it, indicating that she agreed with its terms. The language of the lease plainly exculpated the defendant from liability for damage to plaintiffs' property, "by the act or neglect of any other person or caused in any other manner whatsoever." The plain language of that phrase does not permit us to read into its meaning a provision limiting the exclusion to any of the specific causes

previously enumerated in the lease. Furthermore, we do not find the language of the exculpatory clause to be a clear contravention of public policy.

The judgment of the district court is affirmed.

AFFIRMED.

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KATHERINE HEITHOFF AND JEAN LUEDTKE, APPELLEES, V. NEBRASKA STATE BOARD OF EDUCATION, APPELLANT.
430 N.W.2d 681

Filed October 21, 1988. No. 87-276.

1. **Administrative Law: Appeal and Error.** In an appeal from a judgment pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981 & Cum. Supp. 1986), the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the trial court's findings.
2. **Parties: Words and Phrases.** An indispensable party is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.
3. **Teacher Contracts: Evidence: Due Process.** An evidential hearing, requested regarding potential termination of a teacher's contract, should occur before a tribunal that, among its attributes, is impartial.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with direction.

Robert M. Spire, Attorney General, and Harold I. Mosher for appellant.

Mark D. McGuire, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

SHANAHAN, J.

In an appeal under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981 & Cum. Supp. 1986),

the district court for Lancaster County vacated the order or decision of the State Board of Education, which had terminated the teaching contracts of Katherine Heithoff and Jean Luedtke (teachers).

In an appeal from a judgment pursuant to the Administrative Procedure Act, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the trial court's findings. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985); § 84-918 (Reissue 1981) (Supreme Court's de novo review under Administrative Procedure Act).

By written contract, the State Department of Education employed Heithoff and Luedtke as teachers at the Nebraska School for the Deaf for the 1985-86 school year. On February 26, 1986, Commissioner of Education Joe E. Lutjeharms sent to the board members a memo, recommending and outlining a reduction in the teaching staff at the Nebraska School for the Deaf, a reduction which called for eliminating the teaching positions of Heithoff, Luedtke, and one other teacher. In his memo, Lutjeharms requested that the board take action on his recommendation "so that preliminary notices of reduction in force can be sent as required by . . . the Teachers Association contract." According to minutes of the board's March 7 meeting, the "Consent Agenda" for the meeting contained "Information Items," including "Reduction in Force at the Nebraska School for the Deaf." However, as reflected by the minutes for the March 7 meeting, the board took no action on Lutjeharms' recommended reduction in force which was the subject of his February 26 memo to the board.

On March 26, Lutjeharms mailed a letter to Heithoff, informing her that her contract for teaching "will be terminated at the close of the 1985-86 school year" and explaining that "this termination is a reduction in force due to budgetary considerations, decreasing student population, a teacher returning from leave, and staffing needs. You have a right to request a hearing before the State Board of Education." A similar letter was sent to Luedtke on that date. Heithoff and Luedtke requested a hearing. In response to the Heithoff-Luedtke requests, Lutjeharms, on April 11, sent

another letter to each of the teachers, again expressing the "reasons for termination," as stated in his March 26 letters, and notifying the teacher that her requested hearing was scheduled for May 2. At the hearing, Heithoff and Luedtke appeared with their lawyer, who called the board's attention to statutes pertaining to termination of a teacher's contract, including Neb. Rev. Stat. §§ 79-1254.02 and 79-1254.06 (Reissue 1987).

Section 79-1254.02 in pertinent part provides:

> [E]ach [teacher's] contract shall be deemed renewed and in force and effect until a majority of the board votes, sixty days before the close of the contract period, to amend or terminate the contract for just cause. The secretary of the board shall notify each teacher . . . in writing at least ninety days before the close of the contract period of any conditions of unsatisfactory performance or a reduction in teaching staff . . . that the board considers may be just cause to either amend or terminate the contract for the ensuing year. [A teacher may request a hearing.] At the hearing, evidence shall be presented in support of the reasons given for considering amendment or termination of the contract, and the teacher . . . shall be permitted to produce evidence related thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing.

Section 79-1254.06 provides:

> Before a reduction in force shall occur, it shall be the responsibility of the board of education and the school district administration to present competent evidence demonstrating that a change in circumstances has occurred necessitating a reduction in force. Any alleged change in circumstances must be specifically related to the teacher or teachers to be reduced in force, and the board, based upon evidence produced at the hearing . . . shall be required to specifically find there are no other vacancies on the staff for which the employee to be reduced is qualified by endorsement or professional training to perform.

The lawyer for Heithoff and Luedtke asserted that the board had already reached a decision and taken final action on the

question of a reduction in the teaching staff relative to Heithoff and Luedtke and, in view of such alleged predetermination by the board, requested dismissal of the proceedings. When the board refused to dismiss the proceedings, Heithoff and Luedtke declined to participate further in the proceedings and, accompanied by their attorney, left the hearing. Based on evidence presented at the May 2 hearing, the board found that a reduction in force was justified, necessitating elimination of Heithoff and Luedtke from the teaching staff, and ordered that the teaching contracts for Heithoff and Luedtke be terminated at the close of the 1985-86 school year.

Pursuant to the Administrative Procedure Act, Heithoff and Luedtke appealed to the district court. In their petition, Heithoff and Luedtke stated that, before the May 2 hearing, the "Nebraska State Department of Education and the State Board of Education had predetermined the question of their continued employment," as evidenced by the board's action taken at its meeting held on March 7, 1986, and further evidenced by the Lutjeharms' letters of March 26 and April 11. In their petition, Heithoff and Luedtke claimed that the board's predetermination was a denial of procedural due process, that is, a right to a hearing before a "fair and impartial tribunal," and requested that the court vacate the board's order which had terminated the teachers' employment with the named defendant, State Board of Education. To obtain service on the State Board of Education, the teachers, through their attorney, sent summons by certified mail addressed to:

Mr. Robert Spire
Attorney General's Office
Room 2115, State Capitol
Lincoln, Nebraska 68509.

The return receipt for the certified mailing of the summons was signed by "Val G. Finney" on June 3, 1986, but the receipt did not indicate where the mailed item was actually delivered. The teachers' attorney, on behalf of Heithoff and Luedtke, timely filed an "Affidavit of Service" as proof of service, which, by reference, incorporated the signed postal receipt attached to the affidavit. The attorney's affidavit stated that receipt for the certified mail was "signed by Val Finney, of the Office of the

Attorney General of the State of Nebraska." The affidavit or proof of service also stated that the certified mailing, for which Val Finney had signed the postal receipt at the office of the Attorney General, included a copy of the petition by Heithoff and Luedtke. Neb. Rev. Stat. § 25-505.01(1)(c) (Reissue 1985) provides that service by certified mail "shall be made by (i) within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery, and (ii) filing with the court proof of service with the signed receipt attached." Neb. Rev. Stat. § 25-507.01(2) (Reissue 1985) provides: "When service is by certified mail, the plaintiff or plaintiff's attorney shall file proof of service within ten days after return of the signed receipt."

Claiming that there was an invalid service of summons, the State Board of Education filed a special appearance, which was overruled. The board then filed a demurrer, contending that the court lacked jurisdiction over the board for the purpose of the teachers' appeal and further objected because "[t]here is a defect of parties defendant." See Neb. Rev. Stat. § 25-806(4) (Reissue 1985). When its demurrer was overruled, the board answered, preserving its objection to the court's jurisdiction over the board, and requested affirmance of the board's order terminating the teachers' employment.

The district court concluded that the board had taken "final action" on March 7, 1986, in violation of §§ 79-1254.02 and 79-1254.06 insofar as the board had taken final action, terminating the teachers' contracts, before the hearing requested by the teachers. The court then vacated the board's action and ordered that the teachers be reinstated with back wages to the date of reinstatement.

On appeal, the board contends that the district court erred in (1) finding that summons had been served according to law, (2) overruling the board's demurrer, and (3) finding that the board's action in terminating the employment of Heithoff and Luedtke violated Nebraska statutes governing termination of a teacher's contract of employment.

First, we dispose of the question concerning service of summons and find that the requirements of § 25-505.01(1)(c)

have been satisfied to effect service of summons by certified mail. The postal receipt for certified mail shows that the transmittal, including the summons and a copy of the teachers' petition, was addressed to the Attorney General's office in accordance with Neb. Rev. Stat. § 25-510.02(1) (Reissue 1985) (service of summons on a state agency by certified mail addressed to the office of the Attorney General). That certified mailing, as reflected by the postal receipt signed by Val G. Finney on June 3, 1986, and further reflected in the verified proof of service filed by the teachers' attorney, was delivered at the "Office of the Attorney General of the State of Nebraska." Under the circumstances, if a purpose of summons is notice of commencement or pendency of litigation, the statutory requirements for service by certified mail have been satisfied in the present case. The district court had jurisdiction regarding the appeal by Heithoff and Luedtke.

Next, the board claims that the State Department of Education and Commissioner Lutjeharms were, as we interpret the board's contention, indispensable parties as defendants with the State Board of Education. An indispensable party is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest. See, *Jordan v. Evans*, 99 Neb. 666, 157 N.W. 620 (1916); *Cunningham v. Brewer*, 144 Neb. 218, 16 N.W.2d 533 (1944). The board's contention about the absence of indispensable parties, however, ignores the nature and subject matter of the action maintained by Heithoff and Luedtke. Under § 79-1254.02, a teacher's contract of employment remains in force "until a majority of the board votes, sixty days before the close of the contract period, to amend or terminate the contract for just cause." The State Department of Education consists of the State Board of Education and the Commissioner of Education, who, in the present case, was Lutjeharms. See Neb. Rev. Stat. § 79-321 (Reissue 1987). As a result of § 79-1254.02, the board, not the education commissioner, has authority to terminate a teacher's employment contract. The education commissioner has the duty to "advise and counsel" the board in its action, see

§ 79-321(3), but has no authority to vote on the question whether a teacher's contract should be terminated pursuant to § 79-1254.02. Therefore, by virtue of §§ 79-1254.02 and 79-1254.06, authority to terminate a teacher's employment contract is conferred only on the board of education, which in the present case is the "State Board of Education." The petition by Heithoff and Luedtke alleges that the board violated the statutes governing termination of a teacher's contract of employment. Since validity of termination is the issue in the present case, the board is the only party defendant indispensable for judicial review of the order terminating the contracts of Heithoff and Luedtke. The contention that there is a defect regarding parties defendant is without merit.

Finally, we reach the question whether termination of the employment contracts of Heithoff and Luedtke occurred before the board's meeting, which included the teachers' requested hearing, on May 2, 1986. "Section 79-1254.06 (Reissue 1981) provides that before a reduction in force shall occur, the board must 'present competent evidence demonstrating that a change in circumstances has occurred necessitating' a reduction." *Van Fossen v. Board of Governors*, 228 Neb. 579, 581, 423 N.W.2d 458, 460 (1988).

Heithoff and Luedtke contend, and the district court found, that the board terminated the teachers' employment contracts on March 7, 1986. To support their claim that the board, before the meeting and hearing on May 2, had predetermined the termination of the teachers' contracts of employment, Heithoff and Luedtke rely on the minutes of the board's March 7 meeting and Lutjeharms' letters mailed after the March 7 meeting. Unfortunately, in his letters Lutjeharms did not express that termination of the teachers' contracts was conditioned on future and final action to be taken by the board. We do agree with Heithoff and Luedtke that an evidential hearing, requested regarding potential termination of a teacher's contract, should occur before a tribunal that, among its attributes, is impartial. See *Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 340 N.W.2d 877 (1983).

The present case is similar to *Van Fossen, supra*, inasmuch as both cases involve a letter sent to a teacher, which was used in an

attempt to show that the teacher's contract had been terminated contrary to § 79-1254.02, namely, a board had taken final action which terminated a teacher's contract before occurrence of the requisite hearing requested by a teacher.

Lutjeharms' March 26 letters, stating that the teachers' contracts "will be terminated at the close of the 1985-86 school year," are similar to the letter claimed to reflect a board's predetermination to terminate a teacher's contract in *Van Fossen, supra*, where the board of govenors' resolution reflected that there was a "reasonable basis to believe" that Van Fossen's contract "should be terminated" as a part of a reduction in the teaching staff for the community college area. After adoption of that resolution, the board's secretary wrote to Van Fossen, informing him that the board had "passed a resolution terminating your employment," and notified Van Fossen that he was entitled to a hearing, which, if requested, would be followed by the board's final decision on the termination of Van Fossen's contract. At the requested hearing, Van Fossen "objected to holding the hearing on the basis that [the board's resolution] established that the board had already made up its mind to terminate [his] employment, thereby making any further hearing meaningless." 228 Neb. at 584-85, 423 N.W.2d at 462. As we noted in *Van Fossen, supra* at 586, 423 N.W.2d at 463:

> Contrary to the view urged by Van Fossen, the language in the letter of April 22, 1985, to the effect that "said board passed a resolution terminating your employment as of the 14th day of August, 1985," is not dispositive of the issue. This statement inaccurately described the board's action but neither transformed an option then under consideration into a decision made nor prejudiced Van Fossen in any way, inasmuch as the letter went on to explain in detail the hearing to which Van Fossen was entitled and the fact that "[f]ollowing a hearing, if one is requested, and in any event on or before the 14th of June, 1985, the board shall meet and by a majority vote of all members of the board make its final decision . . . ."

The minutes of the March 7 meeting contain only an ambiguous reference to a "Reduction in Force at the Nebraska

School for the Deaf." This entry is listed on the "Consent Agenda" as an information item for the March 7 meeting. Although the board apparently received Lutjeharms' memo, containing the recommendation that employment of Heithoff and Luedtke be terminated, nothing in the minutes indicates that any action whatsoever was taken on Lutjeharms' recommendation concerning the teachers' contracts. As we construe Lutjeharms' letters to Heithoff and Luedtke, the correspondence was an attempt to inform the teachers concerning their right to a hearing. Lutjeharms' letters, insofar as they recite or otherwise imply that the board had terminated the teachers' contracts, were an incorrect account of the board's action reflected by the minutes of the meeting on March 7. Whereas Lutjeharms' letters recited that the teachers' contracts would be "terminated" at the end of the school year or expressed "reasons for terminating your teaching contract," the minutes of the board's meeting on March 7, the date on which Heithoff and Luedtke claim that the board made its final decision to terminate their contracts, are silent concerning any action whatsoever taken relative to the teachers' contracts. Lutjeharms' inaccurate description concerning the status of the teachers' contracts is insufficient to establish that the board, before the May 2 hearing, had determined to terminate the teachers' employment contracts, a predetermination which would cast some doubt on the board's impartiality in deciding whether to terminate the contracts and would epitomize "Sentence first—verdict afterward." Thus, we find no evidence to support a finding that the board, on March 7, 1986, reached a final decision to terminate the employment contracts of Heithoff and Luedtke. We must, therefore, reverse the judgment of the district court. We remand this matter to the district court with direction to dismiss the petition of Heithoff and Luedtke and reinstate the order of the State Board of Education, entered on May 2, 1986, which terminated Heithoff's and Luedtke's contracts of employment at the conclusion of the then-current school year.

REVERSED AND REMANDED WITH DIRECTION.

RAYMOND LEE FOX, APPELLANT, V. HELEN JANE FOX, APPELLEE.
430 N.W.2d 542

Filed October 21, 1988. No. 87-901.

Appeal from the District Court for Blaine County: RONALD D. OLBERDING, Judge. Affirmed.

Rodney J. Palmer, of Palmer & Kozisek, for appellant.

G.J. Beal, of Gregory J. Beal & Associates, P.C., for appellee.

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

PER CURIAM.

The petitioner, Raymond Lee Fox, appeals from the order of the district court placing the care, custody, and control of the children of the parties, Mary Elizabeth Fox, Casey Glen Fox, and Samantha Gaythel Fox, in and with the respondent, Helen Jane Fox. Petitioner also complains about two evidentiary rulings of the trial court. As required in cases of this nature, we have reviewed the record de novo to determine whether the district court abused its discretion. *Grindle v. Grindle*, 226 Neb. 807, 415 N.W.2d 150 (1987).

We find no abuse of discretion either in the court's order as to custody of the children or in the court's evidentiary rulings. The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. DWIGHT E. REDDICK, APPELLANT.
430 N.W.2d 542

Filed October 21, 1988. No. 87-941.

1. **Postconviction: Proof.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief.
2. **Constitutional Law: Postconviction.** Postconviction relief is available only

when a constitutional right has been infringed or violated.

3. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** A criminal defendant has a constitutional right not only to counsel, but to the effective assistance of counsel.
4. **Effectiveness of Counsel: Pleas.** The voluntariness of a plea entered upon the advice of counsel depends on whether the advice was within the range of competence demanded of attorneys in criminal cases.
5. **Effectiveness of Counsel: Proof.** To assert a successful claim of ineffective assistance of counsel, a criminal defendant must prove (1) that his or her attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that the defendant's interests were not conscientiously protected; and (3) that if the defendant's attorney had been effective, there is a reasonable probability that the results would have been different; in order to satisfy the third, or prejudice, requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, defendant would not have pled and would have insisted upon going to trial.
6. **Effectiveness of Counsel: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties.
7. **Right to Counsel.** The right of an indigent defendant to have counsel does not give such a defendant the right to be represented by counsel of his or her own choosing, and the mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
8. **Postconviction.** An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that defendant is entitled to no relief.
9. **Postconviction: Appeal and Error.** A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal.
10. **Pleas: Waiver: Indictments and Informations: Effectiveness of Counsel.** A voluntary plea of no contest waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defenses that the information is insufficient to charge an offense and that the plea was the result of ineffective assistance of counsel.
11. **Judges: Recusal: Appeal and Error.** A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
12. **Judges: Recusal: Prosecuting Attorneys.** A judge is not disqualified merely because he at some earlier time and in a different case prosecuted the criminal defendant appearing before him.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dwight E. Reddick, pro se.

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

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

CAPORALE, J.

Defendant, Dwight E. Reddick, appeals the denial of an evidentiary hearing and dismissal of his motion, made under the provisions of the Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1985), to vacate or set aside the judgment affirmed in *State v. Reddick*, 221 Neb. 322, 376 N.W.2d 797 (1985) (*Reddick I*). He has assigned six errors to the ruling on his postconviction motion, which meld to assert that the postconviction court erred in denying him an evidentiary hearing and dismissing his motion, inasmuch as the records and files establish that the trial court erred (1) in failing to dismiss the public defender and appoint substitute counsel because of the public defender's conflict of interest and failure to zealously pursue Reddick's defense and (2) in failing to find one of the trial judges to have lacked impartiality. Reddick has also filed a motion to expand the record, claiming that a certain statement made by him has been omitted from the trial court bill of exceptions. We overrule Reddick's motion and affirm the postconviction court's judgment dismissing his motion for postconviction relief.

Reddick, pursuant to his no contest plea, was adjudged guilty of attempted first degree sexual assault. He was thereafter determined to be a nontreatable mentally disordered sex offender and sentenced to imprisonment. Reddick's direct appeal of his conviction and sentence to this court in *Reddick I* resulted in the rejection of his claims that the trial court had erred in finding his condition to be nontreatable and in finding constitutional the requirement of Neb. Rev. Stat. § 29-2914 (Reissue 1985) that nontreatable mentally disordered sex offenders be imprisoned.

We begin by recalling that a defendant seeking postconviction relief has the burden of establishing a basis for such relief, *State v. Harton, ante* p. 167, 430 N.W.2d 313 (1988), and *State v. Painter,* 229 Neb. 278, 426 N.W.2d 513

(1988), which is available only when a constitutional right has been infringed or violated. *Kerns v. Grammer*, 227 Neb. 165, 416 N.W.2d 253 (1987); § 29-3001.

Reddick's first claimed trial error rests on the fact that he wrote a number of letters to the trial judges, complaining about the representation afforded him by the attorneys assigned to him through the office of the Lancaster County public defender, and that he questioned the ethics of one of those attorneys. He argues that these complaints, coupled with his unsuccessful effort to have substitute counsel appointed, created a conflict of interest between his appointed attorneys and himself such as to have deprived him of the effective assistance of counsel.

There is no question but that a criminal defendant has a constitutional right not only to counsel, but to the effective assistance of counsel. *State v. Scholl*, 227 Neb. 572, 419 N.W.2d 137 (1988); *State v. Grotzky*, 222 Neb. 39, 382 N.W.2d 20 (1986); U.S. Const. amend. VI.

The voluntariness of a plea entered upon the advice of counsel depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. *State v. Harton, supra*; *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). We have said that to assert a successful claim of ineffective assistance of counsel, a criminal defendant must prove (1) that his or her attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that the defendant's interests were not conscientiously protected; and (3) that if the defendant's attorney had been effective, there is a reasonable probability that the results would have been different. *State v. Harton, supra*; *State v. Painter, supra*; *State v. Propst*, 228 Neb. 722, 424 N.W.2d 136 (1988); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to satisfy the third, or prejudice, requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, defendant would not have pled and would have insisted upon going to trial. *State v. Harton, supra*; *Hill v. Lockhart, supra*. A reasonable probability consists of a probability sufficient to undermine confidence in the outcome.

*State v. Harton, supra*; *State v. Broomhall*, 227 Neb. 341, 417 N.W.2d 349 (1988).

The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. *State v. Nance*, 227 Neb. 581, 418 N.W.2d 598 (1988). Assuming for purposes of argument, but not concluding, that Reddick's complaints against his attorneys created the awkward situation he claims, there is nothing to indicate that this situation was "inherently conducive to divided loyalties." If anything, the attorneys' best defense against Reddick's allegations would have been made by providing Reddick with the very best defense to the criminal charges facing him that was possible. Thus, Reddick's interests and those of his attorneys were in harmony, not at odds.

The fact that Reddick may have been uncomfortable with the situation he himself created provides no basis for the appointment of substitute counsel. The right of an indigent defendant to have counsel does not give such a defendant the right to be represented by counsel of his or her own choosing, and the mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982).

The record not only fails to demonstrate the conflict of interest claimed by Reddick, but demonstrates that the attorneys assigned to represent him competently protected his interests. Indeed, in entering his plea Reddick himself told the trial judge then presiding that the attorney representing and appearing with him was competent and had performed satisfactorily. It is noteworthy that Reddick had originally been charged with a second offense, that of using a firearm in the commission of a felony, which was dismissed as part of his negotiated plea.

An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files in the case affirmatively establish that defendant is entitled to no relief. *State v. Propst, supra*; *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986). The records and files affirmatively show

Reddick was not deprived of the effective assistance of counsel; he therefore is not entitled to relief on the claimed ground. Thus, the first assignment of error is without merit.

Reddick next argues that one of the trial judges should have disqualified himself as Reddick requested because the questioned judge, while serving as a deputy county attorney, had prosecuted Reddick in a different case several years earlier. The gravamen of Reddick's contention appears to be that the failure of said judge to disqualify himself offended Reddick's constitutional right to due process of law by depriving him of an impartial judge.

The first difficulty Reddick encounters is that this is an issue which could have been raised in his direct appeal. It is the well-settled rule in this state that a motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal. *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988). Moreover, a voluntary plea of no contest waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defenses that the information is insufficient to charge an offense and that the plea was the result of ineffective assistance of counsel. *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988); *State v. Falcone*, 212 Neb. 720, 325 N.W.2d 160 (1982). Additionally, the record shows that while the trial judge in question overruled Reddick's motion to discharge the lawyers assigned to him and appoint substitute counsel, and refused to release Reddick on his own recognizance, that judge had nothing to do with accepting Reddick's plea or determining his status or sentence. Moreover, a motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's sound discretion, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987). A judge is not disqualified merely because he at some earlier time prosecuted the criminal defendant appearing before him. See, *State v. Bird Head, supra*; *State v. Burnside*, 185 Neb. 234, 175 N.W.2d 1 (1970). Thus, even if the issue could be raised at this time, the trial record would fail to establish error in the failure of the questioned judge to disqualify himself and,

consequently, would present no basis for granting postconviction relief. Accordingly, the second assignment of error is also without merit.

This brings us to Reddick's motion that the record be expanded. In essence, he claims that the trial bill of exceptions, as considered by the postconviction court, is deficient in that it does not contain a statement he made under oath. Specifically, he claims to have testified that he had heard from one of his attorneys that the prosecuting attorney expressed the belief that Reddick's victim lied when she said she had not engaged in prostitution. Assuming for the purposes of argument, but not finding, that Reddick so testified and that for some reason the testimony was omitted from the trial bill of exceptions, such occurrences would not change the outcome of this proceeding. The prosecutor's hearsay belief as to the victim's truthfulness, whatever it may have been, is not shown by the record and could have nothing to do with Reddick's decision to plead no contest to the attempted sexual assault, for the prosecutor's belief would not have been admissible in a trial should Reddick have chosen to forgo the benefit of the plea bargain. This resolution must not be read, however, as indicative of any dilution of this court's absolute intolerance of any editing of the record by anyone.

Accordingly, Reddick's motion to expand the record is overruled, and the judgment of the postconviction court denying Reddick's motion for postconviction relief is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JOHN L. LEWIS, ALSO KNOWN AS RODNEY CRAIG FRAZIER, APPELLANT.

430 N.W.2d 686

Filed October 21, 1988. No. 88-009.

1. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the

explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support the conviction.

2. **Verdicts: Appeal and Error.** The Nebraska Supreme Court will not interfere with a guilty verdict based upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict beyond a reasonable doubt.
3. **Sentences: Appeal and Error.** A sentence within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Douglas J. Peterson for appellee.

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

WHITE, J.

Defendant, John L. Lewis, also known as Rodney Craig Frazier, appeals from a conviction in the district court for Douglas County. Defendant was charged with five counts: count I, the robbery of a Best Western Airport Inn; count II, using a firearm to commit that robbery; count III, the robbery of a Taco Bell; count IV, using a dangerous instrument to commit that robbery; and count V, habitual criminal. The defendant filed a motion to sever the two robbery counts, which was sustained. A jury found the defendant guilty of counts I and II. The defendant subsequently entered a guilty plea to counts III and IV, and count V was dismissed pursuant to a plea bargain. Defendant was sentenced to 7 to 10 years for count I, 3 to 5 years for count II, 5 to 10 years for count III, and 2 to 5 years for count IV. The trial judge ordered the sentences to run consecutively.

The defendant appeals his conviction on counts I and II, claiming the district court erred in that the evidence was insufficient as a matter of law to sustain the conviction.

We first note that, in resolving a challenge to the

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

*State v. Britt*, 228 Neb. 201, 202-03, 421 N.W.2d 791, 793 (1988).

The evidence most favorable to the State is as follows. On April 11, 1987, at 2:35 a.m., two armed black men held up the Best Western Airport Inn at gunpoint. The inn is located at Eppley Airfield in Omaha, Nebraska. William King, an airport security guard, was on duty at the time of the robbery and testified that he saw two black males in a gray Ford Granada driving at a high rate of speed coming from the direction of the Airport Inn on a nearby street shortly after the robbery had occurred. Three days later, on April 14, the Omaha police stopped the defendant, in his gray Ford Granada, for having stolen Nebraska license plates. Later that day, Alvin Abbey, the Airport Inn night clerk who was on duty at the time of the robbery, identified the defendant in a police lineup as one of the persons who participated in the April 11 crime. In addition to the identification at the lineup, Abbey also positively identified the defendant at trial as one of the robbers.

The defendant presented two witnesses who testified there was a blue Ford Maverick near the location of the Airport Inn during the early morning hours on the day of the robbery. The recollections of these two witnesses contradicted each other. One witness testified that he saw two black men in the Maverick driving from the direction of the Airport Inn between 3:05 and 3:10 a.m. The other witness, a shuttle bus driver who continually passed the Airport Inn transferring people from the parking lot to the terminal, stated that during the morning hours of April 11 he had seen a blue Ford Maverick parked near the Airport Inn. He also testified that he had observed two black men fishing in a lake near the Maverick. On both direct and cross examination the witness said that he did not see the

car after 1:30 a.m.

The defendant also offered the testimony of his former girlfriend, Rochelle Williams; her sister, Valerie Moham; and the girls' grandmother, Margaret Alexander. Essentially, the testimony of these three witnesses was identical. They testified that on April 10 the defendant and his friends, James Williams and Kenny Richardson, joined Ms. Williams and Moham at approximately 10 p.m. to celebrate Moham's birthday at a local lounge. They all left the lounge a little after closing at 1 a.m. They dropped off Ms. Williams at approximately 1:15 a.m., and she did not see the defendant again until 2 that afternoon. The defendant then returned to Alexander's house in Omaha, where he had been staying.

Moham testified that she sat up and talked with the defendant once they returned to Alexander's home and that the defendant fell asleep at approximately 1:30 Saturday morning, April 11. She further testified that she fell asleep after the defendant.

Alexander testified that she saw the defendant on April 11 when he returned from the lounge. She stated that around 1:30 a.m. he assisted her in repositioning Alexander's paralyzed son. Alexander did not see the defendant the rest of that morning. She did testify that at 3 a.m. she called for the defendant to come downstairs and help her move her son once again, but she received assistance from someone else who had been staying at the home. Alexander admitted on cross-examination that she did not see the defendant at 3 a.m. on April 11, but she claims that she did hear his voice.

At the close of the evidence the case was submitted to the jury, which found the defendant guilty of robbery of the Airport Inn and of use of a firearm to commit that robbery. In making its determination, the jury obviously chose to believe the evidence produced by the State, that the defendant was one of the perpetrators, over the defense's attempt to prove an alibi.

As we stated in *State v. Joy*, 220 Neb. 535, 537, 371 N.W.2d 113, 115 (1985), "We will not interfere with a guilty verdict based upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict beyond a

reasonable doubt." An examination of the record reveals sufficient competent evidence to sustain the jury's verdict.

Defendant also alleges the district court erred in that the sentence imposed was excessive and, as such, an abuse of discretion. Robbery is a Class II felony, which carries a prison term of 1 year minimum and a maximum of 50 years. Neb. Rev. Stat. §§ 28-105 and 28-324 (Reissue 1985). Use of a firearm or deadly weapon is a Class III felony, punishable by a prison term of 1 year minimum and a maximum of 20 years, or a $25,000 fine, or both. § 28-105 and Neb. Rev. Stat. § 28-1205 (Reissue 1985). Defendant was convicted of two Class II felonies and two Class III felonies and was sentenced by the district court to 7 to 10 years' imprisonment for count I, 3 to 5 years' imprisonment for count II, 5 to 10 years' imprisonment for count III, and 2 to 5 years' imprisonment for count IV. All sentences were ordered to run consecutively. The order mandating that the sentences run consecutively, defendant contends, makes the sentences excessive. "We have said repeatedly that a sentence within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge." *State v. Ladehoff*, 229 Neb. 111, 113-14, 425 N.W.2d 352, 354-55 (1988). Clearly, the sentences are within the limits of the statute. Considering the defendant's prior record, the seriousness of the offenses which he committed, and the fact that defendant was given credit for time served awaiting sentencing, there is no abuse of discretion. *State v. Ladehoff, supra.* The judgment of the district court is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. MARJORIE M. BAILEY, APPELLANT.

430 N.W.2d 547

Filed October 21, 1988. No. 88-063.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Douglas D. DeLair for appellant.

Robert M. Spire, Attorney General, and James H. Spears for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and MORAN and BROWER, D. JJ.

PER CURIAM.

The defendant appeals from a sentence to imprisonment imposed after a finding of guilty on her pleas of no contest to two counts of second degree forgery. Four errors are assigned: (1) failure to inform the defendant of the nature of the charges, (2) failure to inform the defendant of the range of penalties that could be imposed, (3) failure to establish a factual basis for her pleas, and (4) imposition of the maximum term of imprisonment on each count and ordering that the sentences be served consecutively.

We have reviewed the entire record and find that entry of defendant's pleas of no contest complied with the requirements of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). Furthermore, we find no abuse of discretion on the part of the trial court in imposing the maximum term of imprisonment on each count and ordering the sentences to be served consecutively.

AFFIRMED.

## STANLEY J. TATARA, APPELLANT, V. NORTHERN STATES BEEF COMPANY, APPELLEE.

430 N.W.2d 547

Filed October 21, 1988. No. 88-081.

1. **Workers' Compensation: Time.** The language of Neb. Rev. Stat. § 48-179 (Cum. Supp. 1986) specifying the time within which the Workers' Compensation Court shall hear and determine the issues presented by an application for rehearing is directory only and not mandatory; therefore, the compensation court's failure to perform its functions within the times specified by that statute does not defeat the rights of an appellant who has seasonably filed an application for rehearing by that court.
2. **Workers' Compensation: Trial.** In workers' compensation cases, issues with regard to the cause of injury and disability are matters of fact to be determined by the Workers' Compensation Court, which sits as the finder of fact.
3. **Workers' Compensation: Expert Witnesses.** As the trier of fact, the Workers' Compensation Court is not bound to accept the opinion of experts.
4. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court have the same effect as a verdict and will not be set aside unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Jeffrey A. Silver, of Silver, Wieland & Haas, for appellant.

Melvin C. Hansen and Allen J. Potts, of Hansen, Engles & Locher, P.C., for appellee.

HASTINGS, C.J., WHITE, and CAPORALE, JJ., and REAGAN, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

On rehearing, the Workers' Compensation Court implicitly found that plaintiff-appellant, Stanley J. Tatara, sustained personal injury in an accident arising out of and in the course of his employment with the defendant-appellee, Northern States Beef Company, but, contrary to Tatara's assertion and the court's ruling on initial hearing, expressly found that he suffered no permanent disability as a result of that accident. Tatara assigns as errors the failure of the compensation court to find (1) it lost jurisdiction to rehear the matter and (2) Tatara suffered permanent partial disability. We affirm.

The evidence establishes Tatara injured his back while trying

to move a piece of meat on July 7, 1982. Thereafter, he experienced intermittent periods during which he could not work and was treated by a board-certified orthopedic surgeon until April 25, 1983, when the surgeon recommended 4 to 6 more weeks of light duty and the use of a back support. Tatara had returned to work as a trimmer in March, and eventually returned to his original work as a bandsaw operator in August or September of 1983.

From April 1983 until May 1985, Tatara did not consult any physicians, suffered no back pain, and was able to fully perform his job duties. During this time, he thought that his back was healed and that he was in the same physical condition he had been in before the July 1982 mishap. He testified that his endurance and ability to lift, bend, squat, climb, sit, stand, walk, carry, reach, and crawl were the same as before the accident. In May 1985, Tatara left his job at Northern States and began work as a dump truck driver for another employer.

On November 12, 1985, he was involved in an automobile accident and, because of back pain, returned to the orthopedic surgeon who had treated him earlier. By April of 1986, the surgeon was of the opinion that Tatara suffered a permanent 15-percent impairment of the body as a whole because of lumbar disk disease. The surgeon was also of the opinion that 12 percent of the impairment was the result of the July 7, 1982, injury, and the balance was the result of the November 12, 1985, injury which aggravated his preexisting condition.

On initial hearing, Tatara was awarded 12 percent permanent partial disability of the body as a whole. Northern States timely filed its application for rehearing on July 24, 1987, after which it appears a settlement conference was held. The rehearing resulting in the order from which this appeal has been taken was held on September 10, 1987, and the compensation court rendered the order in question on December 22, 1987.

Tatara's assertion that the compensation court lost jurisdiction to rehear this matter rests on Neb. Rev. Stat. § 48-179 (Cum. Supp. 1986), which provides, in relevant part, that when an application for rehearing has been filed, the court, if a settlement conference is held, "shall hear the cause within forty-five days" of the filing of the application. The statute also

provides, in further relevant part, that the court "shall make its findings, order, award, or judgment, determining the issues" within 14 days after the rehearing. The rehearing was held on the 48th day after the application for such was filed, and the court did not render its order until 103 days later; thus, a total of 151 days elapsed from the filing of the application for rehearing to disposition, rather than the 59 days contemplated by the statute.

In *Cole v. M. L. Rawlings Ice Co.*, 139 Neb. 439, 297 N.W. 652 (1941), we held that the failure of the district court to try an appeal from the compensation court within 14 days as specified by then Comp. Stat. § 48-174 (Supp. 1939) did not defeat the rights of the appellant, who had completed all the requisite steps to perfect her appeal, and the district court thus had jurisdiction to entertain the appeal. Similarly, *Henderson v. Wilson*, 137 Neb. 693, 291 N.W. 96 (1940), held that the failure of the clerk of the district court to serve a copy of appellant's petition on appeal from an order of the compensation court upon the adverse party as required by statute did not defeat the district court's jurisdiction. See, also, *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977); *Local Union No. 647 v. City of Grand Island*, 196 Neb. 693, 244 N.W.2d 515 (1976); *McCoy v. Gooch Milling & Elevator Co.*, 156 Neb. 95, 54 N.W.2d 373 (1952). The situation, of course, is otherwise when an appellant himself or herself fails to complete the statutory steps for perfecting an appeal. Thus, in *Geller v. Elastic Stop Nut Corporation*, 147 Neb. 330, 23 N.W.2d 271 (1946), the failure of the appellant to file a transcript as required by statute defeated the district court's jurisdiction to entertain an appeal from the compensation court. The reason for the difference is obvious; an appellant controls his or her own actions but does not control a court's actions. Cases cited by Tatara, which construe the word "shall" to be mandatory in contexts other than the failure of a tribunal to act within statutorily specified times, are inapposite.

Thus, the language of § 48-179 specifying the time within which the compensation court shall hear and determine the issues presented by an application for rehearing is directory only and not mandatory. Therefore, the compensation court's

failure to perform its functions within the times specified by that statute does not defeat the rights of an appellant who has seasonably filed an application for rehearing by that court.

Tatara next complains that in the face of the absence of countervailing expert opinion, the compensation court, on rehearing, erred in refusing to accept and be bound by the orthopedic surgeon's unequivocal expert testimony that he, Tatara, suffered a 12-percent permanent partial disability of the body as a whole as a result of the injuries sustained on July 7, 1982. This complaint overlooks the legal reality that in workers' compensation cases, issues with regard to the cause of injury and disability are matters of fact to be determined by the compensation court, which sits as the finder of fact. See, *Poorker v. Heller's Carbonic*, 228 Neb. 729, 423 N.W.2d 792 (1988); *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988).

The complaint also overlooks the legal reality that just as other fact finders are not bound to accept the opinions of experts, *Joyner v. Steenson*, 227 Neb. 766, 420 N.W.2d 278 (1988), *Cathcart v. Blacketer*, 217 Neb. 755, 351 N.W.2d 70 (1984), and *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984), neither is the compensation court. *Kuticka v. University of Nebraska-Lincoln*, 227 Neb. 565, 418 N.W.2d 593 (1988); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985).

Tatara attempts to distinguish the *Kuticka* holding on the bases that in *Kuticka*, the expert opinion on the issue of causation was not expressed as unequivocally as was the opinion in this case and that the plaintiff Kuticka had missed no time from work until 20 months after the accident, whereas Tatara was off work immediately after the subject accident. The fact remains, however, that the *Kuticka* court noted the compensation court's statement that it "simply [did] not accept the opinion." 227 Neb. at 566, 418 N.W.2d at 594.

As so frequently noted and recently reaffirmed, the findings of fact made by the compensation court have the same effect as a verdict and will not be set aside unless clearly wrong. *Kleiva v. Paradise Landscapes, post* p. 234, 430 N.W.2d 550 (1988); *Elliott v. Midlands Animal Products*, 229 Neb. 823, 428

N.W.2d 920 (1988); *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). The record provides no basis on which we can conclude the compensation court's factual finding on the issue of the cause of Tatara's disability is clearly wrong.

The record failing to sustain either of Tatara's assigned errors, we affirm.

AFFIRMED.

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

430 N.W.2d 550

Filed October 21, 1988. No. 88-207.

1. **Workers' Compensation: Words and Phrases.** Total disability under the workers' compensation law means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
2. **Workers' Compensation: Appeal and Error.** Although findings of fact made by the Nebraska Workers' Compensation Court have the same force and effect as a jury verdict in a civil case, they will be set aside when they are not supported by credible evidence and are clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

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

Scot M. Bonnesen, of Ronald J. Palagi, P.C., for appellee.

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

HASTINGS, C.J.

Defendants have appealed from an order of the Workers' Compensation Court finding that plaintiff is suffering from

permanent total disability and awarding benefits on that account. Assigned as errors are the court's determination that permanent total disability is present and the entry of such order without an additional hearing.

This is the second appearance of this case. Our former opinion may be found at *Kleiva v. Paradise Landscapes*, 227 Neb. 80, 416 N.W.2d 21 (1987). Most of the pertinent facts are set forth there.

Upon remand to the compensation court, that court took no further evidence but, rather, decided the case on the basis of its presently existing record. The evidence in that record did not support a conclusion that plaintiff was unable to do the work of a welding inspector but, rather, that he, in his estimation, did not think he could do it from a physical standpoint. The medical evidence was to the effect that plaintiff, who suffered from a spondylolysis without surgical intervention, had a 15-percent permanent partial disability of the body as a whole. The attending physician also testified that plaintiff had no neurological deficits, some restriction of motion in the lumbar spine, some tightness of the hamstrings, and unimpressive muscle spasm. The medical witness testified that plaintiff should limit his sitting at one time to 45 to 50 minutes, his standing time to about an hour, his stooping to a position 30 inches from the ground, and his weight lifting to approximately 35 pounds. The witness offered no opinion as to what sort of gainful employment, if any, in which the plaintiff could engage, and admitted that he was not aware of the extent of the rehabilitation program in which the plaintiff had engaged.

The record in this case hardly supports a conclusion that plaintiff is unable to perform any work which he has the experience or *capacity* to perform. *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987). Total disability means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, *or any other kind of work which a person of his mentality and attainments could do. Hewson, supra*; *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984). Although findings of fact made by the Nebraska 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, *Kleiva, supra*, the award in this case falls short of that standard.

In the state of the present record, considering the absence of evidence as to plaintiff's capability to perform other jobs for which he is, or could be made to be, qualified, it would appear that additional evidence addressing this situation is necessary. Accordingly, the judgment of the compensation court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## IN RE INTEREST OF Z.D.D. AND N.J.D., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.D., APPELLANT.

430 N.W.2d 552

Filed October 21, 1988. No. 88-380.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the trial court; however, where the 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: Abandonment.** Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
3. **Parental Rights.** A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
4. _____. Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated.

Appeal from the County Court for Adams County: HARRY C. HAVERLY, Judge. Affirmed.

Richard C. Witt, of Shoemaker & Witt, for appellant.

James L. Hatheway, Adams County Attorney, for appellee.

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

BOSLAUGH, J.

T.D., the father of two boys born September 7, 1980, and June 18, 1983, has appealed from the order of the county court terminating his parental rights to the children. The mother of the children voluntarily relinquished her parental rights January 13, 1988. Her rights are not an issue in this appeal.

The family problems leading up to the petition for termination began in June 1985, when the father and the mother separated. The father had taken his alcoholism "to its umpteenth degree" and did not know where the children were during the summer. He testified that he knew the mother had taken the children to Cedars Home for Children, but during the summer she would take the children out for a couple of days at a time or on weekends. He testified that he saw the children a couple of times at the babysitter's during the summer of 1985, but intimated that it was difficult to see the children because the mother had requested a restraining order against him.

In March 1987, the parents were divorced. The father was granted temporary custody of the children during the pendency of the divorce proceedings, and they lived with him until December 1985, when the boys were placed in Cedars Home so that he could go into a 30-day inpatient alcohol treatment program at St. Gabriel's. Although the father was released from inpatient treatment in March of 1986, the children remained in Cedars Home from December 1985 to June 1986.

The father lived with his parents until October 1986. He testified that he had to "get on [his] feet" before he could take the boys. In the summer of 1986, the mother contacted him and obtained custody of the boys. Shortly after getting the boys, she moved to Hastings, Nebraska, with them. The father stated that he visited the boys two or three times during the fall of 1986.

On November 24, 1986, the county attorney filed a petition to place the children in protective custody with the Department of Social Services (DSS). The petition alleged the children were

homeless through no fault of their parents. The father appeared at the hearing held December 18, 1986, and admitted the allegations of the petition. At that time, the children were adjudicated to be children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986), and were placed in a foster home in Hastings on December 10, 1986.

A case plan for reuniting the parents with the children was adopted by the county court on April 16, 1987. Although the father did not attend this hearing, his attorney did. The plan required the father to maintain biweekly phone or mail contact and weekly visits with the children. He was to pay $50 a month child support, and maintain a residence for 6 months. He was to provide DSS with the names of physicians who could care for the boys, schools which the boys would attend, and day-care providers. He was to maintain contact with the case manager, advising her of any changes in residence or job.

The father complied with none of those conditions of the plan. He called the caseworker only once, on January 28, 1988. He called a DSS supervisor on December 31, 1987, to request a visit with his children. A home study was not done, and the authorizations for the release of information were not signed. The only requirement of the case plan which the father accomplished was maintaining sobriety.

A hearing was held October 9, 1987, to review the progress of the reunification plan. The father did not attend the hearing. A case plan was adopted which was much the same as the April case plan. The father was to obtain suitable employment for the support of the children, the job to be not less than 35 hours a week, with earnings sufficient to meet the needs of the family. He was to prepare a budget indicating he had sufficient funds for food, clothing, shelter, and other expenses, and pay $100-a-month child support. The father and the boys were to attend family counseling, and he was to attend a parenting class and receive an assessment of his skills. He was to attend four AA meetings a week and submit proof of his attendance to DSS.

The father had a copy of each of the case plans but failed to comply with the conditions. He did not have full-time employment from the time the plans were adopted to the time

of trial. He did not submit a budget. In February 1988, he paid $50 toward support of the children.

The father stated the plans overwhelmed him, but he did not ask his attorney or the court to change the plans. He did not attend the hearings when the case plans were adopted.

The father visited the children in January of 1987. He did not visit the children again until February 20, 1988. According to the foster family, the boys did not receive phone calls from the father, nor cards or presents on their birthdays.

The father was in Hastings on July 22, 1987, but saw only his ex-wife. He testified that it was too late in the evening to see the boys, and he had to be in Grand Island the next day at 8 a.m. He testified that he called the mother in July of 1987 to see the boys, but she said the boys were on their way to Mississippi for a vacation. The foster father testified that the boys were on vacation with his family for 2 1/2 weeks in July of 1987.

The amended supplemental petition to terminate the father's parental rights was dated October 27, 1987. Since he could not be located, the father was served by publication in November of 1987.

The father testified that he did not contact his children for nearly a year because he did not have the money to go to Hastings and he could not afford long-distance phone calls to DSS or the boys. When asked why he did not send cards or letters, he said, "The only thing I can say on that one is I worked with a counselor on some guilt issues, and the frustration of the situation, the condemnation of myself at one time in regards to this . . . ."

The father testified that another reason why he was unable to visit the boys was his job as a traveling photographer, which he held from May to October 1987. He said there were weeks when he would work 1 day, and weeks when he would work 5. He made about $700 a month at that job, but quit because it did not pay enough and was interfering with his recovery from alcoholism. He had a part-time job at the time of trial, but it was "up in the air" and a very "unstable" situation. His wage was $3.75 an hour. He stated that he did not pay child support because he "didn't pay attention to the priority of that."

At the time of trial, the father was not requesting custody of

the children, but merely that they be placed in a foster home in Omaha, so he could have greater contact with them. He testified that he was not financially able to provide a stable environment for the children at the time of trial, but if he had a regular 8-to-5 job and the children lived in foster care in Omaha, he could visit the children more often.

The county court found that the State had met its burden of proof for termination of parental rights based on Neb. Rev. Stat. § 43-292(1), (3), and (6) (Reissue 1984). Those subsections state that (1) the child was abandoned for 6 months or more immediately prior to the filing of the petition; (3) the parent, being financially able, has willfully neglected to provide for the child; and (6) reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination that the child is one as described in § 43-247(3)(a). The trial court further found that the father "made no effort whatsoever to try to comply with [the] Court's previous case plans and it would be detrimental to the [children] to continue this matter any further." The father's motions for new trial and for visitation (pending appeal) were denied.

The father has assigned as error that (1) the State has not met its burden of proof by clear and convincing evidence that his parental rights should be terminated pursuant to § 43-292(1), (3), and (6); (2) the court erred in finding that it was in the best interests of the children to terminate the parental rights of T.D.; (3) the court erred in refusing to grant the request to place the children in an Omaha foster home and in approving case plans which were not reasonable under the circumstances; and (4) the court erred in denying the request for visitation pending trial and pending appeal.

> In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the trial court; however, where the 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.

*In re Interest of J.A. and T.A.*, 229 Neb. 271, 272, 426 N.W.2d

277, 277-78 (1988).

The issue in this case is, taking into consideration the best interests of the children, whether the father's parental rights were properly terminated. The trial court based its decision on three grounds: (1) The father was a person referred to in § 43-292(1), (3), and (6); (2) it was in the best interests of the children to terminate his parental rights; and (3) the father did not comply with the case plan.

The evidence is uncontroverted that the father did not see, call, or send letters or cards to his children from January 1987 until after the petition for termination was filed in October 1987.

In this case, the father made no attempt to contact the children, though he contacted his ex-wife in Hastings. His excuse for not contacting the children was the lack of money to drive from Omaha to Hastings. He did not contact DSS to determine if financial assistance was available.

Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child. *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982). At the time the termination petition was filed, the father had not seen his children for almost 10 months. This lack of contact, with the other evidence, satisfies the abandonment requirement of § 43-292(1).

The evidence at trial shows that, apparently, the father had no intention of contacting his children. Even though his traveling photographer job kept him busy only 1 day a week in some weeks, he did not use that free time to call, see, or write a letter to his boys. He spoke to his ex-wife on the phone, but did not call his boys. When he finally realized that his failure to contact the children could result in the termination of his parental rights, he contacted the foster parents and DSS about a visit.

With respect to the father's failure to comply with the case plans for reunification of the family, the evidence is clear that the father did nothing to comply with the case plans, except maintain sobriety. Under the April plan, the father was to maintain his sobriety; visit weekly and call or write biweekly;

pay $50 a month for child support; maintain a residence for 6 months; have a home study done; provide the caseworker with the names and addresses of doctors for the boys, schools, and day care providers; contact the caseworker if he changed jobs or moved; and sign an authorization for release of information. Under the April plan, he only maintained sobriety. Although he urges that this plan was not tailored to fit his needs, he did not see fit to participate in its formulation. He did not attend the April hearing, did not express his wish that the children be given counseling, and did not tell the court about his problems with paying child support and visiting the children. The plans tended to correct, eliminate, or ameliorate the situation or condition on which the adjudication was made.

Contact with the children would show the father cared about the children and wanted them; support money would demonstrate the priority the father placed on providing for his children; and maintaining a proper home and DSS' home study would help the father prove he would be able to take custody of the children in an appropriate environment. Contact with DSS allows DSS to track his progress as a parent and provider, and allows DSS to provide the father with information about his children. Information about doctors and schools and day care may not be as vital to the goal of reunification, but his failure to take the simple step of finding out which school his sons would attend and who would care for them if they were sick or needed babysitting indicates his lack of commitment to the children. As we stated in *In re Interest of J.W.*, 224 Neb. 897, 904, 402 N.W.2d 671, 676 (1987),

> [I]t was her failure over a period of 16 months to cooperate with and take advantage of the court's and support workers' efforts and services, as well as her failure to visit J.W. The evidence shows that the infrequency of her visits resulted in J.W.'s being uncomfortable when visits did occur.

The children in this case have been shifted around from the Cedars Home and from father to mother since the summer of 1985. They were placed in foster care in December 1986, where they remained until the trial in March of 1988. The termination petition was filed in the fall of 1987, more than 2 years after the

beginning of these problems. As this court has stated in numerous opinions, "A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." *In re Interest of D.C.*, 229 Neb. 359, 367, 426 N.W.2d 541, 546 (1988).

In *In re Interest of D.C., supra* at 366, 426 N.W.2d at 545, this court held that "where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child require that parental rights be terminated."

The record supports the refusal to place the children in foster care in Omaha and the decision to deny the father visitation after his parental rights had been terminated. After parental rights have been terminated, visitation while an appeal is pending would not be in the best interests of children who already have been in limbo for months or years.

The request for visitation during the holiday season of 1987 came after the petition for termination had been filed, and after over 10 months of no word from the father. The denial was supported by the recommendation of DSS.

The request for placement of the children in Omaha came after the termination petition had been filed. Apparently, the father finally realized that he might lose his children for failing to show more interest in them. The evidence does not show that foster placement in Omaha would have been in the best interests of the children. In determining placement for children, the Nebraska Legislature has provided DSS with the authority to make decisions in that regard. "The Department of Social Services shall have the authority to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it." Neb. Rev. Stat. § 43-284 (Supp. 1987). DSS must report to the court within 30 days about a child committed to DSS, and must provide a progress report every 6 months. At the time the father's original request to place the children in Omaha was made, the children's mother was living in Hastings, where the children had been placed, and the children had been living with the foster family for nearly a year. The DSS representative testified that the children's home with the foster family was an excellent placement and that it would not be good for the

children to be uprooted and placed in Omaha.

The evidence is clear and convincing that it was in the best interests of the children that the father's parental rights be terminated.

The judgment is affirmed.

AFFIRMED.

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## GEORGE R. MULLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF AMY SUE MULLER, DECEASED, APPELLANT, V. HAROLD THAUT, M.D., APPELLEE.

430 N.W.2d 884

Filed October 28, 1988. No. 86-391.

1. **Statutes: Judicial Construction: Presumptions: Legislature: Intent.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent.
2. **Statutes: Legislature: Intent.** In considering the meaning of a statute, this court will, if possible, discover the legislative intent from the language of the statute and give it effect. We will not read a statute as if open to construction as a matter of course.
3. **Wrongful Death: Limitations of Actions.** The 2-year limitation in Neb. Rev. Stat. § 30-810 (Reissue 1985) is a statute of limitations.
4. **Physician and Patient: Fraud: Words and Phrases.** A physician is under a duty to disclose material information to his patient, and failure to do so results in fraudulent concealment. "Material information" includes the cause of death of a patient.
5. **Fraud: Limitations of Actions.** One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statute of limitations as a defense.
6. **Estoppel: Limitations of Actions.** Estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations.
7. **Fraud: Actions.** A party will be held to have discovered fraud when it is established that he was possessed of knowledge of facts from which it could be reasonably inferred, that is, inferred from facts which indicate the alleged fraud. Ordinarily, such an inquiry presents a mixed question of law and fact, and where it does not conclusively appear that the party had knowledge of facts of that nature, a complaint should not be dismissed on motion.

8. **Estoppel.** Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality, and justice in accordance with good conscience, honesty, and reason. Under such circumstances, the doctrine subserves its true purpose as a practical, fair, and necessary rule of law.
9. **Estoppel: Limitations of Actions.** When the act or promise of one causes another to do or forbear to do something which he otherwise would have done, the other is estopped from taking advantage of the act or omission caused by his own act or promise. One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought.
10. **Fraud: Limitations of Actions.** The fraudulent concealment of a cause of action from the one to whom it belongs, by the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action.
11. **Fraud: Estoppel: Limitations of Actions: Wrongful Death.** Fraudulent concealment, if proved by the plaintiff, estops the defendant from asserting the statute of limitations as a defense to a plaintiff's wrongful death action under Neb. Rev. Stat. § 30-810 (Reissue 1985).
12. **Summary Judgment.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, and any inferences to be drawn therefrom, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
13. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded for further proceedings.

William A. Wieland, of Healey, Wieland, Kluender, Atwood & Jacobs, for appellant.

Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

BURKHARD, D.J.

On October 17, 1985, George R. Muller, as personal representative of the estate of Amy Sue Muller, deceased, commenced a wrongful death action on behalf of the estate of Amy Sue Muller, his infant daughter, upon the allegations of professional negligence contained in his petition against the defendant, Harold Thaut, a physician. George Muller and Bonnie K. Muller are husband and wife and were the parents of Amy Sue. Plaintiff's first cause of action was for wrongful death, and plaintiff's second cause of action was for conscious pain and suffering sustained by Amy Sue prior to her death, and for funeral expenses. The plaintiff alleged that the defendant's negligence had caused the death of Amy Sue Muller following her birth on August 3, 1976, and further alleged that the action was not barred by the statute of limitations applicable to professional negligence actions or wrongful death actions.

Plaintiff alleged in his petition that by reason of defendant's negligence Amy Sue died 37 minutes after her birth on August 3, 1976. Plaintiff alleged that defendant advised the parents of Amy Sue that Amy Sue had been severely deformed, was not expected to live, and would have been retarded; that her lungs were congested; and that she died because of respiratory problems. Plaintiff alleged that following an August 4, 1976, autopsy on the body of Amy Sue, defendant advised the parents that the autopsy revealed that they need not worry about the possibility of defects in later children, but defendant did not further discuss the cause of death.

Plaintiff alleged that he and his wife relied upon the explanations and advice of the defendant as their family physician, sought no further information as to the death of Amy Sue, and did not see the written autopsy findings or the death certificate of Amy Sue.

Plaintiff alleged that in June of 1985, he and his wife were advised that there might be life insurance benefits payable by reason of Amy Sue's death and that the Mullers were advised to obtain a copy of the death certificate. The plaintiff alleged that on June 20, 1985, upon the Mullers' obtaining a copy of the death certificate signed by the defendant, they discovered

defendant's statement thereon that the cause of death was "a subdural hemorrhage and a laceration of the falx cerebri and the left tentorium cerebelli," the same being traumatic injuries to Amy Sue.

Plaintiff alleged that the statutes of limitations on professional negligence and wrongful death had been tolled and had not imposed a limitation on the cause of action for wrongful death by reason of the fraudulent misrepresentation and concealment of the facts by the defendant as to the cause of death. Plaintiff alleged defendant was now estopped to invoke the provisions of the statutes of limitations to his benefit.

The defendant, in his amended answer to plaintiff's first cause of action, denied, among other things, any negligence on his part, and alleged that plaintiff's first cause of action was barred by the applicable statute of limitations.

Defendant filed his motion for partial summary judgment as to plaintiff's first cause of action, alleging that it was barred by the applicable statute of limitations. Plaintiff dismissed his second cause of action, and a hearing was held upon the defendant's motion for partial summary judgment on March 27, 1986.

On April 16, 1986, the district court entered its judgment finding that plaintiff's decedent died on August 3, 1976, that plaintiff instituted this action on October 17, 1985, that the action was barred by the provisions of Neb. Rev. Stat. § 30-810 (Reissue 1985), and that plaintiff's allegations of fraudulent misrepresentation or concealment were unavailing and the action was barred. Plaintiff's first and only remaining cause of action was dismissed, and plaintiff appealed to this court.

The plaintiff's assignments of error can be boiled down to one: The court erred in finding that plaintiff's action was barred by the 2-year statute of limitations contained in § 30-810. The plaintiff basically contends in that regard that the alleged fraudulent concealment by the defendant renders the wrongful death 2-year statute of limitations unavailable to the defendant.

This court has not previously addressed the issue raised in this appeal as to the effect on the 2-year limitation of a failure to discover a wrongful death cause of action because of fraudulent

concealment by the alleged tort-feasor.

In an action for wrongful death brought under Neb. Rev. Stat. § 30-809 (Reissue 1985), § 30-810 provides: "Every such action . . . shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin."

The defendant relies strongly on *Gengo v. Mardis*, 103 Neb. 164, 170 N.W. 841 (1919). In *Gengo*, one John Butera came to his death in Omaha, Nebraska, on November 15, 1911, while employed as a workman on the Flatiron Building. Paul Gengo became administrator of Butera's estate and on December 5, 1913, as such administrator, filed an amended petition against John C. Mardis, doing business as the J. C. Mardis Company, charging Mardis with the wrongful death of Butera. The action was commenced under the wrongful death statute in existence at the time, which provided that every such action shall be commenced within 2 years after the death of said person. A demurrer was filed to the petition. The demurrer was sustained by the district court for Douglas County, Nebraska, on the ground that the petition did not state a cause of action, as more than 2 years had elapsed from the accruing of said cause to the beginning of the action.

In affirming the district court, this court stated that the purpose of the wrongful death statute, commonly known as Lord Campbell's Act, "was to prescribe limitations and a remedy for a cause of action which did not exist at common law, for at common law the cause of action died with the death of the claimant." 103 Neb. at 165, 170 N.W. at 841.

The *Gengo* court pointed out that the 2-year limitation in the wrongful death statute was contrary to the general statutory provisions with respect to limitations, as the general statutes provided that when a party places himself outside the jurisdiction of the court, absconds, or stays in hiding so that service cannot be had upon him, then the statute of limitations shall cease to operate, while the wrongful death statute

> has its provisions checked and hemmed in as hereinbefore stated, and every action brought under it must be commenced with two years. . . . We are met with the

> proposition that we should construe the statute of limitations as provided for in section 1429 [the wrongful death statute], together with section 7577 [the general statutes of limitations], and the toll for the time which defendant stayed away from the jurisdiction of the court should be allowed, and, if this was done, then the petition states a cause of action.

103 Neb. at 166, 170 N.W. at 841.

In strictly construing the 2-year limitation in the wrongful death statute, this court held that as said statute (Rev. Stat. § 1429 (1913)) was

> a mere paragraph that comprises an entire act beginning with 1420, and was made with reference to this principal act and independent of any other, it was made to control and provide absolutely a time within which an action shall be commenced. If it were not so, then it would have been very easy for the legislature to have the same saving clause that is found under section 7577; but inasmuch as it does not contain any exception, or any such provision, and no saving clause whatever, it is evident that it means just what it says . . . . If there was any saving clause provided for in this section 1429, why was it not placed there? If it intended to provide a condition which modifies and stops the statute of limitations, then why did it not say so? The answer is: It was never intended to be any other way than the way that we find it.

103 Neb. at 167, 170 N.W. at 841-42.

In affirming the finding of the trial judge, the *Gengo* court concluded:

> [S]ection 1429 . . . creates a right of action for damages by death by wrongful act, which did not exist at common law. The enactment of Lord Campbell's Act provides a rule for the statute of limitations which must operate as a condition precedent to a right of action; this time the statute fixes is two years, and the provision is absolute; as it has no saving clause, it must be strictly adhered to.

103 Neb. at 172-73, 170 N.W. at 844.

The *Gengo* decision is almost 70 years old, and apparently the 2-year limitation has not changed over the years. Defendant

cites *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 74, 333 N.W.2d 646, 649 (1983), which states: "Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent." In *Cass Constr. Co. v. Brennan*, 222 Neb. 69, 76, 382 N.W.2d 313, 318 (1986), it was held: "We have repeatedly held that in considering the meaning of a statute, we will, if possible, discover the legislative intent from the language of the statute and give it effect. We will not read a statute as if open to construction as a matter of course."

However, none of the cases involve the issue as to whether or not one who conceals material facts or misrepresents facts necessary to the discovery of the existence of a cause of action against him is estopped to avail himself of the statute of limitations as a defense. Along these lines it has been suggested that the wrongful death statute's 2-year limitation is not a technical statute of limitations, but is a statute of creation and is more analogous to a condition precedent. This seems to be an unwarranted and technical play on words. Section 30-810 provides that the action shall be commenced within 2 years after death. Various limitation of action statutes under chapter 25, article 2, of our statutes provide that the particular action "can only be brought within" a specified number of years after the cause of action shall have accrued. The language in § 30-810 that the wrongful death action "shall be commenced within two years after the death of such person" means in essence and for all logical and practical purposes that such action can only be brought within 2 years after the death of such person. *Gengo v. Mardis*, 103 Neb. 164, 170 N.W. 841 (1919), referred to the "statute of limitations" in the wrongful death statute. The defendant, in his motion for partial summary judgment, stated that "the first cause of action stated in plaintiff's Petition is barred by the applicable statute of limitations." The 2-year limitation in § 30-810 is a statute of limitations.

On the issue of fraudulent concealment, "A physician is under a duty to disclose material information to his patient, and failure to do so results in fraudulent concealment." *Martin v. Rinck*, 501 N.E.2d 1086, 1089 (Ind. App. 1986). "Material

information" includes the cause of death of a patient.

In *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 348 N.W.2d 869 (1984), the plaintiff alleged that in March of 1971, she was implanted with a Dalkon Shield and that in November of 1978, her physician found that she had an abscess and infection in her uterus, and she underwent an abdominal hysterectomy with bilateral oophorectomy. Plaintiff alleged that her injury was caused by the defects in the Dalkon Shield and that the defendant had concealed information regarding the dangers of use of the Dalkon Shield. The defendant filed a demurrer alleging that the plaintiff did not have capacity to sue and that any cause of action was barred by the statute of limitations. The trial court sustained the demurrer and dismissed plaintiff's amended petition. In reversing the district court on the statute of limitations issue, this court stated as follows:

> The issue to be determined is whether the defendant is estopped from raising the statute of limitations as a defense because defendant fraudulently concealed its knowledge of the dangerousness of the Dalkon Shield. In *Rucker v. Ward*, 131 Neb. 25, 33, 267 N.W. 191, 195 (1936), we said, " 'One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statutes of limitation as a defense;' . . . ." In *Luther v. Sohl*, 186 Neb. 119, 121, 181 N.W.2d 268, 269 (1970), we stated that "estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations." We also stated that "if a plaintiff has ample time to institute his action, after the inducement for delay has ceased to operate, he cannot excuse his failure to act within the statutory time on the ground of estoppel." *Id.* at 122, 181 N.W.2d at 270.
>
> *Knaysi v. A. H. Robins Co.*, 679 F.2d 1366 (11th Cir. 1982), is similar to the present case. In that case, Knaysi alleged that her spontaneous septic abortion was caused by the Dalkon Shield and that Robins had concealed its knowledge that septic abortions occurred in connection

with the use of the Dalkon Shield. The eleventh circuit reversed the trial court's grant of summary judgment, which was made on the basis that the action was time barred. The eleventh circuit held that Knaysi had adequately pleaded facts which, if proven, could constitute an equitable estoppel to raising the statute of limitations as a defense. The court stated at 1370: "Having determined that the facts alleged could, if proved, estop Robins from pleading the bar of the statute of limitations, we further conclude that the issue of equitable estoppel was one inappropriate for summary judgment as there exist genuine issues of material fact to be resolved at trial. First, there are obvious questions of fact regarding the alleged misrepresentations made by Robins. In *Dupuis v. Van Natten*, 61 A.D.2d 293, 402 N.Y.S.2d 242 (1978), the Appellate Division, affirming the trial court's holding that triable issues of fact precluded entry of summary judgment for defendant, noted the 'bona fide issues of fact concerning the alleged misrepresentations which resulted in plaintiffs' failure to institute a timely action.' *Id.* at 295, 402 N.Y.S.2d at 243.

"In addition, the highest state court in New York recently has endorsed the notion that the plaintiff's due diligence in bringing suit must 'be demonstrated by the plaintiff when he seeks the shelter of the doctrine [of equitable estoppel].' *Simcuski v. Saeli*, 44 N.Y.2d at 450, 377 N.E.2d at 717, 406 N.Y.S.2d at 263. The Court of Appeals went on to state: 'Whether in any particular instance the plaintiff will have discharged his responsibility of due diligence in this regard must necessarily depend on all the relevant circumstances. . . . *It is not* possible or *appropriate*, however, on the present motion [to dismiss] addressed to the pleading, . . . to determine whether this plaintiff met her obligation of due diligence when she instituted the present action . . . .' *Id.* (emphasis added). Other cases in the New York courts echo the conclusion that the question of a plaintiff's due diligence is a question of fact unsuited for summary judgment. In *Renz v. Beeman*, a diversity action in which

> New York law governed, the Second Circuit opined 'that the test for timely knowledge under the doctrine of equitable estoppel is similar to that set forth with regard to fraud in CPLR § 213(8)—"could with reasonable diligence have discovered it." ' 589 F.2d at 751-52. In *Erbe v. Lincoln Rochester Trust Co.*, 3 N.Y.2d 321, 144 N.E.2d 78, 165 N.Y.S.2d 107 (1957), a fraud action, the New York Court of Appeals elaborated on this reasonable diligence test and the inappropriateness of summary disposition: '[T]he plaintiffs will be held to have discovered the fraud when it is established that they were possessed of knowledge of facts from which it could be reasonably inferred, that is, inferred from facts which indicate the alleged fraud. Ordinarily such an inquiry presents a mixed question of law and fact . . . and, where it does not conclusively appear that the plaintiffs had knowledge of facts of that nature a complaint *should not be dismissed on motion*.' *Id.* at 326, 144 N.E.2d at 80-81, 165 N.Y.S.2d at 111 (citations omitted) (emphasis added). *See also Erbe v. Lincoln Rochester Trust Co.*, 13 A.D.2d 211, 214 N.Y.S.2d 849 (1961), *appeal dismissed*, 11 N.Y.2d 754, 181 N.E.2d 629, 226 N.Y.S.2d 692 (1962) (motion to dismiss should be denied and plaintiff permitted to litigate estoppel issue). In light of these cases we must conclude that the Knaysis' diligence in pursuing their claims against Robins is a triable issue of fact in this case."

217 Neb. at 341-44, 348 N.W.2d at 871-72.

The equitable doctrine of estoppel was discussed at length by this court in *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 346, 175 N.W.2d 621, 623-24 (1970), wherein it stated:

> By the great weight of authority, the equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations and a defendant may, by his representations, promises, or conduct be so estopped where the other elements of estoppel are present. See Annotation, 24 A.L.R.2d 1417. "Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are

> founded upon equity, morality, and justice in accordance with good conscience, honesty, and reason. Under such circumstances, the doctrine subserves its true purpose as a practical, fair, and necessary rule of law." Koop v. City of Omaha, 173 Neb. 633, 114 N.W.2d 380 [1962].
>
> "Equitable estoppels cannot in the nature of things be subjected to fixed and settled rules of universal application like legal estoppels, nor be hampered by the narrow confines of a technical formula.
>
> "Equitable estoppel rests largely on the facts and circumstances of the particular case . . . .
>
> " '. . . a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon.' " National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N.W.2d 821 [1966].

This court in *State Farm, supra*, also quoted as follows from *Rupley v. Huntsman*, 159 Cal. App. 2d 307, 324 P.2d 19 (1958):

> "When the act or promise of one causes another to do or forbear to do something which he otherwise would have done, the other is estopped from taking advantage of the act or omission caused by his own act or promise. One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought."

185 Neb. at 347, 175 N.W.2d at 624.

"Silence on the part of the physician for the statutory period should not destroy the rights of the patient." *Spath v. Morrow*, 174 Neb. 38, 43, 115 N.W.2d 581, 584-85 (1962).

The reasoning behind the doctrine of fraudulent concealment as applied to a statute of limitations defense was discussed in *Colbert v. Waitt*, 445 N.E.2d 1000, 1002-03 (Ind. App. 1982), as follows:

> Before we address whether summary judgment was properly entered, we note that the doctrine of fraudulent concealment is as applicable to the statute of limitations

> defense under I.C. 16-9.5-3-1 [medical malpractice statute of limitations] as it was to the statute of limitation defense based upon the former medical malpractice act. See, *Guy v. Schuldt*, (1956) 236 Ind. 101, 138 N.E.2d 891. This doctrine is not based upon a construction of the statute. Rather, the doctrine is predicated on the principle of estoppel that one who by deception or any violation of duty towards the plaintiff, conceals material facts and thereby prevents the discovery of the wrong, should not be permitted to take advantage of his own deceit or concealment by asserting the statute of limitations. *Guy, supra*. The doctrine is not an "exception" to the rule of our malpractice limitation statute, but constitutes an equitable estoppel which precludes certain defendants from asserting the statutory bar. *Bronckhorst v. Taube*, (1976) 168 Ind.App. 132, 341 N.E.2d 791. Before the doctrine of estoppel may be used to bar the defendant's use of the statute of limitations, the fraud must be of such character as to prevent inquiry, or to elude investigation, or to mislead the party who claims the cause of action. *Guy, supra* 138 N.E.2d at 894.

In *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959), petitioner, claiming that respondent was estopped from pleading the statute of limitations because it had induced delay by representing to the petitioner that he had 7 years in which to sue, brought an action against the respondent in federal district court under the Federal Employers' Liability Act, after expiration of the 3-year statutory period of limitation, to recover damages for an industrial disease he allegedly contracted while working for respondent. In finding that the district court erred in dismissing the case on the ground that it was barred by the 3-year limitation, the Court held that if the petitioner can prove that respondent's responsible agents conducted themselves in such a way that he was justifiably misled into a good-faith belief that he could begin his action at any time within 7 years after it accrued, he is entitled to have his case tried on the merits. The Court went on to say:

> To decide the case we need look no further than the maxim

> that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

359 U.S. at 232-33.

Fraudulent concealment as it relates to rendering a statute of limitations unavailable has been discussed in other cases. In *Halpern v. Barran*, 313 A.2d 139, 143 (Del. Ch. 1973), the court held: "Where there has been fraudulent concealment from a plaintiff, the statute is suspended only until his rights are discovered or until they could have been discovered by the exercise of reasonable diligence." See, also, *Alford v. Summerlin*, 362 So. 2d 103 (Fla. App. 1978).

In 51 Am. Jur. 2d *Limitation of Actions* § 147 at 717-19 (1970), the following is set forth:

> The general rule supported by the decisions in most jurisdictions is that the fraudulent concealment of a cause of action from the one to whom it belongs, by the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action; under this rule, one who wrongfully conceals material facts and thereby prevents discovery of his wrong or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong, until the expiration of the full statutory period from the time when the facts were discovered or should with reasonable diligence have been discovered. Stated in another way, the general trend of the decisions is in support of the rule that where a party against whom a cause of action has accrued in favor of another prevents such other, by actual fraudulent concealment, from obtaining knowledge thereof, or the fraud is of such a character as to conceal itself, the statute of limitations will begin to run from the time the right of action is discovered or by the exercise of ordinary

diligence might have been discovered. This rule finds application most frequently in actions based upon fraud or in which fraud is the gist of the action, but it is by no means restricted to actions of that character; the rule applies regardless of the nature of the cause, if the requisite element of fraudulent concealment of the cause of action is present, and it applies in actions at law as well as in suits in equity. In many jurisdictions the limitation statutes contain exceptions in favor of one from whom a cause of action is concealed, usually allowing him a certain time after discovery of the fraudulent concealment within which to bring suit, although he is entitled in any case to the full statutory period from the date of the act creating his cause of action.

The reasoning adopted in support of the general rule is that to hold that the statute of limitations ran in favor of a person who had concealed the cause of action under such circumstances would be to permit the defendant to take advantage of his own wrong and to sustain a defense of which in good conscience he ought not to be permitted to avail himself. Since the delay of bringing the suit is due to the fraud of the defendant, the cause of action against him ought not to be considered as having accrued until the plaintiff could obtain the knowledge that he had a cause of action. It would be not only subversive of good morals but contrary to the plainest principles of justice to permit one practicing a fraud and then concealing it to plead the statute of limitations when, in fact, the injured party did not know of and could not with reasonable diligence have discovered the fraud. Accordingly, it has been held that a court of equity may, by the use of its injunctive power, disarm the defendant from using the statute of limitations in an action at law where there has been a fraudulent concealment by the defendant of the cause of action against him, or when the defendant has employed means to mislead the plaintiff or to hide from him the fact that a cause of action has arisen.

For a personal representative to commence a wrongful death action in a timely manner, it is necessary for the personal

representative to be aware of facts giving rise to the cause of action.

By misrepresenting or concealing facts, a physician, or any other person, may appreciate a twofold benefit. He may avoid having his skill and judgment questioned, and he may escape liability for the negligent harm he has caused. It is not the policy of the law to encourage such conduct.

A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1985). In reviewing a summary judgment, this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt. *Schatz v. Vidlak*, 229 Neb. 4, 424 N.W.2d 613 (1988).

We conclude that fraudulent concealment, if proved by the plaintiff, estops the defendant from asserting the statute of limitations as a defense to plaintiff's wrongful death action under § 30-810. This is an issue of material fact, and the defendant was not entitled to summary judgment as a matter of law.

We are not saying, or in any way implying, by this opinion that the defendant is guilty of fraudulent concealment. In fact, that is expressly denied by the defendant in his answer. The issue of fraudulent concealment is raised by the pleadings and will only be resolved by a trial on the merits of the case.

The judgment of the district court in sustaining defendant's motion for partial summary judgment is reversed, and this matter is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# FIRST NATIONAL BANK OF OMAHA, A NATIONAL BANKING CORPORATION, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

430 N.W.2d 893

Filed October 28, 1988. No. 87-027.

1. **Pleadings: Actions.** A petition must contain a statement of facts constituting the cause of action, in ordinary and concise language and without repetition.
2. _____: _____. Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
3. **States: Statutes: Actions.** Statutes authorizing suits against the State are to be strictly construed in favor of the sovereign, since they are in derogation of the State's sovereignty.
4. **Actions: Words and Phrases.** A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty.
5. **Negligence: Words and Phrases.** In order for actionable negligence to exist, there must be a legal duty on the part of the defendant to protect plaintiff from injury, failure to discharge that duty, and damages proximately resulting from that undischarged duty.
6. **Tort Claims Act: Words and Phrases.** Tort claim shall mean any claim against the State of Nebraska 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 State, while acting within the scope of his office or employment, under circumstances where the State, if a private person, would be liable to the claimant for such damage, loss, injury, or death.
7. **Tort Claims Act.** Claims exempt under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987), include any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a State agency or an employee of the State, whether or not the discretion be abused; as well as any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
8. **Negligence.** When one under no obligation to act does undertake action, one must act with reasonable care.
9. **Demurrer: Pleadings.** As against a demurrer, the court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial.
10. **Demurrer: Pleadings: Appeal and Error.** If a demurrer is sustained, the adverse party may amend if the defect can be remedied by amendment. This is not an

absolute right, and refusal by the trial court to permit an amendment of the petition must be shown to be an abuse of discretion.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas J. Culhane, William E. Morrow, James B. Cavanagh, and Gary L. Hoffman, of Erickson & Sederstrom, P.C., for appellant.

Robert M. Spire, Attorney General, and Martel J. Bundy for appellee.

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

COLWELL, D.J., Retired.

Plaintiff's appeal involves a claim made under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987). Plaintiff, First National Bank of Omaha (FNB), claims damage when it acquired a bank and a savings company as suggested and approved by the State of Nebraska (State) acting by and through the director of the Department of Banking and Finance (Department). The two institutions later became insolvent. The State's demurrer to the petition was sustained, and the trial court ordered the petition dismissed without leave to amend.

On April 8, 1985, FNB filed a claim with the State Claims Board for $3,760,000 damages caused by acts or omissions of the State. This claim was denied by the board on October 7, 1985. On April 1, 1986, FNB filed its petition in the Lancaster County District Court.

The petition informs us as follows. In April 1980, FNB loaned funds to James and Nancy Gillette to acquire the stock of First Security Bank and Trust Company (Bank) and First Security Savings (Savings), an industrial loan and investment company, both of Beatrice, Nebraska. The loans were secured by stock in both institutions. In January 1983, both institutions were nearly insolvent and the loans were in default, primarily due to nonperforming loans made to Newt Copple, his associates, and related entities. As of April 8, 1983, those loans

to the Bank amounted to $1,181,661, and the loans to Savings amounted to $1,537,308.08. FNB notified the Department of its decision to proceed against its collateral and sell the stock at public sale. The Department, acting through its director, Paul Amen, and its assistant director, Barry Lake, initiated and/or engaged in a series of discussions with FNB. On March 25, 1983, FNB sent notices to potential purchasers of its intent to sell the stock.

On March 10, 1983, the Department received notice from the Federal Bureau of Investigation of a pending investigation of fraudulent loan transactions at the Bank, and it had information of similar fraudulent loan transactions involving Commonwealth Savings Company and S.E. Copple, its president. This information was not shared with FNB.

On April 1, 1983, the director convened a meeting in his office, attended by FNB, the Gillettes, the Nebraska Depository Institution Guarantee Corporation (NDIGC), and S.E. Copple. A plan was proposed by the director for FNB to acquire the Bank and Savings that included three elements:

> (a) The Bank and The Savings Company . . . would each loan S. E. Copple sufficient funds to permit him to purchase the Newt Copple loans from their respective institutions (thereby, in effect, extending his personal credit to further support those loans to Newt Copple and other related entities).
>
> (b) FNB would accept the stock of the Bank and the Savings Company and the other collateral in satisfaction of the loans to the Gillettes, Beatrice State Company and Olympic Investment Company, and, thereby, become the owner of both institutions.
>
> (c) The NDIGC would make a capital contribution of $200,000.00 to the Savings Company and provide a guarantee in the amount of $680,000.00 against further losses by that institution.

On April 8, 1983, FNB entered into an agreement with the Gillettes to acquire the stock and assets of Bank and Savings upon these conditions: (1) The Bank and Savings have each made a loan to S.E. Copple acceptable to the Department; (2) the NDIGC and Savings have made an agreement providing for

capital advances and guarantees acceptable to the Department; and (3) the Department has provided assurances to FNB concerning the Bank's and Savings' capital adequacy, quality of assets, and violations of law. Barry Lake appeared as a witness to the execution of the agreement.

On April 8, 1983, the Department approved the FNB-Gillette agreement. No facts are alleged regarding the agreement. However, by inference, the suggested substitute loans were made by the Bank and Savings to S.E. Copple, and an agreement was made between Savings and NDIGC. There is a conclusion that the Department accepted the terms and conditions of the S.E. Copple loans, accepted the terms of the Savings-NDIGC agreement, and gave assurances to FNB concerning the capital adequacy, asset quality, and violations of law relating to the Bank and Savings. Soon, S.E. Copple defaulted on the notes to the Bank and Savings.

The concluding paragraph, paragraph 15, states six particular acts of negligence that FNB claims were the proximate cause of its damage. The State filed a motion to make parts of paragraph 15, alleging the acts of negligence, more definite and certain, and to strike parts thereof. The motion was granted. FNB realleged parts of paragraph 15 and amended other parts as ordered.

"The enumeration of specific acts of negligence should state the *ultimate acts of negligence* and not the conclusion of the pleader." (Emphasis supplied.) *Graham v. Simplex Motor Rebuilders, Inc.*, 189 Neb. 507, 512, 203 N.W.2d 494, 498 (1973); *Ripp v. Riesland*, 176 Neb. 233, 125 N.W.2d 699 (1964).

FNB has alleged six separate acts or omissions of negligence. These allegations are mixed with lengthy operative facts and conclusions, making the negligent acts difficult to distinguish. Since the general allegation of negligence will withstand the challenge of a demurrer, see *Crawford v. Ham*, 209 Neb. 802, 311 N.W.2d 896 (1981), it is sufficient that we briefly summarize the allegations as being that the State was negligent in: (1) suggesting, fostering, and approving the April 8, 1983, FNB-Gillette agreement; (2) failing, in the course of its operational performance of regulatory duties, to discover S.E. Copple's insolvent condition; (3) approving the S.E. Copple

transactions with the Bank and Savings; (4) failing to discover facts in the operational performance of its duties which would have prevented it from making assurances to FNB; (5) failing to timely advise FNB of the fraudulent and/or criminal conduct of S.E. Copple; and (6) failing to properly investigate the financial condition of S.E. Copple.

The State then demurred to the amended petition, claiming that there was a lack of jurisdiction and that the petition failed to state a cause of action. See Neb. Rev. Stat. § 25-806(1) and (6) (Reissue 1985). The demurrer was sustained "for the reasons set out in said demurrer," and the petition was dismissed for the reason that no cause of action can be stated. Neither party addresses the jurisdiction issue. FNB appeals, claiming the trial court erred in: (1) granting the motion to strike paragraphs 15(a), (c), (e), and (f); (2) sustaining the demurrer, because the amended petition stated a cause of action based on negligence under the State Tort Claims Act; and (3) dismissing FNB's petition, for the reason that it did state facts sufficient to state a cause of action for negligence under the State Tort Claims Act.

In view of the disposition of this case, it is not necessary to discuss the first assignment.

The second and third assignments are discussed together. A petition must contain a statement of facts constituting the cause of action, in ordinary and concise language and without repetition. See Neb. Rev. Stat. § 25-804 (Reissue 1985). "Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute." *Rosnick v. Marks*, 218 Neb. 499, 501, 357 N.W.2d 186, 188 (1984). Ordinarily, a petition is liberally construed in favor of the pleader. See *Bard v. Cox Cable of Omaha, Inc.*, 226 Neb. 880, 416 N.W.2d 4 (1987). Statutes authorizing suits against the State are to be strictly construed in favor of the sovereign, since they are in derogation of the State's sovereignty. See *Frye v. Sibbitt*, 145 Neb. 600, 17 N.W.2d 617 (1945). "Tested by general demurrer a petition for an extraordinary remedy is strictly construed." *Emry v. Lake*, 181 Neb. 568, 570, 149 N.W.2d 520, 522 (1967).

A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty. *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 391 N.W.2d 557 (1986). In order for actionable negligence to exist, there must be a legal duty on the part of the defendant to protect plaintiff from injury, failure to discharge that duty, and damages proximately resulting from that undischarged duty. *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987).

In *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986), a tort case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), this court held:

> Although we do not engage in a special-general duty analysis of sovereign immunity, it is still necessary for the claimant, in order to recover from the municipality, to prove that a duty was owed to him or her, that this duty was breached, and that an injury was proximately caused by that breach.

(Syllabus of the court.)

A general demurrer tests substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980). As against a demurrer, the court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial. See *Fisher v. Housing Auth. of City of Omaha,* 214 Neb. 499, 334 N.W.2d 636 (1983). A demurrer reaches an instrument filed with and made a part of the petition. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977).

## STATUTES

Section 81-8,210(4) provides:

> Tort claim shall mean any claim against the State of Nebraska 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 state, *while acting within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death* . . . .

(Emphasis supplied.)

Section 81-8,219(1), in regard to claims exempt from the act, provides:

> (a) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform *a discretionary function or duty* on the part of a state agency or an employee of the state, whether or not the discretion be abused;
>
> . . . .
>
> (d) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, deceit, or interference with contract rights.

(Emphasis supplied.)

Section 81-8,227 provides:

> (1) Every tort claim permitted under this act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by this act.

(Emphasis supplied.)

Applicable here are Neb. Rev. Stat. §§ 8-1501 to 8-1510 (Reissue 1987), regulating the acquisition or merger of financial institutions, including the powers, duties, and authority of the Department and its director, particularly as they relate to failing institutions.

## THE EXEMPTIONS

> [T]he discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. [Citations omitted.] In other words, the State is liable for negligence of its employees at the operational level, where

> there is no room for policy judgment. . . .
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> . . . .
>
> . . . When one under no obligation to act does undertake action, one must act with reasonable care.

*Wickersham v. State*, 218 Neb. 175, 180-81, 354 N.W.2d 134, 138-39 (1984). See, also, *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977); *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984).

Concerning misrepresentation, both parties argue that two federal cases should be considered: (1) *United States v. Neustadt*, 366 U.S. 696, 81 S. Ct. 1294, 6 L. Ed. 2d 614 (1961), and (2) *Block v. Neal*, 460 U.S. 289, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983). Both cases involve the Federal Tort Claims Act.

The State relies on *Neustadt*, where it was held that misrepresentation under the act included willful or negligent misrepresentation, and an exemption applied where the purchaser of a home relied upon an inaccurate inspection and appraisal made by the Federal Housing Administration. The essence of an action for misrepresentation is the communication of misinformation on which the recipient relies.

FNB relies on *Block*, where the Court held that the claim did not arise out of misrepresentation as in *Neustadt* but, rather, upon the former conduct of officials of the Farmers Home Administration (FmHA) from whom the claimant, Neal, obtained a loan to purchase a house. Neal's contract with the builder provided that the work was to conform to plans and specifications approved by FmHA and that FmHA had the right to approve or reject work, materials, and workmanship. After construction and acceptance of the house, defects in workmanship appeared. Neal claimed relief under the Federal Tort Claims Act, resulting from FmHA employees' failure to inspect and to supervise construction. In approving the claim, the Court distinguished the facts from those in *Neustadt*:

> [T]he essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies. The gravamen of the action against the Government in *Neustadt* was that the plaintiff was misled by a "Statement

> of FHA Appraisal" prepared by the Government. Neustadt alleged no injury that he would have suffered independently of his reliance on the erroneous appraisal. . . .
>
> . . . . FmHA's duty to use due care to ensure that the builder adhere to previously approved plans and cure all defects before completing construction is distinct from any duty to use due care in communicating information to respondent.

460 U.S. at 296-97.

FNB argues that the State had a duty imposed by law to conduct periodic examinations of Commonwealth that would have revealed irregularities at that institution; that the State breached that duty by failing to conduct such examinations; and that "[b]ut for that omission, the Department would not or should not have approved Appellant's takeover of [the Bank and Savings]; nor would (or should) the Department have given Appellant assurances as to the capital adequacy of these institutions." Reply brief for appellant at 5.

The State Tort Claims Act excludes a cause of action based on a discretionary function or duty, § 81-8,219(1)(a), and any cause of action based on misrepresentation or deceit, § 81-8,219(1)(d). However, the act does recognize a cause of action based on the negligent breach of a duty, whether such is imposed by statute or common law. See *Wickersham v. State*, *supra*.

With the bare record of the petition before us, we note that the 30-page petition, incorporating exhibits and a copy of the original claim filed with the board, is confusing in our determination of the operative facts supporting FNB's theory of recovery, i.e., that the State breached its duty to examine Commonwealth periodically as provided by law. We find these operative facts and inferences: The State failed to conduct periodic examinations of Commonwealth as provided by law; the State failed to exercise reasonable care in the operational performance of its regulatory duties; and the State improperly approved FNB's acquisition of the Bank and Savings institutions. As against these allegations, there are other and

overriding allegations supporting the exemptions of discretion and misrepresentation. We agree with the trial court that the petition fails to clearly and concisely state facts alleging a cause of action in favor of FNB, and we affirm its order sustaining the demurrer.

Neb. Rev. Stat. § 25-854 (Reissue 1985) provides that if a demurrer is sustained, the adverse party may amend if the defect can be remedied by amendment. This is not an absolute right, and refusal by the trial court to permit an amendment of the petition must be shown to be an abuse of discretion. See *Suzuki v. Gateway Realty*, 207 Neb. 562, 299 N.W.2d 762 (1980). We are reminded that it is not the purpose of a demurrer to decide what the facts are, and, recognizing the distinction between fraud and tort, we find that it is reasonably possible that FNB may be able to state a cause of action in support of its theory of recovery. The court's order dismissing the petition without leave to amend was in error and an abuse of its discretion; that order is set aside. This cause is remanded for further proceedings. Upon receipt of the mandate by the clerk of the district court, FNB shall have 30 days to file an amended petition.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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## K.M.H., APPELLANT, V. LUTHERAN GENERAL HOSPITAL ET AL., APPELLEES.

431 N.W.2d 606

Filed October 28, 1988. No. 87-368.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

David Hicks, of Pollak & Frank, and, on brief, Walter M. Calinger for appellant.

Jerald L. Rauterkus and Michael A. Fortune, of Erickson & Sederstrom, P.C., for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

Plaintiff appeals from an order granting the motion for summary judgment made by defendants Lutheran General Hospital and Lutheran Medical Center, claiming there are material questions of fact remaining for a jury's decision. Briefly, her petition alleges that on January 6, 1984, while she was a patient in the hospital, she was sexually assaulted by a male nurse employee of the hospital, causing her damages; her claim for recovery was based on respondeat superior and on the hospital's negligent hiring of the nurse.

From a full reading of the record, there is no merit to this appeal, since the order is supported by substantial evidence establishing that defendants were entitled to judgment as a matter of law and, particularly, since plaintiff failed to produce any controverting evidence, which was her duty. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985).

AFFIRMED.

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## K.M.H., APPELLANT, V. LUTHERAN GENERAL HOSPITAL ET AL., APPELLEES.

431 N.W.2d 606

Filed October 28, 1988. No. 87-742.

1. **Summary Judgment.** The party moving for summary judgment must make a prima facie showing that if the evidence were uncontroverted at trial, he or she would be entitled to judgment as a matter of law. Such a showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. The court then views the evidence in a light most favorable to the party opposing the motion, and decides only whether there is an issue of fact, not how such an issue should be decided.

2. **Health Care Providers.** A patient is admitted to a hospital under an implied obligation that she shall receive such reasonable care and attention for her safety as her mental and physical condition may require.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for further proceedings.

David Hicks, of Pollak & Frank, and, on brief, Walter M. Calinger for appellant.

Jerald L. Rauterkus, of Erickson & Sederstrom, P.C., for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff appeals from a summary judgment entered in favor of defendants Lutheran General Hospital and Lutheran Medical Center in a contract case wherein plaintiff, a hospital patient, claims the terms of an implied contract requiring defendants to provide privacy, safety, and security were breached when she was sexually assaulted by a male nurse employee of the hospital. Plaintiff claims error in that there are genuine material fact issues remaining. We reverse and remand for further proceedings.

Neb. Rev. Stat. § 25-1332 (Reissue 1985) provides that a summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt. It is proper 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 material facts, and when the moving party is entitled to judgment as a matter of law. *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

Concurrently with this case, plaintiff filed in the same court a

companion case in tort against the same defendants, alleging the same basic facts. That action was also dismissed on summary judgment.

The petition alleges that plaintiff entered the hospital as a surgery patient on November 26, 1983, where she remained as a patient until discharged on January 6, 1984. Upon her admission to the hospital, there was a professional contract with the defendants whereby they agreed to provide plaintiff "a private, safe, secure, environment for her care and to protect her privacy, safety and security." There are no allegations of consideration, and it is assumed that the alleged terms are somehow implied. While still a hospital patient occupying private room 532, on January 5, 1984, plaintiff received pain and sleeping medication in the late hours. About 3 a.m. on January 6, 1984, she was awakened by an employee of the hospital dressed in hospital uniform, later identified as Thomas Eckles, who touched her and announced the purpose was a "bed check," then sexually assaulted plaintiff. Plaintiff alleges defendants breached the professional contract in six particulars that we summarize as (1) neither providing for nor protecting plaintiff's privacy, safety, and security by staff, facilities, or otherwise; and (2) failing to provide the required degree of care to protect plaintiff from sexual indecencies by male personnel, considering her weakened and stressful condition. The prayer was for special and general damages. The petition contains some allegations appropriate in tort; however, such do not change the theory of the contract action. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). Defendants answered by a general denial followed by their motion for summary judgment, which, after hearing, was granted. For the purpose of the motion, defendants admitted that an intentional tort had been committed by Eckles.

The evidence adduced at the summary judgment hearing is summarized. By affidavit and supporting documents, defendants show that proper and acceptable procedures were followed by the hospital in hiring Eckles and, if plaintiff was assaulted by Eckles, that such act by Eckles was not in the performance of his assigned duties at the time; therefore, defendants were not liable on the theory of respondeat superior.

Plaintiff's affidavits and supporting documents attempted to discredit defendants' defense theories by showing that staff nurses in hospitals are expected and required to assist all patients in a hospital by tasks such as bed checks, answering call lights, and helping patients in and out of chairs and beds, whether or not nurses are assigned to the area where the patient is found. It also included a copy of a letter dated January 16, 1984, signed by Thomas Eckles, stating that he did not assault plaintiff and that he was not in her room at the alleged time and place, but that he passed room 532 on four occasions on the night of the alleged assault.

The party moving for summary judgment must make a prima facie showing that if the evidence were uncontroverted at trial, he or she would be entitled to judgment as a matter of law. Such a showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. The court then views the evidence in a light most favorable to the party opposing the motion, and decides only whether there is an issue of fact, not how such an issue should be decided. *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987).

Throughout their brief, defendants argue that the issues presented at the hearing were whether defendants were responsible for an intentional tort of an employee and whether the hospital was negligent in the hiring and supervision of that employee; further, they argue that the summary judgment should be sustained as demonstrated by their evidence that Eckles committed an intentional tort that was clearly shown not to be within the scope of his employment, citing *Strong v. K & K Investments*, 216 Neb. 370, 343 N.W.2d 912 (1984).

It is true that the evidence did generally relate to alleged tortious acts of Eckles; however, it is not necessary to determine whether this evidence supports the summary judgment. Rather, our attention is first directed to the petition, which on its face shows that there are genuine questions of material fact remaining. "In order to recover on an action for a breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, [and] damage . . . ." *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 799, 352 N.W.2d 145, 147 (1984). The petition appears to allege in general terms

an implied contract, imposing upon the hospital the duty and obligation to provide plaintiff a private, secure environment for her care and to protect her privacy, safety, and security. The facts and circumstances creating the implied promise, together with the duties and obligations to be performed, are material fact questions whether the same are oral, express, assumed, or imposed by law; or, as stated in a 1914 case, "A patient is generally admitted to a hospital . . . under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition . . . may require." *Wetzel v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 636, 640, 148 N.W. 582, 583 (1914).

> Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact. . . .
>
> . . . .
>
> . . . Without that prima facie showing, a plaintiff faced with a motion for summary judgment is not required to reveal the evidence he expects to produce to prove the allegations of the petition.

*Hanzlik v. Paustian,* 211 Neb. 322, 327-28, 318 N.W.2d 712, 716 (1982).

Plaintiff was not obligated to supply any other information at the hearing. There being genuine issues of material fact remaining, the judgment was in error. The summary judgment is set aside, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## IN RE INTEREST OF J.D.M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. M.M. ET AL., APPELLEES.

430 N.W.2d 689

Filed October 28, 1988. No. 87-1007.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment regarding the termination of parental rights, the Supreme Court tries factual questions de

novo on the record, and we are thus required to reach a conclusion independent of the trial court; however, where the evidence is in conflict, we consider 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.** It is not necessary that the court await the time that the child shows permanent scars of a parent's anger and impulsivity before acting to terminate the relationship.

Appeal from the County Court for York County: CURTIS EVANS, Judge. Reversed.

Charles W. Campbell, York County Attorney, for appellant.

Kevin V. Schlender and Michael Powell for appellee M.M.

George E. Brugh for appellee V.M.

Bruce E. Stephens, guardian ad litem.

HASTINGS, C.J., WHITE, and CAPORALE, JJ., and REAGAN, D.J., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal by the State of Nebraska from an order of the county court for York County, juvenile division, which dismissed the supplemental petition to terminate the parental rights of the natural father, M.M., to his child J.D.M., pursuant to Neb. Rev. Stat. § 43-292(5) (Reissue 1984). The mother, V.M., voluntarily relinquished her parental rights prior to oral argument; therefore, her rights are not at issue in this appeal.

Appellant asserts that the court below erred in (1) finding that the State had failed to prove by clear and convincing evidence that the father, M.M., was unable to discharge parental responsibilities because of mental illness or mental deficiency as set forth in § 43-292(5), and (2) failing to find that it was in the best interests of J.D.M. to terminate the father's parental rights.

In an appeal from a judgment regarding termination of parental rights, the Supreme Court tries factual questions de novo on the record, and we are thus required to reach a conclusion independent of the trial court; however, where the evidence is in conflict, we consider and may give weight to the

trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988); *In re Interest of M.R., J.R., and N.R.*, 228 Neb. 47, 420 N.W.2d 924 (1988); *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988).

The factual background of this case is disturbing. At the time J.D.M. was born, on October 17, 1986, his father and mother were incarcerated due to convictions of felony child abuse. These convictions arose out of abuse they inflicted on their first child, E.M.

The abuse toward E.M. began when the child was between 1 and 2 weeks old. At this time, M.M. began spanking the child when the child cried. M.M. also employed other methods in an attempt to punish the infant for crying. For example, M.M. slit a nipple on the child's milk bottle to cause the milk to rush out of the bottle, choking the child. At other times, if the child cried while in his carriage, M.M. would spin the carriage around rapidly in an effort to make the infant cease crying. However, the incident of abuse that led to E.M.'s permanent injuries and the resultant convictions for child abuse occurred when E.M. was 5 weeks old.

Shortly after Thanksgiving in 1985, M.M. and V.M. began fighting. Their shouting woke up the child. In an attempt to quiet the 5-week-old infant, M.M. began to shake the child violently. Dr. Miyazaki, a pediatrician at the University of Nebraska Medical Center, testified that when E.M. was brought in several days later, E.M. had an intercranial hemorrhage due to the trauma from being shaken vigorously. This violent shaking by M.M. had caused the tearing of a blood vessel within the skull and the resultant hemorrhaging.

In addition to shaking the child at this time, both parents spanked the child in a further attempt to quiet E.M. Finally, while M.M. was spanking the infant, V.M. grabbed E.M. and threw him against a wall. The infant fell from the wall onto some stereo speakers. The infant was then put back into bed, and the parents continued to argue. Once again E.M. awoke and began to cry. M.M. took the infant and punched him in the back with his fist, causing the child to scream out in pain. M.M. then placed E.M. on the bed and whipped the 5-week-old infant

with his belt. In response to this onslaught of abuse, the child continued to cry until M.M. finally raised the child, holding the baby under his arms, and violently shook him back and forth. Approximately an hour later the infant went to sleep.

The next day the child began to show the effects of the violent abuse of the night before. The child did not wake up as usual and within a few days stopped eating. E.M. also began to have seizures. In spite of manifestations of injury, E.M. was not taken to the hospital until approximately a week later. V.M. testified that she waited to take E.M. because M.M. said if she took the baby to the hospital she would never see M.M. or E.M. again.

As a result of this abusive treatment, E.M. was diagnosed as suffering from an intercranial hemorrhage, a skull fracture, a fracture to the left clavicle, and a left distal femoral fracture. Additionally, the child was suffering from anemia resulting from significant bleeding and severe brain damage. The prognosis for E.M. is not hopeful. E.M. may be totally blind in one eye and damaged in the other due to hemorrhaging in the child's retinas. Approximately 2 months prior to the termination hearing, E.M. was noted to suffer from symptoms of severe mental retardation, to be in continual pain, and to suffer from personality development problems. Dr. Miyazaki testified that the child would continue to suffer from these handicaps throughout his life.

The juvenile court found that the State had not met its burden of proving by clear and convincing evidence that M.M. has a mental illness or mental deficiency, as required by § 43-292.

Apparently, the juvenile court was concerned regarding the definition of "mental illness or mental deficiency," as set forth in § 43-292(5). Section 43-292(5) provides for termination of parental rights if it is found that "[t]he parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period."

The expert testimony in this case does suggest that M.M. does not suffer a mental illness or deficiency as those words are

commonly known in psychological terms. Dr. Balters, a clinical psychologist, testified that, as psychologically defined, mental deficiency means mental retardation, and Dr. Balters did not find M.M. to be mentally retarded. Dr. Balters also testified that mental illnesses are reserved for those who have disturbed interactions with reality, and he did not find M.M.'s condition to be within this definition of mental illness.

Instead of utilizing the term "mental illness" or "mental deficiency," Dr. Balters testified that M.M. has a personality disorder with problems of impulse control. M.M.'s personality disorder is manifested by rendering him incapable of sustaining the kinds of stress that others contend with, and he reacts to such stress by acting out violently. Finally, Dr. Balters testified that in his opinion M.M. was not amenable to treatment because he was unlikely to learn from therapy. It was Dr. Balters' position that it was remotely possible for M.M. to change after approximately 5 years of treatment but that, in his opinion, the people who do change after treatment have more intelligence and motivation than M.M.

This court has not required a mental health expert to testify in a termination case brought pursuant to § 43-292(5) that the parent suffers from a condition labeled by psychologists as a "mental illness" or "mental deficiency." See *In re Interest of R.L.T.*, 221 Neb. 251, 376 N.W.2d 310 (1985). In *In re Interest of R.L.T., supra*, this court affirmed the termination of a mother's parental rights based on testimony that she suffered from a personality disorder likely to last for an indefinite period. There was no testimony that she suffered from a "mental illness" or "mental deficiency" per se.

It is this court's responsibility to interpret the statutory language of § 43-292(5). While we decline to adopt an absolute definition of the term "mental deficiency," we hold that the term certainly encompasses the mental condition of M.M. in this case. Where a personality disorder is manifested by acts of extraordinary violence, as in this action, the mental condition certainly rises to the level of mental deficiency. To hold otherwise would be absurd. It is difficult to imagine that the Legislature, in adopting a child protection statute, did not intend to terminate the parental rights of a parent who abuses a

child to such a degree as to render a 5-week-old infant permanently brain damaged, merely on the basis that "mental deficiency" is not understood by psychologists to cover a condition other than mental retardation.

The Supreme Court of New Hampshire held a similar view in *In re Doe*, 123 N.H. 634, 465 A.2d 924 (1983). New Hampshire has a statute with language very similar to § 43-292(5). N.H. Rev. Stat. Ann. § 170-C:5(IV) (Supp. 1981) of the New Hampshire child protection statutes provides that parental rights may be terminated if the court finds that "[b]ecause of mental deficiency or mental illness, the parent is and will continue to be incapable of giving the child proper parental care and protection for a longer period of time than would be wise or prudent to leave the child in an unstable or impermanent environment." In *In re Doe, supra*, the father was diagnosed as suffering from a personality disorder. The father contended that a personality disorder is not a "mental illness" as contemplated by the Legislature when the New Hampshire termination statute was enacted. The New Hampshire court did not feel constrained by the definition of "mental illness" utilized by psychiatrists. The court stated, "We do not believe that one who has physically abused a young child can argue that a child-protection statute which provides for the termination of parental rights on grounds of mental illness does not implicitly encompass mental illnesses which manifest themselves in abusive or violent conduct." 123 N.H. at 642, 465 A.2d at 930. Similarly, we do not believe that one who has physically abused a young child can argue that a child protection statute providing for the termination of parental rights on grounds of mental deficiency does not encompass mental deficiencies which manifest themselves in violent and abusive conduct. Therefore, we hold M.M.'s personality disorder to be within the definition of "mental deficiency" as that term is used in § 43-292(5).

Moreover, the record contains sufficient evidence establishing that this disorder will continue for a prolonged indeterminate period, as required for termination pursuant to § 43-292(5). Dr. Balters testified that he did not believe M.M. was amenable to treatment. Dr. Balters also testified regarding M.M.'s lack of remorse for the injuries he inflicted on his

first son, E.M., and his lack of motivation to pursue treatment.

Finally, although M.M. has had no unsupervised contact with J.D.M. and therefore J.D.M. has not been abused in any way, that does not change our opinion in this case. It is not necessary that the court await the time that the child shows permanent scars of his father's anger and impulsivity before acting to terminate the relationship. *In re Interest of R.L.T., supra*. There is no need to provide M.M. with the opportunity to abuse his second child.

From a de novo review of the record, we hold that it has been established by clear and convincing evidence that M.M. now suffers from a personality disorder likely to last for an indefinite period and which is likely to subject his child to physical injury and that it is in the best interests of the child to terminate the parental rights of M.M.

The judgment of the lower court is therefore reversed.

REVERSED.

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STATE OF NEBRASKA, APPELLEE, V. STANLEY J. TATARA, APPELLANT.
430 N.W.2d 692

Filed October 28, 1988. No. 87-1070.

1. **Trial: Witnesses.** In a bench trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony.
2. **Convictions: Appeal and Error.** In reviewing the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the 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 finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Jeffrey A. Silver, of Silver, Wieland & Haas, for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino,

Omaha City Prosecutor, and J. Michael Tesar 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. The defendant-appellant, Stanley J. Tatara, was charged in county court with operating a motor vehicle while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). After a bench trial, the county court found Tatara guilty "of the charge of: Drunken Driving - First Offense." Defendant was fined and sentenced to probation. The district court affirmed the judgment and sentence of the county court. Tatara appeals to this court, challenging the sufficiency of the evidence to sustain his conviction and alleging the trial court erroneously admitted into evidence the results of the test of his breath, as measured by the Intoxilyzer Model 4011AS. We affirm.

In a bench trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). In reviewing the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the 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 finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988).

Taking the view most favorable to the State, the record shows that on November 21, 1986, Omaha Police Officer Edward George was operating a radar machine and timed the defendant traveling at approximately 61 miles per hour on the John F. Kennedy Freeway at D Street in Omaha, where the speed limit is 45 m.p.h. The incident occurred around 7:30 p.m. in sparse traffic. Defendant was traveling in the center lane, but did not appear to be weaving from side to side. Officer George pulled in behind defendant with red lights on and shined his spotlight on

the back of defendant's truck. Defendant did not stop. Officer George then sounded his siren, and defendant pulled over.

Officer George approached the driver's side of the truck. When defendant rolled the window down, Officer George smelled an odor of alcohol coming from the vehicle. He further observed that defendant's eyes were somewhat glassy and watery and asked defendant to step out of the vehicle. Defendant's speech was slow and deliberate, but not slurred.

When defendant got out of the truck, his walking was unbalanced and unsure. He was "very deliberate" in his steps, as if he were "trying to step over something — around it." Defendant walked from his truck to the police car, but placed his hand on the side of the truck and on the front fender of the police car to balance himself.

Officer George testified he had been around people who had consumed alcohol, that he had consumed alcohol himself, and that he had seen other people intoxicated. He has made hundreds of drunk driving arrests in the course of his career as a police officer. Officer George stated that in his opinion, based on his observations of the defendant, defendant had consumed too much alcohol to be operating a motor vehicle on city streets.

Officer David Stokes also observed defendant for 20 to 25 minutes at the scene of the arrest and testified he smelled alcohol coming from the defendant. Officer Stokes further testified that defendant's walk was unsteady and that his speech was hesitant and unsure. Defendant did not testify.

Jerry Tosoni of the Omaha Police Division crime lab had performed a breath test on the defendant using the Intoxilyzer Model 4011AS device. The defense stipulated that the test had in all respects been administered in conformity with the rules and regulations of the Nebraska Department of Health. The result of the Intoxilyzer breath test was .167 percent. Defendant objected to the evidence of the result of the test, and in this court assigns as error the action of the trial court in admitting the test results "without competent expert foundational testimony that such [Intoxilyzer] provided a trustworthy reliable measure of alcohol in the blood." In answer to this contention, we point out that Neb. Rev. Stat. § 39-669.11 (Reissue 1984) provides:

> Any test made under the provisions of section 39-669.08, if made in conformity with the requirements of this section, shall be competent evidence in any prosecution under a state statute . . . involving operating a motor vehicle while under the influence of alcoholic liquor, or involving driving or being in actual physical control of a motor vehicle with an amount of alcohol in the blood in violation of a statute . . . .

The statute then goes on to set out the manner in which the tests must be made, and by whom. In the case before us, the breath test was administered in accordance with methods approved by the Department of Health, by a device specifically approved in the regulations of the department, and by a properly licensed person. Defendant stipulated to those facts. No evidence, expert or other, was adduced by defendant. The trial court did not err in receiving into evidence the results of the tests, measured by an Intoxilyzer Model 4011AS. See *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988).

With regard to defendant's contention that the evidence, in the absence of the Intoxilyzer test results, was not sufficient to find defendant guilty, a violation of § 39-669.07 may be proven in either one of two ways: (1) that the defendant operated or was in actual physical control of a motor vehicle while under the influence of alcohol; or (2) that the defendant, while driving a motor vehicle or in actual physical control of a motor vehicle, had ten-hundredths of 1 percent 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. *State v. Babcock, supra.* We note that § 39-669.07 has been amended since this incident. See § 39-669.07 (Supp. 1987).

We have sustained the trial court's action in admitting the test results in evidence, but in addition, a police officer's opinion, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol. *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

The record in this case shows that Officers George and Stokes had the opportunity to observe the defendant at close range over a period of time. Both officers detected an odor of

alcohol coming from the defendant and noticed that defendant had some difficulty speaking and walking. It was Officer George's opinion, based on his observations of the defendant, that defendant had consumed too much alcohol to be operating a motor vehicle on city streets. Under these circumstances, the evidence was more than sufficient to enable the trial court to find that defendant operated or was in actual physical control of a motor vehicle while he was under the influence of alcohol.

The judgment of the district court, affirming the order of the county court, is affirmed.

AFFIRMED.

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GALEN DON SVOBODA, APPELLANT, V. JANE MARIE SVOBODA, APPELLEE.

430 N.W.2d 695

Filed October 28, 1988. No. 88-052.

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

L.W. Kelly, Jr., of Kelly, Kelly & Schroeder, for appellant.

Jerald L. Rauterkus, of Erickson & Sederstrom, P.C., for appellee.

HASTINGS, C.J., WHITE, and CAPORALE, JJ., and REAGAN, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

Petitioner has appealed from the judgment of the district court which ordered a dissolution of the marriage of the parties and awarded custody of their three minor children to the respondent. As his sole assignment of error, petitioner attacks the award of custody.

Child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal, that court's determination will be affirmed in the absence of an abuse of discretion. *Clark v. Clark*, 228 Neb. 440, 422 N.W.2d

793 (1988). Having reviewed the record de novo, which we are required to do, we find the action of the trial court in the awarding of custody was fair and reasonable and in the best interests of the minor children, and was not the result of an abuse of discretion.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

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

430 N.W.2d 900

Filed October 28, 1988. No. 88-102.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed as modified.

George G. Rhodes, Custer County Attorney, for appellant.

Steven O. Stumpff, of Stumpff Law Office, for appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

PER CURIAM.

Claiming that the sentences imposed are too lenient, see Neb. Rev. Stat. § 29-2320 (Reissue 1985), the State appeals from the judgment of the district court for Custer County sentencing John Golden to 3 years' probation plus 90 days in the county jail for third degree assault on a police officer, see Neb. Rev. Stat. § 28-931(1) (Reissue 1985), and a consecutive sentence of 2 years' probation for use of a firearm in the commission of a felony, see Neb. Rev. Stat. § 28-1205(1) (Reissue 1985). Golden cross-appeals, contending that the sentences are excessive.

This is the second appearance of this case in this court. The factual basis for the charges is contained in our first opinion. See *State v. Golden*, 226 Neb. 863, 415 N.W.2d 469 (1987).

At Golden's first trial he pled guilty to the charges of third

degree assault on a peace officer and use of a firearm to commit a felony, and was sentenced to 90 days in the county jail and 3 years' probation. The State challenged those sentences as excessively lenient, and Golden cross-appealed, alleging that his guilty pleas were involuntary. Determining that Golden's pleas were involuntary, this court reversed the previous convictions of Golden and remanded to the district court for further proceedings. See *State v. Golden, supra.*

On remand, Golden again pled guilty. This time the court sentenced Golden to 3 years' probation plus 90 days in the county jail on the assault charge and 2 years' consecutive probation on the firearm charge, or a total of 5 years' probation.

The State appealed again under § 29-2320, claiming that the sentences imposed are excessively lenient.

We first note that Golden's guilty pleas entered after remand satisfy the requirements of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), for a valid guilty plea. The record affirmatively demonstrates that Golden waived all rights specified in *Irish*; therefore, Golden entered valid guilty pleas.

Regarding a claim of an excessively lenient sentence, we have held that, absent an abuse of discretion by the trial court, a grant of probation will not be disturbed on appeal. *State v. Stastny*, 227 Neb. 748, 419 N.W.2d 873 (1988). There is no abuse of discretion in this case. In imposing a sentence of probation, the trial court relied on the absence of felony charges in Golden's prior record and Golden's ability to stay out of trouble during the 18 months after the incident in question. Although the jail time imposed does not approach the maximum incarceration authorized as a penalty, see Neb. Rev. Stat. § 28-105(1) (Reissue 1985), we do not find an abuse of discretion and, therefore, affirm the sentences imposed on Golden.

On his cross-appeal, Golden claims that the sentences were excessive because the trial court imposed heavier sentences after conviction on remand than were imposed originally. See Neb. Rev. Stat. § 29-2308 (Reissue 1985).

Golden correctly points to our opinions in *State v. Lopez*, 217 Neb. 719, 350 N.W.2d 563 (1984), and *State v. Beach*, 215

Neb. 213, 337 N.W.2d 772 (1983), which adhered to *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). *Pearce* held that a different sentence could be imposed on retrial where events subsequent to the first trial had shed new light on the defendant's character and where the reasons for imposing a heavier sentence appeared in the record. The trial judge in this case indicated on the record that "circumstances have not materially changed since the last sentencing." Thus, there was no basis for increasing the sentences after remand. The increased subsequent sentences imposed on Golden are not allowable under constitutional guarantees. See, *State v. Lopez, supra*; *North Carolina v. Pearce, supra*. We, therefore, reduce Golden's sentences from a total of 90 days in jail plus 5 years' probation to 90 days in jail plus 3 years' probation, the sentences imposed after Golden's previous convictions.

AFFIRMED AS MODIFIED.

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JAMES H. SORENSEN, APPELLANT, V. CITY OF OMAHA, PUBLIC SAFETY/FIRE DIVISION, APPELLEE.

430 N.W.2d 696

Filed October 28, 1988. No. 88-130.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Workers' Compensation: Proof.** Where an injury is the result of mental stimulus, in order for it to be compensable under the Nebraska workers' compensation law, the injured party must prove an unexpected or unforeseen event, happening suddenly and violently and producing at the time objective symptoms of injury and violence to the physical structure of the body.
3. **Workers' Compensation: Evidence.** To demonstrate violence to the physical structure of the body, the party claiming injury must produce some evidence of actual physical injury, external or internal.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Ronald L. Brown, of Brown Law Offices, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, and Jo A. Bennett for appellee.

HASTINGS, C.J., WHITE, CAPORALE, and FAHRNBRUCH, JJ., and REAGAN, D.J.

WHITE, J.

James H. Sorensen appeals an order of dismissal entered by a three-judge panel of the Nebraska Workers' Compensation Court after rehearing.

Appellant was a 21-year veteran of the City of Omaha fire division who held the rank of firefighter until he took the examination for the position of captain. He was selected from the eligibility list as a probationary captain on December 31, 1985. Pursuant to city ordinance and the contract between the City of Omaha and the Professional Firefighters Association of Omaha, Local 385, appellant was required to serve a 6-month probationary period. On satisfactory completion of the probationary period, appellant's promotion to captain was to be confirmed. On June 26, 1986, shortly before the completion of the probationary period, appellant was notified of his demotion. After reconsideration by his superiors, appellant was reappointed to a second 6-month probationary period as captain. Approximately 2 months into the second probationary period, on August 28, appellant left his job because of "harassment," "pressure," and "stress" he experienced as a result of his failure to be confirmed as a fire captain, and because of the supervision and treatment afforded to him by supervisors during both probationary periods.

Following his demotion in June of 1986, appellant was treated by his family doctor for stress and "epigastric problems with nausea, abdominal pain." In a deposition taken in October 1987, appellant's doctor testified that appellant specifically suffered from stomach pain, nausea, vomiting, psychomotor retardation, and rectal bleeding. The doctor prescribed Tagamet for epigastric pain and symptoms, and Phenergan for insomnia. It was the doctor's opinion that appellant's physical

symptoms were related to job stress and that appellant was totally disabled from August 28, 1986, through the date of deposition.

The record discloses that appellant also saw the city's psychologist and a private psychologist for emotional difficulties.

On January 2, 1987, appellant filed a petition in the Nebraska Workers' Compensation Court, alleging he had suffered a stress-related physical and psychological injury in the course of his employment. The Workers' Compensation Court found the following:

> On June 29 [sic], 1986, the plaintiff was in the employ of the defendant as a probationary captain of the fire division, and while so employed and on said date and while engaged in the duties of his employment he suffered gastritis and injury to his psyche as a result of an accident or occupational disease arising out of and in the course of his employment by the defendant when, at the end of plaintiff's probationary period, he was advised by his superiors that his promotion was to be rescinded or not confirmed. As a result of said accident and injury, the plaintiff incurred medical and hospital expense and was totally disabled . . . [and] is still temporarily totally disabled and will remain temporarily totally disabled for an indefinite future period of time.

Accordingly, the court awarded appellant medical expenses and temporary disability compensation.

On rehearing, a three-judge panel of the Workers' Compensation Court reversed the award and dismissed appellant's petition. Citing *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942), the court stated:

> Plaintiff's primary complaints are emotional. He further complains of abdominal pains. . . .
>
> In this case the plaintiff failed to establish violence to the physical structure of the body as a result of an accident arising out of and in the course of his employment with the defendant and his petition must therefore be dismissed.

Appellant's sole assignment of error is that the rehearing panel of the Workers' Compensation Court erred in concluding

that appellant had not sustained an accidental injury as that term is defined by Neb. Rev. Stat. § 48-151(2) and (4) (Reissue 1984).

We note initially that the question presented is one of statutory interpretation. Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988).

In order to recover compensation under the Nebraska workers' compensation law, an employee must show he or she suffered a personal injury caused by an accident arising out of and in the course of his or her employment. See Neb. Rev. Stat. § 48-101 (Reissue 1984). In this case, the only issue is whether the appellant has met his burden of proving an "injury" as the term is currently defined in the Nebraska workers' compensation law.

There is no dispute regarding the fact that mental stimulus rather than physical trauma caused appellant's injury. A similar case dealing with mental stimulus producing injury is *Bekelski v. Neal Co., supra*. There, this court, interpreting the former but substantially similar version of § 48-151, held that for a plaintiff to recover, he or she had to prove (1) an unexpected or unforeseen event, happening suddenly and violently, (2) producing at the time objective symptoms of injury and (3) violence to the physical structure of the body. We find that appellant has not met his burden of establishing violence to the physical structure of the body and therefore decline to address the first two elements, except to note that appellant's ailments clearly meet the second requirement, of objective symptoms of injury. *Bekelski v. Neal Co., supra*.

With regard to the third element, the court in *Bekelski* said that the statutory language

> indicates a clear distinction between physical and bodily injury on the one hand and mental, nervous and psychiatric injury unaccompanied by violence to the physical structure of the body on the other. The plain import of the words used eliminates from the operation of the law disabilities resulting from mental disturbances,

> nervousness and psychiatric ailments when violence to the physical structure of the body cannot be established.

*Id.* at 660, 4 N.W.2d at 743. The court reversed plaintiff's award on the grounds that she failed to demonstrate damage to the physical structure of her body.

In *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985), this court distinguished *Bekelski* on the facts, but also implicitly reaffirmed the principles set out in that case. The plaintiff in *Johnston*, unlike the plaintiff in *Bekelski*, suffered physical trauma and mental stimulus which induced a physical injury, namely "minimal superficial erosions of the lower esophagus and minimal superficial erosion of the duodenal bulb." *Johnston* at 459, 364 N.W.2d at 3.

Therefore, in order to demonstrate violence to the physical structure of the body, the appellant in this case had to produce at least some minimal evidence of actual physical injury, external or internal. The record indicates no such evidence. Commonsense tells us that appellant's ailments were probably the products of physical injury, possibly an ulcer, but the appellant has failed to meet his evidentiary burden showing an actual injury such as a minimal superficial erosion of the lower esophagus.

Appellant urges this court to adopt the approach noted by Professor Arthur Larson, by characterizing his injury as a mental-physical claim, and attempts to convince the court of its compensability as such. Larson has summarized cases dealing with mental stimulus producing physical injury. 1B A. Larson, The Law of Workmen's Compensation § 42.21(a) (1987). The general trend, as highlighted by these cases, demonstrates a two-step analysis. For the injury to be compensable, the plaintiff must prove (1) a mental stimulus (2) which resulted in a distinct physical injury.

We decline to adopt this approach. As this court stated in *Bekelski*, our statute is plain on its face and requires the appellant to go through a three-step analysis in order to prove that his injury is compensable under the Nebraska workers' compensation statutes. In addition, the cases cited by Larson which use a two-step analysis approach to mental-physical claims seem to require proof of an actual physical injury such as

an ulcer, heart attack, or stroke; the same burden of proof we require to establish violence to the body. Therefore, even if this court were to adopt the approach set out in Larson, appellant's claim still would fail for want of evidence.

Accordingly, the decision of the rehearing panel of the Nebraska Workers' Compensation Court is affirmed.

AFFIRMED.

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## IN RE INTEREST OF A.Z., B.Z., AND R.Z., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. S.Z., APPELLANT.

430 N.W.2d 901

Filed November 4, 1988. Nos. 88-138, 88-139.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on the record, which requires the court to reach a conclusion independent of the trial court; however, where the 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: Evidence: Appeal and Error.** 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.
3. **Parental Rights: Juvenile Courts.** A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
4. _____: _____. Although the juvenile court is not required to implement a plan for rehabilitation, noncompliance with a reasonable plan presents an independent reason justifying termination of parental rights.

Appeal from the County Court for Dodge County: DANIEL BECKWITH, Judge. Affirmed.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf & Boggy, for appellant.

Dean Skokan, Dodge County Attorney, and Joe Stecher for appellee.

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

WHITE, J.

S.Z., the natural mother of A.Z., B.Z., and R.Z., the children involved in these proceedings, appeals from orders of the county court for Dodge County, sitting as a juvenile court, which, on January 19, 1988, terminated her parental rights. The court found that S.Z. had failed to correct conditions which led to the determination that her children were juveniles as defined in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986). The parental rights of the children's biological fathers have also been terminated, but these terminations are not at issue in these consolidated cases. In addition, S.Z. has another daughter, L.M.; however, no petition has been filed seeking a termination of her parental rights with regard to this child.

The original petition regarding B.Z. and R.Z. was filed in December of 1983. The court adjudicated both as children defined under § 43-247(3)(a) (Cum. Supp. 1982), following evidentiary hearings on January 11 and August 1, 1984. The original petition concerning A.Z. was filed in December of 1984. On January 29, 1985, A.Z. was found to be a child as defined by § 43-247(3)(a). All issues in the above cases were consolidated for trial in the Dodge County Court. The issues in regard to all the children are identical; therefore, this opinion addresses all three children.

The appellant contends that the trial court erred in (1) finding that the State of Nebraska had proven by clear and convincing evidence the existence of circumstances described in subsection (6) of Neb. Rev. Stat. § 43-292 (Reissue 1984), and further finding that termination of parental rights is in the best interests of the children; (2) finding the State had met its burden of proving that S.Z. had willfully failed to comply with the provisions of a reasonable rehabilitation plan; and (3) finding the rehabilitation plan fundamentally fair and reasonable. In an appeal from a judgment terminating parental rights, the Nebraska Supreme Court tries the factual questions de novo on

the record, which requires the court to reach a conclusion independent of the trial court; however, where the 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. *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988); *In re Interest of M.R., J.R., and N.R.*, 228 Neb. 47, 420 N.W.2d 924 (1988).

The appellant also assigns as error a number of evidentiary rulings made by the court. Specifically, the appellant objects to the trial court's judicial notice of prior proceedings containing hearsay testimony and the testimony of witnesses regarding their opinion of whether S.Z.'s parental rights should be terminated, the ultimate issue in this action. The admissibility of this evidence does not affect our determination.

> 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.

*In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 266, 417 N.W.2d 147, 157 (1987).

The objection to taking judicial notice of prior proceedings is based on the argument that the prior proceedings contain hearsay, and therefore acceptance of them into evidence does not comport with procedural due process. See *In re Interest of J.S., A.C., and C.S., supra*. While it is true some inadmissible evidence is contained in the record of prior proceedings, in this case some testimony is not hearsay and is clearly admissible. Therefore, we will consider only the admissible evidence contained in the record of prior proceedings.

Social services for Dodge County has been involved in the lives of S.Z. and her children since 1977. The contact social services had with S.Z. which precipitated these proceedings was in July of 1980 in response to claims of neglect filed with Dodge County social services. A home visit was initiated, and the caseworker found the home very dirty and S.Z. exhausted. At

that time S.Z. had only two children. S.Z. moved to Missouri soon after, and the county was not involved again until June of 1981.

The 1981 contact was in response to complaints concerning lack of parental supervision. S.Z. had locked herself out of her trailer home and pushed L.M. through a window to get in. L.M. was badly cut. An emergency pickup order was issued, and L.M. and B.Z. were placed in foster care. At that point S.Z. cooperated with social services, and her children were returned home a month later. Social services maintained supervision and conducted a number of home visits. Conditions improved, and court jurisdiction was terminated in April of 1982.

R.Z. was born on May 10, 1983. In October, S.Z. voluntarily placed all three children in foster care due to a conviction for insufficient-fund checks. The children were returned to the mother when her incarceration ended 3 days later. One month later, further complaints were received regarding the family. L.M. alleged that her stepfather, who had just been released from incarceration after being convicted of sexually assaulting L.M., had again sexually assaulted her. The assault occurred when the mother allowed L.M. to ride unaccompanied with her stepfather to Hooper, Nebraska. When L.M. informed her mother of what had transpired between her stepfather and herself, S.Z. did not notify the authorities of the incident. L.M. then reported the incident herself, which resulted in emergency foster care for all of the children.

A hearing was held on November 30, 1983. The court returned R.Z. to the mother's custody, but L.M. and B.Z. remained in foster care. Both L.M. and B.Z. have remained in foster care since their placement in November of 1983. Unsupervised visitations were authorized through the weekend. S.Z. continued to have problems in caring for the children during the arranged visitations. Because of these problems, which included allowing the children to play outside in the winter without dressing them in winter clothing, visitation was restricted in a hearing held in March of 1984. This hearing resulted in visitation being reduced to only 4 hours on Saturdays.

In April of 1984, R.Z. was voluntarily placed in foster care by his mother, due to her poor health. S.Z. was pregnant at the time and was experiencing some complications.

S.Z.'s fourth child, A.Z., was born on April 21, 1984. S.Z. remained hospitalized due to bleeding ulcers, and A.Z. was placed in foster care. On May 11, R.Z. and A.Z. were returned to S.Z.'s custody. However, shortly thereafter foster care for R.Z. and A.Z. was requested by the mother, but this was only for 1 week in June of 1984.

In hearings held in August of 1984, the court began insisting on the development of a rehabilitation plan designed to reunite the family. At the first August hearing, psychological reports were received into evidence. These reports recommended continued foster care for the children. Connie DeBord, a caseworker for Dodge County social services, wrote a letter admitted into evidence at the second August hearing. She stated that she went to S.Z.'s home to discuss the development of a rehabilitation plan, but S.Z. refused to cooperate and threw objects about the room. On August 8, R.Z. was placed in foster care once again and has not since been returned to S.Z.'s custody.

A psychological evaluation of S.Z. was arranged with Dr. Ann Taylor in September of 1984. During the evaluation S.Z. became very argumentative and refused to cooperate, and finally Dr. Taylor asked S.Z. to leave her office. Because S.Z. displayed a violent temper, Dr. Taylor recommended that no one from Dodge County social services visit S.Z. without a law enforcement escort. Various visits were made and rehabilitation plans repeatedly ordered by the court. S.Z. continually refused to cooperate with any attempts to formulate a plan.

Finally, in December, 5 months after the court had begun attempting to formulate a rehabilitation plan with S.Z.'s assistance, the juvenile court ordered a comprehensive plan to be drafted, with or without the assistance of S.Z. The court then suspended all visitation until a rehabilitation plan was prepared and complied with.

On December 14, A.Z., S.Z.'s youngest child, was placed in foster care. This placement was made because of evidence of neglect. Specifically, there was evidence that S.Z. did not have a

sufficient amount of food on hand and that she had told a social services employee that she did not care whether A.Z. got any food. When the juvenile authorities arrived to pick up A.Z. for foster care, S.Z. became verbally abusive, screaming and grabbing the child from the social service workers. A juvenile officer present at the pickup testified that S.Z. was incoherent and shaking violently. In January of 1985, A.Z. was found to be a child as defined by § 43-237(3)(a).

Due to S.Z.'s lack of assistance in formulating a rehabilitation plan, the social services department compiled its own plan in January of 1985. S.Z. refused to sign a draft of the proposed plan. At a hearing in January regarding the proposed rehabilitation plan, S.Z. was asked if she would ever comply with a plan for rehabilitation. While testifying in answer, she was nonresponsive and often incoherent. At the January hearing, S.Z. was given 1 last week to prepare a plan of her own. A valid plan was not developed by S.Z. within the time specified.

A complete rehabilitation plan was established in a hearing held on February 27, 1985. During this session S.Z. was in an extremely agitated state, crying much of the time. One provision of the plan was no visitation until full compliance was achieved. The court insisted on this provision, as visitation in the past had been disruptive and even harmful. For example, when B.Z. was returned to his foster parents after one visitation, he was found to have a bead and popcorn imbedded in his ear canal. Additionally, Sandra Hudson, a foster parent for both B.Z. and L.M., testified that when the children were returned from visitations they were often inappropriately dressed for winter, often without underwear or socks.

In early 1985, S.Z. moved to Omaha. Further court proceedings followed, prior to any termination petitions being filed. S.Z. did comply with some terms contained in the rehabilitation plan. For example, the plan required her to establish a separate residence for herself, which she did for a time, and obtain employment, which she still maintains.

An evaluation was held on November 5, 1985, and a review hearing was held on March 25, 1987. At this time S.Z. no longer had independent living and was residing in shelters throughout

Omaha. Although visitation was forbidden by the court due to noncompliance with the rehabilitation plan, S.Z. had managed to have secret visitations with her children approximately three or four times in the 1 1/2-year span between hearings. Because the rehabilitation plan adopted over 2 years ago had still not been complied with, the court denied any requests for visitation.

Termination proceedings were begun in July of 1987 regarding B.Z., R.Z., and A.Z. After the petitions for termination were filed, S.Z. was allowed limited supervised visitations. Evidence adduced at the termination proceedings clearly established S.Z.'s noncompliance with the rehabilitation plan. On January 19, 1988, the county court entered its orders terminating S.Z.'s parental rights to her children B.Z., R.Z., and A.Z., pursuant to § 43-292(6).

After an extensive review of the record in this case, this court is convinced that S.Z., after many attempts by social services to obtain compliance with a rehabilitation plan, has made little or no progress toward correcting the conditions which led to the initial determinations that her children were children as defined by § 43-247(3)(a).

The appellant, S.Z., has been under judicial jurisdiction for approximately 5 years. She has been under the supervision of Dodge County social services for over 10 years. For the last 3 years, S.Z. has been allowed no visitation, until termination petitions were filed by the State in July of 1987.

Section 43-292 provides:

> 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:
>
> . . . .
>
> (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.

A juvenile court has the discretionary power to prescribe a

reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988). In this case a rehabilitation plan was established by the court. S.Z. has failed to even minimally comply with the established rehabilitation plan.

We have held that although the juvenile court is not required to implement a plan for rehabilitation, noncompliance with a reasonable plan presents an independent reason justifying termination of parental rights. *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987); *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of L.H., supra.*

In *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 267, 417 N.W.2d 147, 158 (1987), we stated:

> [R]egarding 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.

The issues we are presented with are whether the rehabilitation plan is reasonable and whether the evidence supporting the termination orders is clear and convincing. We believe the record contains such clear and convincing evidence.

The appellant argues that the rehabilitation plan was unreasonable. The plan established by the court and the justifications for each point are outlined below.

"1. The mother shall take steps to establish financial and living independence i.e. apply for disability or Social Security Income Supplement, employment, or job skill training."

This provision was established in response to problems occasioned by S.Z.'s continuous poverty. In 1983, B.Z. and R.Z. were voluntarily placed in foster care due to a conviction for insufficient-fund checks. Lack of funds was a contributing factor in the appellant's inability to provide a stable and healthy

environment for the children. The court did not require financial independence, but merely expected her to take steps to secure some financial stability. The appellant did obtain employment, but has not achieved any living independence over a 3-year period. Basically, the appellant has a pattern of moving from one charity shelter to another or staying with friends. Appellant appears no closer to this goal than she was in February of 1985.

"2. The mother shall obtain appropriate family planning counseling."

Although this may be seen as too little too late, it cannot be said that the court was unreasonable in ordering such a provision. When the juvenile petition was filed on behalf of A.Z., the appellant had given birth to four children. The oldest child, L.M., was born during appellant's first marriage. B.Z. was born during appellant's second marriage. The appellant has been unable to identify the father of R.Z. and identified A.Z.'s father for the first time at the termination hearing. The appellant has borne four children by four different fathers, at least one of whom remains unidentified. The appellant has obtained no family planning counseling.

"3. The mother shall receive counseling as long as deemed necessary by an approved counselor. Costs to be paid by the Court or the Dept. of Social Services."

The mental health of the appellant has been a concern to all parties involved in this case. The testimony of S.Z. during these proceedings evidences a continued decline in the ability of the appellant to think rationally. Her responses were often totally inappropriate, and she cried and spoke incoherently throughout. When an appointment was made for counseling with Dr. Taylor, S.Z. was abusive and uncooperative and had to be asked to leave. S.Z. failed to establish the counseling she has repeatedly demanded to arrange for herself.

"4. The mother shall cooperate with a Social Services homemaker on learning appropriate parenting skills and for budgeting skills."

The appellant's home throughout these proceedings has been described as cluttered and very dirty. S.Z.'s home did improve for a time when a homemaker was assisting, but S.Z. later

refused to cooperate with a homemaker. As for her parenting skills, appellant repeatedly sought voluntary foster care for a break from parenting responsibilities. She stated that caring for the children often made her feel "cooped up." S.Z. would often have to request more food stamps at the end of the month as she could not make them last long enough to cover household expenses. Except for a short time after the 1981 complaints, S.Z. never did cooperate with a homemaker or seek budgeting assistance.

"5. The mother shall establish a separate residence for herself."

The noncompliance with this provision has been addressed in the above discussion of item 1 of the plan.

"6. The mother shall become active in and participate in an approved Parent Support Group."

L.M., the appellant's oldest daughter, has been the victim of repeated sexual abuse by her stepfather. This, along with other problems the appellant has had with her children, suggests the need for the appellant's participation in a parent support group, both to help the appellant develop an understanding for the needs of her children and to lend support to the appellant.

"7. The mother shall develop other support groups of her choice, i. e. church, appropriate friends, etc."

"8. The mother may contact the school(s) her children attend and counsel with the school representatives regarding any educational needs of the children."

These two points were included upon the request of the appellant. She cannot now argue that their inclusion was unreasonable.

The only provision of the rehabilitation plan seriously contested by the appellant is the denial of visitation rights until full compliance with the plan was achieved. There was evidence establishing that in the 2 years preceding the provision denying visitation the children were adversely affected by visitations. They would return to the foster parents agitated and neglected. When the foster parents would arrive to pick up the children and bring them back to the foster home, often S.Z. did not know where the children were and the foster parents would have to locate the children. Admittedly, this no-visitation

provision was quite harsh. However, even with the threat of no visitation with her children, S.Z. failed to comply with the other provisions in the rehabilitation plan.

In addition, we do not feel that it is now in the best interests of the children to go back and attempt to undo whatever hardship this provision placed on S.Z. It has now been over 4 years since B.Z. and R.Z. were last placed in foster care, and A.Z. has been in foster care since shortly after her birth. In that span of time the living conditions of the appellant have changed little. Her attitude has been uncooperative and remains so. She has done nothing toward seeking counseling for her unstable emotional state, nor has she sought help in improving her parenting skills, even when ordered to do so by the court. Therefore, we find it to be in the best interests of the children to affirm the order of the county court terminating the parental rights of S.Z. When parents cannot rehabilitate themselves within a reasonable time, the best interests of the children require that a final disposition be made without delay. *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987). The children have remained suspended in indefinite foster care awaiting a definitive decision concerning their future for too long. We cannot gamble with the future of these children any longer; they are entitled to a decision resolving their future. We hold the evidence supporting the court's termination orders to be clear and convincing. The decisions of the county court for Dodge County are affirmed.

AFFIRMED.

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D & R REALTY, A NEBRASKA GENERAL PARTNERSHIP, APPELLANT AND CROSS-APPELLEE, V. ROBERT J. BENDER AND LAVERN J. BENDER, APPELLEES AND CROSS-APPELLANTS.

431 N.W.2d 920

Filed November 10, 1988. No. 86-924.

1. **Leases.** Ambiguities in a lease should be construed against the person preparing the lease.

2. **Leases: Landlord and Tenant.** Where a substantial portion of leased premises is destroyed or rendered incapable of being used by a lessee, the lessee is entitled to an apportionment of the rental to be paid, in the absence of an expressed assumption of the risk of such destruction.
3. **Trial: Appeal and Error.** The failure by the trial court separately to state findings of fact or conclusions of law under Neb. Rev. Stat. § 25-1127 (Reissue 1985) is not reversible error where the record affirmatively shows that such failure worked no injury to appellant.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Affirmed in part, and in part reversed and dismissed.

Robert R. Steinke, of Allphin & Steinke, and David E. Pavel for appellant.

Mark M. Sipple and Eugene G. Schumacher, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

GRANT, J.

This is an appeal from the district court for Platte County. Plaintiff-appellant, D & R Realty (D & R), a Nebraska general partnership, brought this action against defendants-appellees, Robert J. and LaVern J. Bender (Benders).

The record shows that on March 1, 1979, the Benders, as lessees, entered into a written lease agreement with the lessor, D & R. The Benders leased 160 acres of farmland near Monroe for 3 years and, as annual rental, were to deliver 7,000 bushels of No. 2 yellow corn to D & R by December 1 of each year. Approximately 130 of these acres were irrigated by a center pivot sprinkler. Through a series of subsequent extensions of the lease, the Benders farmed the land until the end of the 1984 crop-year.

Sometime during July of 1982, lightning damaged a motor control on the center pivot. While the Benders were charged with securing insurance for such events, the lease agreement required D & R to make all premium payments. The insurance secured by the Benders and paid for by D & R covered all but $956.79 of the cost to repair the motor control. A dispute arose as to which of the parties was responsible for this cost. Benders

paid the balance and withheld a like amount from their 1982 rental payment. After D & R refused to negotiate an extension of the lease, the Benders paid an additional $956.79 to D & R, and D & R extended the lease for the 1983 crop-year.

During the spring of 1984 a series of torrential rains flooded the Monroe area. Because of these rains, the Benders were able to plant only 97.5 acres of the leased land. On January 25, 1985, 55 days after the lease payment in corn was due, the Benders tendered to D & R a cash payment of $13,008.84 based on the number of acres they were able to farm and calculated on the market value of the type of corn specified in the contract. This pro rata payment was accepted by D & R as a partial payment on the annual rental.

In May of 1985, D & R brought suit (as tried in two causes of action), seeking to recover (1) the difference in the amount paid by the Benders and the value of 7,000 bushels of corn, and (2) damages caused by Benders in claiming a right to lease the farm for the 1985 crop-year. The Benders counterclaimed, seeking to recover (1) $956.79 paid to D & R for repairs necessitated by the lightning damage to the center pivot irrigation system; (2) $2,425, representing one-seventh of the center pivot system improvements made by defendants in 1979 under the lease; and (3) damages incurred as a result of D & R's termination of the lease.

After a trial to the court, the court sustained Benders' motion to dismiss D & R's second cause of action, and no error is assigned as to this ruling. The district court in its memorandum opinion found in favor of Benders on D & R's petition with respect to the 1984 lease payment, found in favor of D & R on Benders' counterclaim for $956.79, rendered judgment for $2,425 in favor of Benders as to their counterclaim representing one-seventh of the center pivot system improvement, and found in favor of D & R on Benders' counterclaim for wrongful termination of the lease.

D & R appeals, assigning six errors, which, as argued in its brief, may be summarized as errors in the trial court's actions (1) in overruling D & R's motion that the court make specific findings of fact; (2) in finding in favor of Benders on D & R's petition, when the lease required full payment notwithstanding

the fact that not all of the leased land could be planted; and (3) in rendering judgment on Benders' counterclaim for $2,425, representing one-seventh of the center pivot improvement installed by Benders, when D & R was legally justified in not renewing the lease for the 1985 crop-year because of Benders' late and partial lease payment for the 1984 crop-year.

Benders cross-appeal, assigning four errors, which, as argued, may be summarized as errors in the trial court's actions (1) in rendering judgment in favor of D & R on Benders' counterclaim for $956.79 paid for repairs based on the court's finding there was an accord and satisfaction on that issue, and (2) in dismissing Benders' counterclaim for wrongful eviction.

We affirm the trial court's action in dismissing D & R's petition and affirm in part and reverse in part the trial court's actions on Benders' counterclaim.

The record further shows that during the last weeks in April 1984, when farmers normally planted in the Monroe area, unusually heavy rains flooded the area. Robert Bender testified that "[w]ater began to flow out of the sandhills, which is extremely out of the ordinary. It has never happened in most people's lifetime." An employee of the Platte County Agricultural Stabilization and Conservation Service (ASCS) testified at trial that there was more water in the area than he had ever seen before. The ASCS employee also testified that measurements conducted by his office showed that only 97.5 acres of the D & R property could be planted.

In May of 1984, Robert Bender contacted the two principals of D & R, Don and Roger Erftmier, about the flooding problems. The Erftmiers were apparently indifferent to Benders' problems with the flooding. Roger Erftmier told Robert Bender that if he did not farm the ground he was going to hire a custom farmer and would sue for any deficiency. Bender then wrote to Don Erftmier, requesting permission to plant soybeans rather than corn. Don Erftmier granted the request but stated that he still expected to be paid in corn.

Some 2 months after the normal planting season, floodwaters receded to the point that the Benders were able to plant 97.5 acres of the leased land in soybeans. The remaining leased acres could not be planted.

At the conclusion of the crop-year, and after December 1, 1984, Benders paid D & R $13,008.84 in cash. The time of this payment was beyond the date required by the contract. In determining this amount the Benders divided the 130 irrigated acres into the 7,000 bushels to find the per-acre bushel requirement. The Benders then multiplied this result by the 97.5 acres they were able to farm. They then multiplied this result by $2.48, the agreed value of No. 2 yellow corn on December 1, 1984. D & R accepted the Benders' tender as partial payment to mitigate damages.

D & R in its petition sought to recover the balance of the corn due under the terms of the lease. In support of its prayer for these damages, D & R relies on the following provision in the lease:

> Though the anticipated profits from the Farm crop will significantly exceed [7,000 bushels], the fact that such crop fails entirely or does not exceed such bushel requirement will in no way relieve the Farmers from delivering [7,000 bushels] of corn to the Owner. Farmers [Benders] acknowledge that it may be necessary to purchase and Farmers agree to purchase such quantity of corn from other sources in order to comply promptly with the provisions of this subparagraph.

D & R contends that this provision places the entire loss caused by the flood on the Benders. The trial court did not agree, nor do we. While the burden of such a contingency may be placed on a party by agreement, this court will not strain the language of an agreement to do so. The record shows that the lease was prepared by D & R, and, under settled law, any ambiguities in a lease should be construed against the party preparing the lease. *May v. Marijo Corp.*, 207 Neb. 422, 299 N.W.2d 433 (1980). The Benders' crop did not fail. They were prevented from planting the entire acreage because of a flood. A flood, characterized at trial as unlike any in memory, could not be within the contemplation of the parties when the agreement was executed.

In *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N.W. 785 (1897), we held that where a substantial portion of leased premises is destroyed or rendered incapable of being used

by a lessee, the lessee is entitled to an apportionment of the rental to be paid, in the absence of an expressed assumption of the risk of such destruction.

The view adopted in *Wattles, supra*, is reflected in Restatement (Second) of Property § 5.4 (1977). Unless a tenant has agreed to assume a risk, he will not be required to pay rent on leased property rendered valueless for his purposes through no fault of his own. D & R argues that the flooding of the property was not an act of God. Testimony at trial shows that the floodwater did not reach the property until a neighbor channeled the water across a road to the D & R property. The rule from *Wattles, supra*, is not limited to acts of God, but may extend to conditions created through no fault of the tenant. The Benders' partial payment for 1984 was proper except for its timeliness under the terms of the lease.

D & R also assigns as error the district court's denial of its motion for findings of fact and conclusions of law. Pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 1985), a party, "with a view of excepting to the decision," may request a court to "state in writing the conclusions of fact found separately from the conclusions of law." The record shows that D & R did not make a motion under § 25-1127 until after the judgment herein was entered. Counsel for the Benders, however, did make such a motion, before the trial began, and the statute sets out that the findings must be made if one of the parties requests such findings. Section 25-1127 is mandatory in form, and we have so held. See *Dormer v. Dreith*, 145 Neb. 742, 18 N.W.2d 94 (1945). On request, the trial court should follow the dictates of the statute. Nonetheless, we held in *In re Guardianship of Lyon*, 140 Neb. 159, 164, 299 N.W. 322, 324-25 (1941), "While this section of the statute is mandatory . . . a failure by the trial court separately to state findings of fact or conclusions of law is not reversible error, when the record affirmatively shows that such failure worked no injury to appellant." While we do not approve of the trial court's action in not honoring the request to set out, in writing, findings of fact and conclusions of law, with regard to the entire case, there is no prejudice to appellant in the court's action. The questions presented are primarily questions of law with regard to the interpretations of a contract. The

action of the trial court in this regard, while erroneous, was not prejudicial to D & R. The court's action in not setting out findings of fact and conclusions of law does not require reversal on that ground.

Appellant D & R also assigns as error the action of the trial court in rendering judgment for Benders, on Benders' counterclaim, for repayment of a portion of the center pivot system improvement installed by Benders under the lease. Pursuant to the lease agreement between the parties, D & R agreed to return to the Benders a pro rata portion of the costs of the center pivot improvement should the Benders not farm the property during the fourth through seventh years because of D & R's actions. This provision, paragraph 6D, states as follows:

> Owner acknowledges that the Farmers intend to add a substantial improvement to the pivot system at the Farmers expense. The Owner agrees that, in the event the Farmers do not farm the property during years 4 through 7 because of an action on the Owners part, the Owner will reimburse the Farmers for the remaining unused portion of the pivot improvement on the basis that the improvement has a seven year life. In the event the Farmers do not farm the property during the years 4 through 7 because of an action on their part, the Owner will reimburse the Farmers for the remaining unused portion of the pivot improvement, less one year, on the basis that the improvement has a seven year life.

(Emphasis omitted.) The lease also contained the following provision, in paragraph 10C:

> The Farmers agree that if they or either of them fail to observe or perform any of the conditions or covenants imposed upon them hereby, then the Owner shall have the right to declare this Agreement terminated and upon so declaring the Owner shall have the right to reenter and repossess the Farm and shall be entitled to any and all crops and improvements thereon as liquidated damages for the Farmers' default hereunder.

The district court, "taking into account the mode and manner of which the lease was not renewed," held that the Benders were entitled "to 1/7th of the initial improvement cost

of the pivot . . . reflected in the evidence and without contradiction" to be $2,425, as one-seventh of the initial cost of $16,975 for the center pivot improvement.

D & R contends that the Benders, by failing to tender 7,000 bushels of corn on or before December 1, 1984, breached the lease agreement. We read the lease more broadly than the Benders, who argue only an election by them not to farm would prevent them from recovering the final pro rata pivot improvement cost, and agree with D & R that both of the before-mentioned provisions when read together indicate that any breach by the Benders would prevent Benders from any entitlement to this payment. Under *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N.W. 785 (1897), the Benders were within their rights in making a reduced payment because of the flood in 1984. The Benders, however, delayed making any payment until almost 2 months after the December 1, 1984, due date. The Benders contend that the parties were negotiating a settlement during this period, which excused them from promptly tendering payment. The record shows that D & R opted to declare the agreement breached as a result of this delay, prior to accepting the Benders' tender in order to "mitigate damages." The Benders, by not tendering payment on or before December 1, 1984, breached the agreement and are not entitled to any amount set forth in paragraph 6D of the lease.

Also dispositive on this issue is the language of the contract stating that the center pivot improvement had a 7-year life and that if the Benders' actions prevented them from farming in the last 4 years of the possibly extended contract, D & R would reimburse Benders "for the remaining unused portion of the pivot improvement, less one year." (Emphasis omitted.) At the time of the termination of the contract, the Benders had used the improvement for 6 years and were not entitled to any reimbursement. The trial court's judgment in favor of Benders on the counterclaim concerning the reimbursement of the seventh year's pivot improvement under paragraph 6D is reversed.

The Benders cross-appeal for the return of the $956.79 paid to D & R in 1982 is without merit. The claim was made some 2 years after the fact, and only after D & R brought suit. The

district court's decision that the parties had reached an accord and satisfaction on this issue in extending the lease for the 1983 crop-year is affirmed.

The Benders' assignment of error in the trial court's action in dismissing the Benders' counterclaim for wrongful eviction is also without merit. As set out above, the record shows that the Benders breached their lease agreement with D & R by not timely tendering even partial payment for the acres they farmed in 1984. The action of the trial court in dismissing that portion of the counterclaim is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

COLWELL, D.J., Retired, dissenting.

I respectfully dissent from those parts of the majority opinion holding (1) defendants were not obligated under the lease to deliver the full quantity of 7,000 bushels of rental corn to plaintiff in satisfaction of their lease agreement, and (2) the court's failure to make separate findings as required in Neb. Rev. Stat. § 25-1127 (Reissue 1985) was not prejudicial error.

Basically, I disagree with the position of the majority that the facts show defendants were prevented from planting all of the land because of a flood. I contend that any interference in defendants' possession (planting) was caused by the independent unlawful acts of third parties diverting surface waters that had accumulated and concentrated in volume on land across the road from the leased land so that the water "backed up" upon the leased land.

"Floodwaters" are waters that spill over banks of a stream during high water, flow over adjacent lands in the stream's flood plain, and return to the stream at a point or points downstream. *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985). "Surface water" is water which appears upon the surface of ground in a diffuse state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow. Diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. However, when diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other

drainageway, the rule as to diffused surface waters does not apply. See, *Shotkoski v. Prososki*, 219 Neb. 213, 362 N.W.2d 59 (1985); *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

Defendant Robert Bender described how the water reached the leased land:

> Approximately the last week of April water began to flow. We had a lot of rain. Water began to flow out of the sandhills, which is extremely out of the ordinary. It has never happened in most people's lifetime. It started flowing out of the sandhills and began running and flooding property on down on the west side of the road.

Bender stated,

> When the flood came, the water was on the west side of the road and it would have remained on the west side of the road until some neighbors had dug underneath the road and caused it to cave in allowing the water to cross over to the east side of the road, and the County did not correct that and caused the water to come over there and back up into Mr. Erftmier's property.

Bender further testified,

> Q. Now, of what significance, if any, [is] the fact that this road broke through or gave way and the water flowed through the road?
>
> A. Well, that's what allowed the water to go on the east side, which eventually backed up into my property and Erftmier's property on the east side of the road after flooding on the west, and then I was surrounded on both sides.
>
> Q. Where this break or gap in the road occurred and where water flowed across and through, how far is that from the Erftmier, D&R Realty, property?
>
> A. Approximately a half mile. The road opening was approximately a half mile to the north of the D&R Realty property.

It is a general rule that a third person who causes an injury to the use or possession of leased premises is liable to the tenant in possession. See, 51C C.J.S. *Landlord & Tenant* § 354 (1968); *Ristine v. Geigy Agricultural Chemicals*, 188 Neb. 550, 198 N.W.2d 199 (1972).

Cropland farmers are keenly aware of farming risks involving the uncertainties of weather, such as extreme heat, drought, excessive rainfall, and the accumulation and pooling of water after heavy rains, and, by the very nature of that business, farmers assume those hazards and risks whether they own or lease the land, albeit defendants here were assured needed water via the irrigation system. By the terms of the written lease between the parties, defendants lessees assumed those usual risks of farming that related to weather conditions. At the same time, defendants had the right to plant the 160 acres free from any interference from third persons, including the diversion of water. See *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987).

The record is limited concerning the character of the water, natural depressions, water courses, channels, and swales on the west side of the road, and also concerning the circumstances of the county road holding back the water; however, a finding could be made that the accumulated water on the west side of the road was diffused surface water concentrated in volume and velocity, and it was unlawful for third persons to divert the water to the damage of a neighbor, and defendants had a possible cause of action against those third parties.

The majority relies on the rule in Restatement (Second) of Property § 5.4 at 194-95 (1977),

> Except to the extent the parties to a lease validly agree otherwise, there is a breach of the landlord's obligation if, after the tenant's entry and without fault of the tenant, a change in the condition of the leased property caused by the landlord's conduct or failure to fulfill an obligation to repair, *or caused suddenly by a nonmanmade force*, makes the leased property unsuitable for the use contemplated by the parties . . . .

(Emphasis supplied.) That rule is not applicable here for the reason that the change in the condition of the leased land was not "caused suddenly by a nonmanmade force"; rather, it was caused by the manmade force of third persons changing the county road and diverting the water. Further, the Restatement, *supra* at comment *i.* at 200, provides,

> A third person, not acting for the landlord, may

> intentionally, negligently or accidently damage the leased property and the changed condition may prevent the tenant from using the property in the manner contemplated by the parties. Though the rule of this section is not applicable in that case, the tenant may have an action for damages against the third person for his conduct.

As I understand the position of the majority, the accumulated water (flooding) on the leased land made applicable the rule in *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 268, 69 N.W. 785, 790 (1897), "Where a substantial portion of leased premises is *destroyed without the fault of the lessee*, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction." (Emphasis supplied.)

The facts in *Wattles* are distinguishable. Wattles leased a 15-acre pond and icehouses used to store ice; the icehouses were destroyed by windstorm, commonly called an act of god; and the court ordered apportionment of the rental, forgiving the months when the icehouses could not be used. In the case at bar, surface waters had accumulated on farm ground across the road and some distance north of the leased premises, and when some neighbors disturbed or changed a county road, they caused the water to cross over the road and back up upon the leased land, to defendants' damage. While the accumulation of water across the road had its origin in unusually heavy rainfall, it neither caused damages nor interfered with defendants until the tortious acts of some unidentified third parties changed the road.

It is significant in *Wattles* that the court's discussion concerned leased premises that were either "destroyed" or "no longer existed," or, in the case of flooding, the land was "washed away." None of those facts were present here; rather, the land remained and defendants were prevented from planting a crop on a part of leased premises, which should not be cause for apportionment of rent. See Annot., Modern Status of Rule as to Tenant's Rent Liability After Injury to or Destruction of Demised Premises, 99 A.L.R.3d 738, 739

(1980):

> A number of modern cases dealing with the issue of the tenant's rent liability after destruction of the demised premises support the view that, in the absence of a lease or statutory provision respecting the issue, the tenant's rent liability depends on whether the thing leased remains after the injury or destruction. Thus, provisions of the lease which outline the extent of the premises demised become a focal point for these courts, which then compare such lease provisions with the extent of the destruction in particular cases in order to determine whether the tenant remains liable for rent. While the courts have exhibited varying degrees of strictness in reading lease provisions regarding the extent of the premises demised, in general the courts have held that the tenant remains liable for rent if any part of the demised premises remains that is capable of being occupied and enjoyed by the tenant, but that rent liability is extinguished if the thing demised has been totally destroyed. The latter view is sometimes expressed as an exception to the common-law rule that a tenant remains liable for rent notwithstanding injury to the premises.

Concerning the terms of the lease relating to consideration, the lease clearly provides that lessees shall deliver 7,000 bushels of corn to the lessor as payment for the annual rent. This is a "cash lease" arrangement where the medium is corn instead of cash. The paragraph in the lease discussed by the majority concerning anticipated profits, etc., was a further explanation and understanding between the parties that 7,000 bushels of corn must be delivered as rent annually. It was not a contingency, and it did not create an ambiguity.

Lastly, the majority holds as neither prejudicial nor reversible error the failure of the trial judge to make separate findings as required by § 25-1127. Such findings are mandatory in a law case and helpful in equity actions. See, *Dormer v. Dreith*, 145 Neb. 742, 18 N.W.2d 94 (1945); *Carl v. Wentz*, 116 Neb. 880, 219 N.W. 390 (1928). The absence of such findings in an equity case may not be prejudicial because of the court's de novo review. *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986).

The purpose of § 25-1127 is to provide appellants with a basis to question the rulings of the court upon the legal questions involved. See *Fee v. Fee, supra*. The mandatory rule is important here, since the evidence is limited and there are no findings of fact concerning the cause of the water "backing up" onto the leased land. Appellant is also faced with the rule that the general findings of the trial court in a law action in which the jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly erroneous. See *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). On several occasions this court has directed litigants' attention to their failure to request the court to make findings as provided in § 25-1127, and now the majority holds that such failure is not prejudicial anyway. The provisions of § 25-1127 being mandatory, it was prejudicial for the court to fail to make such findings, and it was reversible error.

The judgment in favor of defendants on plaintiff's first cause of action should be reversed, and that cause remanded for a new trial on that issue. The judgment entered in favor of defendants on their counterclaim for repayment of a portion of the center pivot improvement should be set aside, and that cause remanded with directions to make separate findings of fact and conclusions of law, pursuant to § 25-1127, and to enter judgment thereon.

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TERI ANN GRIFFITH, APPELLEE, V. WAYNE DOUGLAS GRIFFITH, APPELLANT.

431 N.W.2d 609

Filed November 10, 1988. No. 88-125.

1. **Child Custody: Appeal and Error.** Custody matters are initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we consider and may give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

2. **Trial: Evidence: Waiver.** If, when evidence is offered, the other party consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, he waives whatever objection he may have had thereto.

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

Wilbur C. Smith, of Smith & Hansen, for appellant.

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

BOSLAUGH, WHITE, and SHANAHAN, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

Respondent, Wayne Douglas Griffith, appeals from the order in a dissolution proceeding awarding custody of the parties' minor child, Tisha Marie, born July 23, 1983, to petitioner, Teri Ann Griffith, and ordering respondent to pay child support in the amount of $200 per month and to pay $400 to petitioner for attorney fees.

The respondent assigns seven errors which are summarized as follows: (1) The district court erred in awarding custody of the minor child to the petitioner; (2) the district court erred in failing to rule on the admission of an audiotape which was offered as evidence and listened to at trial; and (3) the district court erred in ordering the respondent to pay $400 to petitioner for attorney fees.

> Child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal, although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion. Additionally, this court may give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

*Clark v. Clark*, 228 Neb. 440, 445-46, 422 N.W.2d 793, 797 (1988). See, also, *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987); *Staman v. Staman*, 225 Neb. 864, 408 N.W.2d 320 (1987).

On November 17, 1986, the court, by stipulation, entered an

order granting temporary joint custody of Tisha to petitioner and respondent and ordering the respondent to pay temporary child support in the amount of $150 per month. The respondent filed a response and cross-petition praying for custody of Tisha and asking that petitioner provide support for the child.

A guardian ad litem was appointed for the minor child.

At the dissolution trial, the petitioner testified that in June of 1987, she contacted authorities with regard to allegations of sexual abuse made by Tisha with respect to the respondent. The State filed charges against the respondent, but all charges were dropped at the preliminary hearing. The record from the dissolution proceeding includes considerable evidence regarding the alleged sexual assault. The guardian ad litem informed the court that his recommendation was for the respondent to be awarded custody of Tisha because the guardian had concluded that the criminal allegations made by petitioner were without foundation.

At trial, a clinical social worker testified on behalf of the petitioner. This social worker had seen Tisha as a client. The social worker testified that she believed that Tisha had not been coached with regard to the sexual assault. Another witness, a clinical child psychologist, testified on behalf of the respondent. This witness had taped one of her conversations with Tisha on an audiotape. This tape was played at trial. According to the psychologist, the tape included a portion of the conversation wherein the child stated, "My mom lied." The psychologist testified that on the tape, the child continued, stating, "I know she lied." "How do you know?" "Because I told her he didn't do it, I said no, he didn't, she said yes, he did." Prior to playing the tape in open court, the psychologist testified in detail as to what was discussed. The tape was offered into evidence by the respondent.

The petitioner objected to the admission of the tape. The court deferred ruling on the objection and on the admissibility of the tape. Such ruling was never made.

A trial judge has a duty to rule on the admissibility of the evidence. *Wilson Concrete Co. v. A. S. Battiato Constr. Co.*, 196 Neb. 185, 241 N.W.2d 819 (1976).

If, when evidence is offered, the other party consents to

> its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, he waives whatever objection he may have had thereto.

(Syllabus of the court.) *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948).

After hearing and observing the witnesses during the course of the trial, the trial judge determined that both parents were fit and proper persons to be awarded custody of the minor child and awarded custody of Tisha Marie to petitioner.

Awarding attorney fees in a marriage dissolution case is a matter initially entrusted to the sound discretion of the trial judge and, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Hamm v. Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988).

We have reviewed this record de novo, and we find neither an abuse of discretion on the part of the trial court nor other error in the record. Therefore, the trial court's judgment and decision to award custody to the petitioner are affirmed.

AFFIRMED.

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## COMMERCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, A CORPORATION, APPELLANT, V. ABA CORP., A CORPORATION, ET AL., APPELLEES.

431 N.W.2d 613

Filed November 18, 1988. No. 86-1083.

1. **Judicial Sales: Appeal and Error.** As a general rule, the confirmation of judicial sales rests largely within the discretion of the trial court. Consequently, the determination of the trial court will not be disturbed on review except for an abuse of such discretion. The trial court may not, however, exercise its discretion arbitrarily. Its determination is to be one which is sound and equitable in view of all the circumstances. The determination must be in the interest of fairness and prudence, with a regard for the rights of all concerned and the stability of judicial sales.
2. **Judicial Sales: Vendor and Vendee.** At a sheriff's sale, also known as a judicial

sale, the court is the vendor; the officer conducting the sale is a mere instrument of the court. The stability and integrity of the court is of paramount concern.

3. **Judicial Sales: Case Overruled.** To preserve the integrity of the court and the stability of judicial sales, a bidder may no longer withdraw his bid at a judicial sale. To the extent that *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N.W. 695 (1894), and *George v. Pracheil*, 92 Neb. 81, 137 N.W. 880 (1912), hold differently, they are overruled.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

William J. Riley, of Fitzgerald, Schorr, Barmettler & Brennan, and, on brief, David H. Fisher, of Fitzgerald, Brown & Dunmire, for appellant.

William D. Kuester, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

This is an appeal challenging the refusal of a deputy sheriff and a district court to grant Commercial Federal Savings and Loan Association's desire to withdraw its bid at a judicial sale. The Lincoln County District Court granted appellees' motion to confirm the sale and overruled Commercial Federal's motion to set the sale aside. Commercial Federal appeals. We reverse.

Commercial Federal filed a petition for foreclosure of a mortgage on a trailer court owned by the appellees. A decree of foreclosure was entered, in which the court found that Commercial Federal held a first mortgage on the property in the amount of $294,647.45, plus interest. An order of sale was issued to the Lincoln County sheriff. Pursuant to published notice, the sale was opened on October 21, 1986, at 10 a.m. at the Lincoln County courthouse.

In conducting the sale, Deputy Sheriff Jim Henry utilized a bid sheet. The name and bid of each bidder was written on the sheet by either the deputy or the bidder.

At approximately 10:15 a.m., an attorney representing Commercial Federal submitted a bid of $120,000. This bid was entered on the bid sheet by the deputy. At approximately 10:40

a.m., attorney William Kuester submitted a bid of $250,000 on behalf of one of his clients. This bid was entered on the deputy's bid sheet by Kuester.

Shortly thereafter, Commercial Federal's attorney submitted a second bid, this time for $260,000, which the deputy entered on the bid sheet. At 10:55 a.m., Deputy Henry announced that the sale would remain open for 5 more minutes. At that time, Commercial Federal's attorney asked the deputy to withdraw Commercial Federal's last bid. This request was refused because the bid had been written on the bid sheet.

Deputy Henry was willing to allow Commercial Federal to withdraw its bid if Kuester and his client would consent. Such consent was denied, and the deputy closed the sale at approximately 11:02 a.m. The sheriff's return of the order of sale, naming Commercial Federal as the successful bidder with a bid of $260,000, was filed with the court the same day.

All parties filed motions with the court, the appellees seeking confirmation of the sale and Commercial Federal seeking to have the sale set aside. A hearing on both motions was held November 3, 1986. At that hearing, Deputy Henry testified that it was the policy of the Lincoln County Sheriff's Department that, once a bid was written on the bid sheet, it could not be withdrawn.

Commercial Federal's attorney testified that his representation included bidding at sheriffs' sales on property foreclosed by his client. At this particular sale, Commercial Federal's attorney was to

> make the initial bid, which I did, and then, to increase — if a third party was bidding, increase the bid at increments of $10,000.00, without jeopardizing a third party sale; which means that if it comes to the end of the sale and I'm — Commercial Federal seems to be the successful bidder, that I'm to withdraw my highest bid to allow the third party bidder's highest bid to stand.

The court's order dated November 20, 1986, overruled Commercial Federal's motion to set aside the sale and confirmed the sale to Commercial Federal for $260,000. The court held that the deputy's writing of Commercial Federal's bid on the bid sheet constituted acceptance of the bid and that it

could not thereafter be withdrawn. We do not embrace the trial court's reasons for reaching the conclusion that it did.

On appeal, Commercial Federal assigns two errors which are, essentially, the same: The trial court erred in finding that Commercial Federal should not have been allowed to withdraw its final bid at the sheriff's sale.

It is the general rule that the confirmation of judicial sales rests largely within the discretion of the trial court. Consequently, the determination of the trial court will not be disturbed on review except for an abuse of such discretion. The trial court may not, however, exercise its discretion arbitrarily. Its determination is to be one which is sound and equitable in view of all the circumstances. The determination must be in the interest of fairness and prudence, with a regard for the rights of all concerned and the stability of judicial sales. *Sherman v. Schulz*, 220 Neb. 375, 370 N.W.2d 123 (1985); *Nebraska State Bank & Trust Co. v. Wright*, 213 Neb. 822, 331 N.W.2d 535 (1983); *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982).

Commercial Federal argues that rules applicable to auctions, found in the Nebraska Uniform Commercial Code, apply to sheriffs' sales. Neb. U.C.C. § 2-328 (Reissue 1980) provides: "(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. . . . (3) . . . [A] bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid." The U.C.C. applies only to personal property. Commercial Federal's contention that these rules apply is based upon this court's decision in *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N.W. 695 (1894). The *Hamer* court held, "The bid only amounts to a proposition to buy, and until the crier of the sale, by the fall of the hammer or other recognized act of acceptance, signifies assent to the proposition there is no contract, and the proposal may be withdrawn." *Id.* at 293, 58 N.W. at 699. This holding was followed in *George v. Pracheil*, 92 Neb. 81, 137 N.W. 880 (1912). Both *Hamer* and *George* involved bids at judicial sales.

The appellees argue that Commercial Federal's practice of sham bidding constitutes a fraud upon the court which should

not be permitted. At a sheriff's sale, also known as a judicial sale, the court is the vendor; the officer conducting the sale is a mere instrument of the court. The stability and integrity of the court is of paramount concern. See, *Smith v. Carnahan*, 83 Neb. 667, 120 N.W. 212 (1909); *Glaser v. Weinberger*, 188 Neb. 205, 196 N.W.2d 113 (1972); *Hull v. Hull*, 183 Neb. 773, 164 N.W.2d 455 (1969).

At a private auction, several items of personal property are generally offered for sale. If a high bidder withdraws his bid on an item before the hammer falls, and no other bids are submitted, the item can be saved until later in the sale and sold again. Judicial sales are ordinarily limited to a short period of time. People often bid and then leave, especially if a higher bid has been submitted. If a parcel of land or item of personal property is not sold because the high bidder withdraws his bid, another order of sale must be issued by the court. The sheriff must, again, publish notice and conduct a sale of that property. A cloud of uncertainty would hang over every judicial sale if high bidders are permitted to withdraw their bids.

As the trial court pointed out, following the rules urged by the appellant could, in a judicial sale, easily result in lower sale prices, to the detriment of those responsible for a deficiency judgment. It would not be difficult for an individual to submit a high bid, thereby discouraging other bidders. That individual could then wait until near the end of the sale, after other potential bidders had left, withdraw his bid, and submit any bid he desired. Clearly, the integrity of the sale and of the court would be undermined.

Judicial sales must be conducted in a reasonable manner under conditions which are not conducive to manipulation, sham bidding, or fraudulent intervention. In order to preserve the integrity of the court and the stability of judicial sales, we find that the *Hamer* and *George* rule, permitting a bidder to withdraw his bid at a judicial sale, must be replaced. To that end, we look to other areas of Nebraska law.

The Legislature recognized the need for stability and integrity in a particular type of auction when it enacted the Nebraska Trust Deeds Act in 1965. Neb. Rev. Stat. § 76-1009 (Reissue 1986) provides in part:

> On the date and at the time and place designated in the notice of sale, the trustee shall sell the property at public auction to the highest bidder. The attorney for the trustee may conduct the sale. Any person, including the beneficiary, may bid at the sale. *Every bid shall be deemed an irrevocable offer, and if the purchaser refuses to pay the amount bid by him for the property struck off to him at the sale, the trustee may again sell the property at any time to the highest bidder. The party refusing to pay shall be liable for any loss occasioned thereby* and the trustee may also, in his discretion, thereafter reject any other bid of such person.

(Emphasis supplied.)

In our opinion, the above-emphasized portion of § 76-1009 is a sound rule, not only for auctions of trust property, but also for judicial sales. Accordingly, we now hold that every bid at a judicial sale shall be deemed an irrevocable offer. If the highest bidder at a judicial sale refuses to pay the amount bid by him, thus requiring the property be resold, that person or entity shall be liable for the difference between the price on resale and his, her, or its highest bid. To the extent that *Nebraska Loan & Trust Co. v. Hamer, supra*, and *George v. Pracheil, supra*, hold differently, they are overruled.

However, we cannot ignore the fact that Commercial Federal relied upon a rule in existence for 94 years. Fairness and equity dictate that the above-announced rule of law be effective as of the date of this opinion. Therefore, the trial court's confirmation of the October 21, 1986, sale to Commercial Federal is reversed and the cause remanded with directions to vacate the sale. The district court is ordered to tax the costs of the sale to Commercial Federal.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., not participating.

# DOROTHY URYASZ, APPELLEE, V. ARCHBISHOP BERGAN MERCY HOSPITAL, APPELLANT.

431 N.W.2d 617

Filed November 18, 1988. No. 87-048.

1. **Expert Witnesses: Trial.** Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken.
2. **Judgments: Appeal and Error.** A judgment will not be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party.
3. **Damages: Evidence: Proof.** Damages for permanent impairment of future earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury. A person to whom another has tortiously caused harm is entitled to compensatory damages if he establishes by proof the extent of such harm and the amount of his damages with reasonable certainty.
4. _____: _____: _____. Where the evidence first shows that there has been an impairment, loss, or diminution of future earning capacity, the process to ascertain compensatory damages for such loss requires (1) the determination of the extent to which such capacity has been diminished; (2) the determination of the permanency of the decrease in earning capacity; and (3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth. The time for assessing such damages is at the time of trial.
5. _____: _____: _____. There is no fixed rule for determining the amount of compensation for damages for impairment of future earning capacity, except as may be fair and reasonable under the circumstances. Such recovery for loss may be based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for a new trial on the issue of damages.

Michael F. Kinney and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Donald J. Loftus, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

In this negligence case, Dorothy Uryasz, plaintiff, claims that while she was a patient at defendant hospital, she was injured by an injection given by a nurse. Plaintiff recovered a jury verdict and judgment against defendant for $105,000. Defendant appeals; we reverse and remand for a new trial on the issue of damages.

Plaintiff, age 46 years, sustained a neck injury at work in October 1982, for which she was hospitalized in January 1983 and again, in defendant hospital, on March 8, 1983. On March 17, 1983, her doctor ordered an injection, which Nurse Joyce Hassing administered in plaintiff's left groin area. There is evidence that administering an injection in that groin area was an irregular procedure. Plaintiff felt pain down her left leg, and, when she was trying to walk 1 hour later, her left leg was weak. Following dismissal from the hospital, she experienced numbness in her left leg, foot drop, and depression. Plaintiff has not worked since her claimed leg injury. In February 1986, plaintiff began 4 weeks of therapy at the Pain Management Center (PMC), Omaha, Nebraska, resulting in improvement in her leg condition. Expert testimony supported plaintiff's theory that the injection injured her femoral nerve, causing pain, a psychogenic injury, and residual damage to her left leg. Impairment of future earning capacity was a damages issue. Medical damages were about $16,000.

Her work history began in 1974, when she started working at a pharmacy part time, tending the cash register and helping to stock shelves. Later, she worked full time, and in 1977, she briefly managed the store when the owner left town, earning $5.75 per hour as manager. In 1978, she and her husband bought the store, which she managed up to March 8, 1983; while they owned the store, it operated at a loss.

There was conflict in the evidence concerning negligence, liability, injuries, and damages, as shown by defendant's witnesses, John Goldner, M.D., a neurologist, Omaha, Nebraska; Fred D. Strider, Ph.D., a clinical psychologist, Omaha, Nebraska; Frank J. Menolascino, M.D., a psychiatrist, University of Nebraska College of Medicine, Omaha, Nebraska; and Nurse Joyce Hassing, who denied

administering the injection in the groin area.

Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict of the jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceeding in which it was secured. *Schmidt v. Schmidt*, 228 Neb. 758, 424 N.W.2d 339 (1988).

Six errors are assigned: (1) allowing witness Dr. David Jasper to testify regarding causation of plaintiff's injuries; (2) allowing witness Dr. Edward Schima to testify regarding causation of plaintiff's injuries; (3) allowing witness Dr. Charles Golden to testify regarding causation of plaintiff's injuries and the effect on plaintiff's future earning capacity; (4) allowing Dr. Jerome Sherman to testify regarding diminution of future earning capacity; (5) submitting the issue of loss of future earning capacity to the jury; and (6) instructing the jury on a specification of negligence not sustained by the evidence.

Assignments Nos. 1 and 2 are briefly discussed together.

> Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. . . . Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken.

*Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 804, 277 N.W.2d 236, 241 (1979).

The first two assignments of error deal with the admission of testimony of Drs. Jasper and Schima. Dr. Jasper was Uryasz' treating physician at the time the injection occurred, and Dr. Schima, a neurologist, consulted with Dr. Jasper concerning the cause of Uryasz' complaint. At trial, counsel for defendant objected to the admission of opinions on the cause of the numbness of Uryasz' left leg, unless the opinions were based upon a reasonable degree of medical certainty.

As to the testimony of Dr. Schima, no appealable error occurred in allowing his testimony at trial. Most of the testimony Dr. Schima gave regarding the cause of the numbness was elicited on cross-examination. The detailed cross-examination of Dr. Schima waived any objection

defendant may have had to his testimony. See *Anson v. Fletcher*, 192 Neb. 317, 220 N.W.2d 371 (1974).

The conclusion Dr. Jasper reached was that the injection could not have caused the numbness in Uryasz' leg. Defendant concedes this in its brief. As with Dr. Schima, defendant conducted an extensive cross-examination of Dr. Jasper, which included the cause of the numbness and which was a waiver of its objection. Further, their respective opinions had a reasonable basis, and they were properly received in evidence as being within the discretion of the trial judge, *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982), and as assistance to the jury to understand the evidence and to determine facts. Neb. Rev. Stat. § 27-702 (Reissue 1985).

The third assignment objects to the opinions of Dr. Golden, a psychologist and director of the PMC at the University of Nebraska Medical Center, concerning (1) causation and (2) the impairment of plaintiff's future earning capacity.

Plaintiff was referred to the PMC in September 1985. After several weeks of counseling she reluctantly entered PMC's therapy program in February 1986 to treat her pain, numbness in her left leg, loss of use of that leg, and depression. After 4 weeks, when discharged, her therapist described her then condition as improved. Her walk was normal, she was not dragging her shoes, and her gait pattern was about normal. However, she had a continuing condition of weakness in the left leg compared to her right leg, and the muscle strength in her left leg was improved but not normal.

The medical evidence establishes as fact that an injury to the femoral nerve will not directly cause pain or numbness in the leg below the knee. Nevertheless, it is plaintiff's theory that plaintiff experienced a posttraumatic stress disorder, a psychogenic injury, following the groin injection, causing plaintiff's claim of pain and numbness in her left leg and including her foot. "[A] workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability." *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 608, 144 N.W.2d 154, 157 (1966).

It was Dr. Golden's opinion, based on reasonable psychological certainty, that "her problem that we saw was

caused by the incident of the injection at Bergan Mercy Hospital in 1983" and that "I am sure of the diagnosis that the injection was the proximate cause of the pain." Dr. Golden then gave his opinion relating to the issue of impairment of future earning capacity within a reasonable psychological certainty, that "there is a residual impairment" in Uryasz' left leg and that "it will continue" in the future. Further details of this part of his testimony are discussed later.

There was a sound and reasonable foundation for these opinions. Dr. Golden possessed special skills, and admission of the called-for opinions relating to causation and impairment was within the discretion of the trial judge, *Herman v. Lee, supra*, and would assist the jury, § 27-702. There was no error in allowing these opinions. Their weight and credibility were for the jury.

Assignment No. 6 challenges the negligence instruction No. 2(f), for the reason that it is not supported by competent evidence. *Brown v. Kaar*, 178 Neb. 524, 134 N.W.2d 60 (1965); *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987). Particularly, No. 2(f) recites, "in failing to supervise the nurse who administered the injection to Plaintiff." A full understanding of this instruction requires consideration of parts of instructions Nos. 7 and 2, as follows. Instruction No. 7 provides in part:

> Before the Plaintiff can recover damages against Defendant Archbishop Bergan Mercy Hospital, the burden of proof is upon the Plaintiff to establish, by a preponderance of the evidence, each and all of the following elements or propositions:
>
> (1) that Defendant Archbishop Bergan Mercy Hospital was negligent in the care of the Plaintiff, that is that it departed from the standard of care in general use in this or a similar community, as defined in Instruction Nos. 4 and 5, in one or more of the particulars alleged against this Defendant in Instruction No. 2;
>
> (2) that such professional negligence, if any, of Defendant Archbishop Bergan Mercy Hospital was a proximate cause of the injury to Plaintiff, if any.

Instruction No. 2 provides in part:

> She alleges the Defendant failed to comply with the standards of practice applicable to it in the following particulars:
>
> (a) in giving the injection in Plaintiff's left groin;
>
> (b) in failing to give the injection in an area of Plaintiff's body which would not subject her to a risk of nerve damage;
>
> (c) in failing to heed Plaintiff's protestations at the onset of the injection;
>
> (d) in continuing to administer the injection after Plaintiff protested of the pain that ensued with the injection;
>
> (e) in continuing to administer the injection after Plaintiff demanded that the injection be stopped; and
>
> (f) in failing to supervise the nurse who administered the injection to Plaintiff.

The six particular allegations of negligence in instruction No. 2 were taken from plaintiff's amended petition. At the instruction conference, defendant's counsel made a general objection to instruction No. 2, as follows:

> Instruction No. 2, Defendant objects to the giving of Subparagraph D, E, and F for the reason that I believe D and E are repetitious and redundant and duplicitous of what is set out in the allegation in Subparagraph C; I am also going to object to Subparagraph B because I think it is repetitious and redundant of paragraph A; and I object because I don't think there was any evidence in the record to support that allegation.

The purpose of an instruction conference is to give the trial court an opportunity to correct any errors being made by it. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). Defendant did not offer a substitute instruction, *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987), and counsel did not clearly state a reason for his objection to No. 2(f); in so doing, counsel was less than helpful to the trial judge in the preparation of the jury instructions. Under these attending circumstances, the record comes close to being tantamount to a failure on the part of defendant to make an objection to proposed instruction No. 2(f), which would have precluded it

from raising that claimed error on appeal, *Haumont v. Alexander, supra*; however, we approve instruction No. 2(f) on other grounds.

Basic to plaintiff's theory of recovery is the doctrine of respondeat superior, i.e., the relationship of master and servant existed between defendants and Nurse Hassing at the time of the alleged injury, the alleged administering of the injection in plaintiff's groin area resulted in the alleged tort, and Nurse Hassing was acting within the scope of her employment. See *Strong v. K & K Investments*, 216 Neb. 370, 343 N.W.2d 912 (1984). The evidence would support a jury finding that the relationship of master and servant existed.

"Jury instructions are to be read as a whole, and when they fairly submit the case and do not mislead the jury, there is no prejudicial error." *First West Side Bank v. Hiddleston*, 225 Neb. 563, 567, 407 N.W.2d 170, 173 (1987).

A judgment will not be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party. *Emery v. Mangiameli*, 218 Neb. 740, 359 N.W.2d 83 (1984). See, also, Neb. Rev. Stat. § 25-853 (Reissue 1985).

Instruction No. 2(a), (b), (c), (d), and (e) all allege particular acts of Nurse Hassing's negligence in the administering of the injection in plaintiff's groin area, for which there is some supporting evidence as to each allegation.

Instruction No. 2(f) concerns the negligence of defendant to supervise Nurse Hassing contrary to applicable standards of practice, for which there is no supporting evidence, as defendant claims. However, submitting instruction No. 2(f) was not prejudicial to defendant because the failure to supervise would be of no consequence unless it was the cause or resulted in Nurse Hassing's negligent act(s) of administering the injection. Since defendant would be liable for the negligent acts of Nurse Hassing under the doctrine of respondeat superior, the result is the same for defendant on the issue of liability. The giving of instruction No. 2(f) was not misleading, it did not affect any substantial rights of defendant, and it was not reversible error.

All of the assignments of error relating to liability having

been decided in favor of plaintiff-appellee, we turn to the issue of damages.

Assigned errors Nos. 4 and 5 relate to the issue and proof of impairment of future earning capacity, a recoverable item of general damages. *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964).

Damages for permanent impairment of future earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury. A person to whom another has tortiously caused harm is entitled to compensatory damages if he establishes by proof the extent of such harm and the amount of his damages with reasonable certainty. See *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964).

In connection with this issue, it is important to understand that the recovery in terms of money is for impairment of a person's *capacity* to earn in the future and not for loss of earnings, although past earnings are admissible to prove impairment, *Jacobsen v. Poland*, 163 Neb. 590, 80 N.W.2d 891 (1957); this concept of damages is not generally understood by the lay public and jurors. The record before us does not adequately contain an explanation of those differences to aid and guide the jury in its understanding of this damages issue as related to the evidence.

Not intended as a definition, Restatement (Second) of Torts § 924, comment *d.* at 525-26 (1979), provides:

> *Loss or impairment of earning capacity for the future.* The extent of future harm to the earning capacity of the injured person is measured by the difference, viewed as of the time of trial, between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm. This difference is the resultant derived from reducing to present value the anticipated losses of earnings during the expected working period that the plaintiff would have had during the remainder of his prospective life, but for the defendant's act. . . . Accordingly, the trier of fact must ascertain, as nearly as can be done in advance, the difference between

> the earnings that the plaintiff probably would or could have received during his life expectancy but for the harm and the earnings that he will probably be able to receive during the period of his life expectancy as now determined. In this computation, there are considered the type of work that the plaintiff has done and the type of work that, in view of his physical condition, education, experience and age, he would have been doing and will be likely to do in the future during the working period of his life, together with all other matters reasonably relevant.

Where the evidence first shows that there has been an impairment, loss, or diminution of future earning capacity, the process to ascertain compensatory damages for such loss requires (1) the determination of the extent to which such capacity has been diminished, (2) the determination of the permanency of the decrease in earning capacity, and (3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth. The time for assessing such damages is at the time of trial. *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972).

There is no fixed rule for determining the amount of compensation for damages for impairment of future earning capacity, except as may be fair and reasonable under the circumstances. Such recovery for loss may be based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. *Baylor v. Tyrrell, supra.*

The fourth assignment relates to the testimony and opinions of expert Dr. Jerome F. Sherman, associate professor of finance at Creighton University, which he described as a projection of Dorothy's economic loss.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. Neb. Rev. Stat. § 27-703 (Reissue 1985).

Prior to Dr. Sherman's testimony, defendant objected to the proposed testimony based on the contents of a prior deposition of the witness and a report that he had prepared. The reasons

assigned were insufficient evidence of impairment, insufficient foundation, speculation, and no shown causal connection. The trial judge denied the objection to this anticipated evidence, noting the prior testimony of Dr. Golden on causation and observing that the evidence would assist the jury. § 27-703.

Dr. Sherman testified without further objection that he assumed Uryasz was 46 years of age, her past employment history and earnings, she managed a family pharmacy that never made a profit, and she was employed briefly as a manager at $5.75 per hour. He computed her annual income, using $5.75 per hour as a base, at $11,960, and multiplied that by 18, being her employable years to age 65, which projected $215,280 as his opinion of her future earning capacity. No factors of the extent or permanency of her impairment were considered or used. Upon cross-examination, he stated that if Uryasz went back to work and she could handle the job, she would have no loss, but if she did not return to work, the figure of $215,280 was her earning capacity.

An analysis of this testimony shows that it was subject to objection when adduced and a later motion to strike for several reasons: (1) the purpose was to give an opinion on impairment of future earning capacity, which requires the elements of a shown impairment, the extent the earning capacity has been diminished, and degree of permanency of the impairment to earning capacity, *Lake v. Southwick, supra*; (2) the witness must be shown to possess competent facts and underlying data to give such an opinion, otherwise it should not be received and is subject to being stricken, *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979); (3) the only evidence in the record of the extent and degree of permanency of the impairment was speculative and indefinite, and, at most, presented a fact question for the jury, but in any event, such factors were either not considered or unknown to the witness; and (4) the witness assumed Uryasz was employable, but his opinion was in terms of total impairment, which he described as not going back to work. The result was that Dr. Sherman made a mathematical computation that was within the capabilities of a lay person, which he improperly described as impairment of future earning capacity. This produced speculation and

confusion in the evidence; however, there was no error, since defendant failed to object to the testimony when produced, waived the objection by its cross-examination, Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985), and failed to later move to strike Dr. Sherman's testimony at any time, *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985). The testimony became a question of weight and credibility for the jury.

In this same connection, Dr. Sherman was next permitted to testify, without objection, to the present value of $215,280, using the assumption that wages historically increase "at approximately the same rate as the return on a safe Government bond with a three- to four-year maturity," and agreed that

> the present value today of Dorothy's earnings, if she were able to work and earn for the rest of her work-life expectancy, amounts to $215,280, and . . . any interest she can earn on that money starting from today would be equivalent to what she would have received in terms of increases in wages over that same period.

He valued the present value of Uryasz' future loss of earning capacity at the same value as his opinion of future earning capacity, $215,280.

The jury instructions given by the court on present value were contrary to the procedure described by Dr. Sherman; they followed NJI 4.12 and 4.13. Since defendant's argument does not allude to this part of Dr. Sherman's testimony, it will not be further discussed.

The fifth assignment challenges the inclusion in the damages instruction, No. 14(5), as an element of damages, "The value of the loss or diminution of the power to earn in the future."

Defendant urges that the rule in *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964), is dispositive. In *Schwab*, plaintiff, a teacher, received injuries to one leg, diagnosed as a 10- to 15-percent permanent partial disability. When she resumed her teaching duties, the disability was an inconvenience in her work. The proof of impairment of future earning capacity failed because the disability was not related to her work performance. Plaintiff urges that the rule in *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972), supports her

burden of proof. In *Lake*, plaintiff, a teacher, received injuries to her lip and one leg; she resumed teaching half days; and there was no mathematical assessment of her disability. In that case, plaintiff testified that the permanent injury to her lip had healed but it caused her difficulty sometimes when speaking in the classroom, that her leg always ached after standing, and that she could not teach full time because of her leg pain. A medical doctor testified that " '[i]t would appear' " that the leg pain and fatigue plaintiff experienced after one-half day teaching " 'should continue,' " and it was difficult to say how long it would continue. *Id.* at 536, 198 N.W.2d at 321. Defendant offered no testimony on that issue. In *Lake*, the court held the evidence of the injuries, the extent thereof, their duration, and their relation to plaintiff's work performance was sufficient to submit the impairment issue to the jury.

Plaintiff urges that the work performance facts in *Siciunas v. Checker Cab Co., Inc.*, 191 Neb. 766, 217 N.W.2d 824 (1974), are applicable. We do not agree. There, the plaintiff's skills were limited to tasks requiring her to stand on her feet for prolonged periods, lift and carry objects, and lift her arms above her head, all being limited by her injury. Here, the facts show that plaintiff's skills did not limit her job opportunities and capabilities.

Summarizing the relevant evidence on this issue, plaintiff testified that she has not worked since her claimed injury; that since her discharge from the PMC she has recovered about 90 percent; that she continues to have pain and numbness in her left leg; that she was unable to return to work; that if she returned to work, she would not work in a drugstore, as she "could not stay on [her] legs that long and do a job well"; that she took classes in flower arranging; and that her work at the pharmacy included managing the store, clerking, stocking shelves, ordering supplies, cleaning, bookwork, and sales. Witness Dr. Sherman's testimony concerning plaintiff's diminution of earning capacity and its present worth was speculative and confusing to the jury. Dr. Golden testified that from the injection injury there was a residual impairment in Uryasz' leg that will continue in the future, and in performing her job functions in the future requiring her to be on her feet for

any extensive period of time, "[i]t will cause an impairment" and "will reduce her capacity in such circumstances."

The evidence, if believed, shows that plaintiff had an injury and an impairment, in some indefinite degree, to her future earning capacity; however, relating the extent and permanence of that impairment to plaintiff's job performance under this record would require the jury to indulge in speculation and uncertainties. The evidence fails to prove with reasonable certainty the impairment of plaintiff's future earning capacity. *Schwab v. Allou Corp., supra.* The giving of instruction No. 14(5) was error requiring a new trial on the issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

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STATE OF NEBRASKA EX REL. CONNIE THOMPSON, APPELLANT, V. WALTER ALDERMAN, SECRETARY OF THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 1 OF HOWARD COUNTY, NEBRASKA, ET AL., APPELLEES, ST. PAUL EDUCATION ASSOCIATION ET AL., INTERVENORS-APPELLEES.

431 N.W.2d 625

Filed November 18, 1988. No. 87-056.

1. **Mandamus.** Mandamus is an extraordinary remedy, not a writ of right, and will issue only when the duty to act is clear.
2. **Statutes.** Statutory language should be given its plain and ordinary meaning, and where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning.
3. **Claims: Words and Phrases.** A claim is a demand for compensation or payment.
4. **Schools and School Districts: Claims.** Neb. Rev. Stat. § 79-805 (Reissue 1987), which requires the publication of claims allowed by the board of education of a Class III school district, does not require the publication of the individual salaries of the employees of the district.

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

Alan E. Peterson and Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

John F. Recknor, of Barlow, Johnson, DeMars & Flodman, and Mark D. McGuire, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees and intervenors-appellees.

Robert A. Bligh for amicus curiae Nebraska Association of School Boards.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This action was commenced to obtain a writ of mandamus to compel the respondent Walter Alderman, as secretary of the board of education of school district No. 1 in Howard County, Nebraska, to publish the "individually itemized salaries paid or allowed by the Board for any and all employees, including teachers, setting forth the name of the claimant, the amount, the nature of the claim allowed consisting of not more than ten words in the stating of the nature of the claim" in a legal newspaper published in Howard County, Nebraska. The school district was also joined as a respondent.

The relator, Connie Thompson, is a resident and taxpayer of Howard County and is the editor of the Phonograph-Herald, a legal newspaper published in Howard County. The St. Paul Education Association, an association of the certificated teaching employees of the school district and the collective bargaining agent for the teachers, and Noel G. Olin, president of the association, intervened in the action supporting the position of the respondents.

The relator relies upon Neb. Rev. Stat. § 79-805 (Reissue 1987), which is applicable to Class III school districts such as the respondent and which requires the secretary of the board to publish, within 10 days after each meeting, "a list of the claims arising on contract or tort, allowed thereat, setting forth the name of the claimant, the amount, and nature of the claim allowed . . . ."

The trial court found that the evidence failed to show that the board of education "in any manner takes action on the payroll of any employees of respondent nor does it show in any manner that any employee presents any claim on his or her own behalf

within the meaning of §79-805 R.R.S. 1943," and found that the relator had failed to prove that any claim arising out of contract or tort and allowed by the board had not been published as required by § 79-805. The petition of the relator was dismissed. The relator has appealed.

The record presents no issue of fact. The sole question presented is whether the statute in question, § 79-805, requires the secretary of the board to publish a list of the salaries of the employees of the school district.

Section 79-805 is very specific and requires only that a list of the "claims" allowed at a meeting of the board be published. Unless the salaries of the employees of the school district constitute claims allowed by the board, the relator is entitled to no relief.

Mandamus is an extraordinary remedy, not a writ of right, and will issue only when the duty to act is clear. *State ex rel. School Dist. v. Board of Equalization*, 166 Neb. 785, 90 N.W.2d 421 (1958); *State ex rel. Krieger v. Board of Supervisors*, 171 Neb. 117, 105 N.W.2d 721 (1960).

The relator's briefs reveal some of the difficulty there is in ascertaining what the "clear duty" is that the respondents are supposed to have. In the appellant's original brief the relator states, at 4, that the board must publish the individual salaries either monthly or annually. In her reply brief at 5, the relator states that all payments to employees "constitute claims which must be published." But, at 6, the relator states that the publication must be made "at the time the contracts are approved."

The fact is, there is no duty, much less a clear duty, to publish the individual salaries of the employees of the district at any time.

The salary schedule for the certificated employees of the district is negotiated by the St. Paul Education Association, the collective bargaining unit for the teachers. The salary schedule determines the salaries for teachers according to their experience and postbaccalaureate education. A teacher is placed on the salary schedule by an administrative procedure within the superintendent's office; the school board has nothing to do with the placement of teachers on the salary schedule.

Individual teachers' salaries are not approved by any school board action.

The record shows that in the summer of 1986, the board of education approved a new salary schedule for the certificated staff, approved raises for the principals and the superintendent, and approved raises for all other employees. The base pay for the salary schedule was printed in the St. Paul Phonograph-Herald on July 23, 1986, and the amounts of the other raises were printed on August 20, 1986.

The noncertificated employees, the principals of the elementary and high schools, and the superintendent all negotiate their salaries individually. New salaries are approved and published by lump sums for groups of noncertificated employees.

All payroll checks are prepared by the educational service unit in Kearney. The board does not approve each employee's paycheck. No teacher or other staff member has ever presented a claim for his or her salary during the 19-year tenure of the superintendent.

The central issue in this case is the meaning of the word "claims" as it is used in § 79-805, which provides:

> It shall be the duty of the secretary of such board of education, within ten days after any regular or special meeting thereof to publish one time in a legal newspaper published in or of general circulation in such city or village a list of the claims arising on contract or tort, allowed thereat, setting forth the name of the claimant, the amount, and nature of the claim allowed . . . .

There is no mention in § 79-805 of a requirement that individual salaries be published.

It is an accepted rule of statutory construction that

> [s]tatutory language should be given its plain and ordinary meaning . . . and where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. . . . Further, it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

(Citations omitted.) *Sorensen v. Meyer*, 220 Neb. 457, 462-63, 370 N.W.2d 173, 177 (1985).

The word "claim" suggests that some type of action is necessary by the person seeking payment, such as submitting some type of invoice or statement to the school board in order to receive the payment due. Webster's Third New International Dictionary, Unabridged 414 (1981) defines the word as "an authoritative or challenging request" or a "demand for compensation, benefits, or payment." Black's Law Dictionary 224 (5th ed. 1979) defines the word in the legal context: "To demand as one's own or as one's right; to assert; to urge; to insist."

Although there is no general statutory procedure for filing claims against school districts, such as Neb. Rev. Stat. § 23-135 (Cum. Supp. 1988) applicable to counties, see *Jackson v. County of Douglas*, 223 Neb. 65, 388 N.W.2d 64 (1986), the St. Paul school board publishes its actions on "claims" regularly. These include claims for payment of bills for school supplies, subscriptions for magazines, paint, bus repairs, gasoline, fuel, fertilizer, mileage, utilities, books, drapes, dues, etc. As Superintendent Ringlein testified, these claims are presented to the district's bookkeeper, who writes out the claims on a sheet and sends them to the educational service unit in Kearney, which prepares the checks. The service unit returns the claims, and they are taken to the next board meeting and submitted to the board for payment. These claims are subject to the specific approval of the board. The superintendent testified that from time to time a claim has been postponed in order to determine whether claim presented to the district was justified.

This procedure is entirely different from the procedure used in establishing salaries and paying teachers and other school employees. In fact, for those school district employees subject to the collective bargaining agreement, the bargaining agent negotiates for the salary and benefits paid to teachers. Individual teachers at no time bargain for their salaries, and they do not present claims or requests for payment of their salaries.

Noncertificated employees bargain individually for their salaries, but they are paid on the basis of the position they hold,

not on the basis of who they are. They do not present claims for payment of salaries, nor does the school board approve the payroll or checks as they are issued each month.

Clearly, as the word "claim" is understood in its ordinary sense, the employees of the school district do not present claims for which they demand payment and upon which the school board must act before the employees receive their pay.

In addition to the plain language of the statute, support for appellee's position is found in the Attorney General's opinion, published in 1947, at the time the act was passed. That opinion states: "We think it clear that some action of the board is contemplated, in other words, if no action of the board was taken in allowance of a claim then no publication need be made, if some action was taken then publication must follow." Rep. of the Att'y Gen. of Neb. 281, 282 (1947-1948).

The record in this case shows that, at every relevant time when the board took action, a publication was made. When the new salary schedule was adopted for teachers, with a base salary of $13,900, that figure was published as part of the proceedings of the school board. When the raises for noncertificated staff, the principals, and superintendent were approved by the board, the amount of those raises was published. But because no claim is ever made for individual salaries, no board action was necessary, no board action was taken, and no publication was necessary.

The purpose of § 79-805 is to provide information for the public about how school district funds are being spent. The publication which the school district presently makes, including the base salary being paid, the amount of any raises for personnel, and all claims allowed is more than sufficient to satisfy the requirements of § 79-805. The individual contracts for all school district employees are available for public inspection. Also, the record shows the superintendent has mailed copies of the lists of salaries to persons requesting them and had furnished copies to the relator.

The Legislature requires county boards in counties having less than 150,000 inhabitants to publish, once a year, the names of all employees and their salaries or hourly wages. Any change in those amounts and any additional employees must also be

published. On a month-to-month basis, the county board is allowed to publish the payroll as an aggregate sum. Neb. Rev. Stat. § 23-122 (Reissue 1987). Other agencies such as public power districts are required specifically to publish the salaries of their officers. Neb. Rev. Stat. § 70-624 (Reissue 1986). The Legislature has not placed such a duty on school boards. Absent an affirmative duty to publish the individual salaries of teachers and school district employees, school boards are not required to publish the individual salaries of school district employees.

The record shows no clear duty on the part of the respondent Alderman such as to entitle the relator to mandamus.

The judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

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PETE GARZA, APPELLANT, V. MAACO AUTO PAINTING AND BODYWORKS, APPELLEE.

431 N.W.2d 629

Filed November 18, 1988. No. 87-195.

1. **Appeal and Error.** In an action at law tried without a jury, it is not the role of this court to resolve conflicts in or reweigh the evidence; in such an instance this court will presume that the trial court resolved any controverted facts in favor of the successful party and will consider the evidence and permissible inferences therefrom most favorably to that party.
2. _____. In actions at law tried to the court, the findings and conclusions of the trial court have the effect of a verdict and will not be set aside unless clearly wrong.

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

Pete Garza, pro se.

Craig G. Ongley, of Schmid, Mooney & Frederick, P.C., for appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

PER CURIAM.

This pro se appeal arises out of an action for damages in which plaintiff, Pete Garza, contended that defendant, Maaco Auto Painting and Bodyworks, failed to repair his automobile in accordance with their agreement. Garza also claimed that Maaco made certain misrepresentations upon which he relied, to his detriment. Maaco counterclaimed for the agreed price of the repairs. Following a bench trial, the court dismissed Garza's petition and entered judgment on Maaco's counterclaim in the amount of $1,473.30 and costs. We affirm.

As pled and tried, Garza's claims were based on breach of contract and misrepresentation. Maaco's counterclaim was based on breach of contract. As such, it is an action at law. *Occidental S. & L. v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984). In an action at law tried without a jury, it is not the role of this court to resolve conflicts in or reweigh the evidence; in such an instance this court will presume that the trial court resolved any controverted facts in favor of the successful party and will consider the evidence and permissible inferences therefrom most favorably to that party. *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988). In such actions, the findings and conclusions of the trial court have the effect of a verdict and will not be set aside unless clearly wrong. *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988).

Our review of the record reveals sufficient evidence to support the following findings and conclusions: (1) that a contract was entered into between the parties; (2) that the contract provided for the painting of Garza's automobile, as well as the installation of a vinyl roof and sunroof; (3) that Maaco performed the work as required by the contract; (4) that no misrepresentations were made by Maaco; and (5) that Garza breached the contract by failing to pay the agreed price of $1,473.30 for the repairs performed. Having reviewed the record, we conclude that the decision of the trial court cannot be said to be clearly wrong.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. JAMES E. HAWTHORNE, APPELLANT.

431 N.W.2d 630

Filed November 18, 1988. No. 87-773.

**Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

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 Bernard L. Packett for appellee.

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

SHANAHAN, J.

As the result of a jury trial in the district court for Douglas County, James E. Hawthorne was convicted of first degree sexual assault, namely, sexual penetration of another by force, threat of force, coercion, or deception in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1985). In his lone assignment of error, Hawthorne claims that he was denied the right to effective assistance of counsel, which is guaranteed by the sixth amendment to the U.S. Constitution. Hawthorne does not claim a violation of his right to counsel guaranteed by Neb. Const. art. I, § 11. Hawthorne bases his ineffective assistance of counsel claim on the fact that his retained lawyer, during direct examination of Hawthorne at trial, elicited that, more than 10 years before the trial for first degree sexual assault, Hawthorne was convicted of a felony, which evidence is inadmissible by virtue of Neb. Evid. R. 609 (Neb. Rev. Stat. § 27-609 (Reissue 1985)). In this appeal, Hawthorne is represented by court-appointed counsel, the Douglas County

public defender's office.

Regarding a convicted defendant's claim of a sixth amendment violation concerning assistance of counsel, the U.S. Supreme Court stated in *United States v. Cronic*, 466 U.S. 648, 659 nn.25-26, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984):

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. [Citations omitted.]
>
> Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. See *Strickland v. Washington, post*, at 693-696 [citations omitted].

After *United States v. Cronic, supra*, but on the same day, the U.S. Supreme Court issued *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in which the Supreme Court fashioned a test and factors to be considered in determining whether a convicted defendant has been denied the sixth amendment right to assistance of counsel in reference to defense counsel's alleged deficient performance in representing the accused. In *Strickland*, the Court adopted a two-part test regarding a convicted defendant's claim of ineffective assistance of counsel, namely:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown

in the adversary process that renders the result unreliable. 466 U.S. at 687.

The *Strickland* Court then stated: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687-88, and continued:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. [Citation omitted.] The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

466 U.S. at 691-92.

The *Strickland* Court next discussed certain sixth amendment contexts in which prejudice is legally presumed; for example, actual or constructive denial of the assistance of counsel at a critical stage of a criminal proceeding, interference with the assistance of counsel, and, in certain situations, counsel operating under a conflict of interest. After considering situations of presumed prejudice, the Court observed:

> Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. . . . Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse

effect on the defense.

466 U.S. at 693.

In reference to the two-part test for a determination whether counsel's deficient performance prejudiced an accused's defense, the Court, in *Strickland*, then characterized the prejudice which must be shown to warrant overturning a defendant's conviction: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

In *Strickland v. Washington*, 466 U.S. 668, 695-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Court hastened to point out:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.
>
> . . . In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of

> a breakdown in the adversarial process that our system counts on to produce just results.

The *Strickland* Court concluded:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 U.S. at 697.

Therefore, according to the test adopted in *Strickland v. Washington, supra*, to sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. As used in the *Strickland* test, a reasonable probability is "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Cf. *State v. Lenz*, 227 Neb. 692, 699, 419 N.W.2d 670, 674 (1988), where this court, alluding to the State's burden on appeal, expressed: "[E]rror in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt." Cf., also, *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). Nevertheless,

under the *Strickland* test, the defendant has the burden to prove counsel's deficient performance, which prejudiced the defense. Thus, to a large extent, the *Strickland* test requires a judicial evaluation of evidence presented to the trier of fact and a determination concerning the likelihood of a defendant's conviction in the absence of counsel's conduct which is alleged to be deficient.

In the light of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and to place in perspective Hawthorne's claim of ineffective assistance of counsel, we must review the evidence adduced at Hawthorne's trial, which commenced on April 28, 1987, especially the evidence concerning events immediately before, at, and shortly after the sexual penetration alleged in the charge against Hawthorne.

According to the victim, who was 17 years of age, she spent an evening with her brother at a friend's house and, shortly after 9 p.m., left to walk to her home located approximately a mile away. As the victim walked toward her home, a taxicab, driven by 33-year-old Hawthorne, stopped. The victim had cab fare, and, when Hawthorne asked whether the victim needed a ride, she answered "yes." As the pair proceeded in Hawthorne's cab toward the victim's home, Hawthorne remarked that he had to make "another run" and inquired whether the victim would mind riding along on the side trip, which took the cab to an apartment building previously visited by some of the victim's relatives. Hawthorne stopped the cab, entered the apartment, returned, and asked the victim to enter the apartment with him. Inside the apartment, Hawthorne directed the victim to disrobe, but, after she refused, the two returned to the cab and continued traveling toward the victim's home. Near an abandoned building, Hawthorne parked the cab and told the victim to disrobe. When the victim attempted to leave the cab, Hawthorne grabbed her arm and, as she was trying to free herself, pulled the frightened and crying victim into the cab and threatened to harm her. When the victim had disrobed at Hawthorne's demand, Hawthorne proceeded to have vaginal intercourse with her. After sexual relations with the victim, Hawthorne started to drive his cab from the scene of the assault, but the victim leaped into the street and ran to a nearby

bar, where she informed one of the bar employees about the sexual assault. Police were summoned to the bar and, after an initial interview, took the victim to a hospital, where she was examined by a physician. A medical examination disclosed semen in the victim's vaginal area but no injuries, such as bruises.

An employee of the bar where the victim had gone after the sexual assault testified that the victim was crying on her entry into the bar, and, when asked what happened, the victim answered, "I was raped." A police officer, summoned to the bar in response to the victim's complaint, testified that the victim was "kind of hysterical, crying, shaken pretty bad." A female police officer then interviewed the victim, who stated that she had been sexually assaulted. During this interview, the victim was "crying and in hysterics."

Police identified the cab and Hawthorne as its driver. Without a warrant for Hawthorne's arrest, the police went to the home of Hawthorne's girlfriend and surrounded the house. When police came to the residence's door, Hawthorne, who was hiding under a bed, told his girlfriend not to answer the door. Later, police apprehended Hawthorne for sexual assault of the victim.

Hawthorne testified that the victim had hailed his cab, entered the vehicle, sat in the front passenger's seat, and stated that she was "going home." En route toward the victim's home, Hawthorne stopped his cab at an apartment building, which he and the victim entered without incident. Inside the apartment for approximately 7 minutes, the victim and Hawthorne embraced and kissed until the pair left to resume their travel to the victim's home. In the cab, the victim again seated herself in the right front seat. After a few blocks, Hawthorne pulled the cab into a vacant lot because "it was already established . . . [t]hat we were going to have sex." The victim voluntarily disrobed, and the pair engaged in sexual intercourse over a period of 25 minutes during which the victim never fought or resisted. Hawthorne denied any threat or violence toward the victim in conjunction with the pair's sexual intercourse. According to Hawthorne, after resumption of the journey to the victim's home, Hawthorne stopped his cab at a point

indicated by the victim, who got out of the cab and walked into the night. Hawthorne then drove to his girlfriend's house. As an explanation for his hiding under the bed at his girlfriend's residence, Hawthorne explained that he believed the police were somehow involved in an attempt to collect delinquent child support from Hawthorne. At this point during the direct examination of Hawthorne, and without previous evidence regarding Hawthorne's criminal history, the following occurred:

> [Hawthorne's counsel] I might as well ask you right now—we're here to bare your soul to the world—have you ever been convicted of a felony?
>
> [Hawthorne] Yes?
>
> [Counsel] How many.
>
> [Hawthorne] Two.

On cross-examination, Hawthorne was asked: "[H]ave you ever been convicted of giving false information, of lying to the police?" Hawthorne responded: "Yes." Also, during cross-examination and without objection, Hawthorne acknowledged that he had "lied" to authorities concerning his delinquency in payment of child support.

The two felonies mentioned by Hawthorne on direct examination were a burglary conviction on February 3, 1975, for which Hawthorne was sentenced to 2 years' probation, and a felony assault conviction on July 12, 1977, which resulted in Hawthorne's sentence to 2 years' probation.

In the light of testimony from the victim and Hawthorne, one essential fact was admitted by Hawthorne and, therefore, was beyond dispute—Hawthorne sexually penetrated the victim. Consequently, the jury had to decide: Was Hawthorne's sexual penetration of the victim accomplished by force? Fundamental to that jury question is still another question: Whom should the jury believe—the victim, who claimed that sexual penetration by Hawthorne was the result of force, or Hawthorne, who asserted that sexual penetration was consensual? Witness credibility, whether the victim's or Hawthorne's, was a factor in the jury's answer to those questions. The jury found Hawthorne guilty of first degree sexual assault.

In his motion for new trial, Hawthorne alleged that

> there was inadvertent error when testimony was offered and received regarding two prior felony convictions when in fact there should have been evidence of but one prior felony conviction because one of the felonies was more than ten years old, which affected the jurors in determining the credibility of the Defendant.

In arguing Hawthorne's motion for new trial, Hawthorne's counsel remarked:

> I stated that there was an inadvertent error when testimony was offered and received regarding two prior felony convictions when in fact there should have been evidence of but one. And then after — and I'll say inadvertent error, because I was under the belief — and I don't know how I happened to believe that it's — that, knowing that he was on probation and that the probation would have carried within a ten-year period when indeed — and I've submitted the originals of the two prior felonies to the Court . . . and I've got the copies here — both of them were more than ten years old. Pursuant to 27-609 under the new evidence code that evidence should never have come out and it was through my error that the defendant testified to those two, but I did know that he was convicted of two prior felonies but I did also know that he was put on probation and that would have carried it within the ten-year statute of limitations.
>
> So I'm arguing that certainly through this inadvertent error the jury was prejudiced and certainly this did affect his credibility to the jury. I'm not saying that it affects his credibility under the moral code or in any other sense but to a jury indeed they're going to take into consideration the fact that he's been convicted on two prior occasions and that he has a background of lying and cheating and doing whatever those two felonies were and that indeed this affected the outcome of the case and that's why the guilty verdict was brought in by the jurors.

Hawthorne contends that his 1975 felony burglary conviction was inadmissible under Neb. Evid. R. 609(2) (§ 27-609(2)) as a means to impeach his credibility. Hawthorne

asserts that his

> trial counsel committed error when he allowed [Hawthorne] to testify that he committed two prior felonies. This act or omission was clearly outside the range of competent assistance of counsel and entitles [Hawthorne] to a new trial if [Hawthorne] was prejudiced by this act or omission.
>
> . . . .
>
> [Hawthorne's] defense depended entirely on his credibility that the sexual encounter was consensual. Accordingly, [Hawthorne's] trial counsel's action in bringing out the incompetent impeachment evidence was clearly prejudicial.

Brief for appellant at 9.

In pertinent part, Neb. Evid. R. 609 states:

> (1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.
>
> (2) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date.

Although some conduct of counsel, such as refraining from an objection to inadmissible evidence, may be strategy at trial which binds a defendant in a criminal case, see *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984), and "Absent exceptional circumstances, [the defendant] is bound by the tactics used by his counsel at trial . . . ," *Jones v. Barnes*, 463 U.S. 745, 759, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (Brennan, J., dissenting), counsel's conduct at Hawthorne's trial, rooted in unfamiliarity with the Nebraska Evidence Rules, does not rise to the stature of strategy. Evidence that Hawthorne was convicted of burglary, in Nebraska a crime punishable by imprisonment in excess of 1 year (Neb. Rev. Stat.

§§ 28-507 and 28-105(1) (Reissue 1985)), when such conviction occurred more than 10 years before Hawthorne's trial, was inadmissible under Neb. Evid. R. 609(2). Divulgence of a witness' criminal past may expose a witness to a jury's disfavor. In reference to Fed. R. Evid. 609, a counterpart to Neb. Evid. R. 609, Weinstein has expressed:

> When the witness is a party, the jury's antipathy may be translated into finding him guilty or liable without regard to whether he, in fact, committed the act with which he is charged.
>
> In a criminal case, the accused with a record risks that the jury may wish to punish him because he is bad regardless of his present guilt . . . .

3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 609[02] at 609-60 (1988).

Under the circumstances, the conduct of Hawthorne's counsel in eliciting from Hawthorne testimony concerning the prior felony (burglary) conviction, which was otherwise inadmissible as evidence, was performance which fell below a standard of reasonableness required in the defense of a criminal charge, namely, conversance with the rules of evidence. Hawthorne has shown that his "counsel's performance was deficient" and has, therefore, established the first component of the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

However, because *Strickland* prescribes a two-part conjunctive test, we must determine whether Hawthorne has demonstrated reasonable probability that, but for his counsel's eliciting the inadmissible testimony about the burglary, the jury would have acquitted Hawthorne on the charge of first degree sexual assault.

Hawthorne argues: "Undeniably, the Defendant's first felony conviction [burglary in 1975] was inadmissible under §27-609(2) for the purposes of attacking his credibility." Brief for appellant at 7. From Hawthorne's preceding statement, one reasonably concludes that the second felony conviction, the assault conviction in 1977, was admissible under Neb. Evid. R. 609(2) for impeachment of Hawthorne's credibility. In addition to the 1977 conviction for felony assault, Hawthorne admitted

that he had been "convicted of giving false information, of lying to the police," although the precise nature of Hawthorne's falsehood is undisclosed, and that he had "lied" to authorities concerning his obligation to pay child support. In the absence of his testimony concerning the burglary conviction, Hawthorne asserts, his credibility would have remained substantially intact and virtually unblemished. In essence, Hawthorne argues that his testimony about the burglary conviction was the evidential straw that broke the back of his credibility camel. However, Hawthorne's admitted falsehood to the police and untruthfulness to child support authorities, acts which indicate a marked propensity to veer from verity, were apt to make an unfavorable impression on the jury in its evaluation of Hawthorne's credibility. The victim's testimony and the circumstances surrounding the incident, independently supported by testimony from witnesses whose veracity was conceded or not seriously challenged by Hawthorne, cannot be categorically disregarded or overlooked by tunnel vision fixed on a solitary aspect of the evidence. When we look at all the evidence against Hawthorne, as we must in applying the *Strickland* test, we cannot conclude that Hawthorne has demonstrated a reasonable probability that the jury would have acquitted him if his counsel had not elicited Hawthorne's testimony concerning the burglary conviction in 1975. After extracting the questioned testimony from the evidence presented to the jury and after a review of the entire record of Hawthorne's trial, we find nothing "sufficient to undermine confidence in the outcome" of Hawthorne's trial, namely, the verdict of guilty. The verdict against Hawthorne is one with "overwhelming record support" rather than a verdict "only weakly supported by the record." Therefore, we must conclude that Hawthorne has failed to establish that his counsel's errors prejudiced Hawthorne's defense and "were so serious as to deprive the defendant of a fair trial. . . ."

Under the test set forth in *Strickland v. Washington, supra*, Hawthorne's claim of ineffective assistance of counsel, as a violation of the sixth amendment to the U.S. Constitution, has no merit. The judgment of the district court is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. JERRY A. MARCO, APPELLANT.

432 N.W.2d 1

Filed November 18, 1988. No. 87-886.

1. **Motions to Suppress: Appeal and Error.** In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence. At a hearing to suppress evidence, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. The Supreme Court will uphold the trial court's findings of fact in a suppression hearing unless those findings are clearly wrong.
2. **Search and Seizure: Arrests: Probable Cause.** The validity of a search, as an incident of a felony arrest without a warrant, depends on the presence or absence of probable cause for the arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a felony.
3. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
4. **Aiding and Abetting: Jury Instructions.** An aiding and abetting instruction is usually proper where two or more parties are charged with commission of the offense.
5. **Aiding and Abetting.** Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
6. **Jury Instructions.** It is the duty of the trial court, upon request of the accused, to instruct the jury upon any valid defense if there is credible evidence to support it. However, the trial court is not required to give an instruction where there is insufficient evidence to support the facts claimed.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, reversed in part, and in part remanded for further proceedings.

Casey J. Quinn for appellant.

Robert M. Spire, Attorney General, and James H. Spears for appellee.

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

FAHRNBRUCH, J.

Jerry A. Marco appeals his jury convictions on three drug-related offenses and his concurrent 20-month to 5-year sentences on two of the charges. We vacate one sentence, reverse one conviction, affirm two convictions and one sentence, and remand for resentencing on one conviction.

The information charges that Marco did: count I, knowingly or intentionally acquire or obtain or attempt to acquire or obtain possession of a controlled substance, meperidine, by misrepresentation, fraud, forgery, deception, or subterfuge; count II, intentionally possess a controlled substance, Demerol, also known as meperidine; and count III, conspire with another person to acquire or attempt to acquire a controlled substance, Demerol, also known as meperidine, by fraud, contrary to Neb. Rev. Stat. §§ 28-418(1)(c) (Reissue 1985), 28-416(3) (Cum. Supp. 1986), and 28-202(1) (Reissue 1985), respectively, all of which are Class IV felonies.

Each offense carries a possible penalty of not more than 5 years' imprisonment and/or up to a $10,000 fine. Neb. Rev. Stat. § 28-105(1) (Reissue 1985). The sentences could be imposed consecutively.

In sentencing Marco, the trial judge found that the elements in count I were also contained in count III and "constitute one offense for purposes of sentencing." He then imposed concurrent 20-month to 5-year terms of imprisonment upon the defendant on counts II and III. Two days' credit on the sentences was given for Marco's time spent in jail awaiting final disposition of the case.

Marco's first two assignments of error claim that the trial court erred (1) in entering a conviction on the charge of conspiracy where no overt act was alleged in count III of the information and (2) by not properly instructing the jury in regard to an overt act requirement in a conspiracy charge.

Neb. Rev. Stat. § 29-2014 (Reissue 1985) provides:

> In trials for conspiracy, in cases where an overt act is required by law to consummate the offense, *no conviction shall be had unless one or more overt acts be expressly alleged in the indictment,* nor unless one or more of the acts so alleged be proved on trial; but other overt acts not

> alleged in the indictment may be given in evidence on the part of the prosecution.

(Emphasis supplied.)

There is no overt act expressly alleged in count III of the information charging Marco with conspiracy. There is merely an allegation that the defendant "or another person with whom he conspired did commit an overt act." Section 29-2014 is resolute that a defendant may not be convicted unless the overt act is expressly alleged in the information. Since the conspiracy charge against Marco does not meet that necessary statutory requirement, Marco's sentence for conspiracy must be vacated, his conspiracy conviction set aside, and the charge dismissed.

Marco's four remaining assignments of error, rearranged and summarized, claim the trial court erred by: (1) failing to sustain the defendant's motion to suppress illegally seized evidence; (2) instructing the jury on aiding and abetting; (3) failing to instruct the jury on Marco's theory of defense; and (4) failing to adequately instruct the jury on the law and in misleading the jury by the instructions given. None of these assignments of error have merit.

On January 5, 1987, a female, identifying herself as being from a Dr. Soori's office, telephoned Michael Cordwin, a pharmacist at the LaVista Pharmacy in Sarpy County, Nebraska. The caller asked whether the pharmacy had 500, 50-mg. Demerol tablets in stock. Cordwin said that he did not, but that he would sell what he had in stock and obtain the balance within 2 days.

Thereafter, Cordwin telephoned Dr. Soori's office to verify the order. A female confirmed that she placed the call and that the prescription was legitimate. Cordwin could not recall if the caller or the female in Dr. Soori's office gave a name. He testified, however, that the voice of the caller and the voice of the female in Dr. Soori's office were the same.

At about 7 p.m. the same day, a woman resembling Cynthia Marcault went into the LaVista Pharmacy and asked if the prescription for a Frank Belt was ready. She produced a written prescription intended for Belt for 500, 50-mg. Demerol tablets, signed by Dr. Soori. As required by law, the prescription form contained a space for the patient's address. It was blank.

Cordwin inserted the address given to him by the woman who presented the prescription. The address was for the K mart Pharmacy in Bellevue, Nebraska, and had been written on the back of the prescription. Cordwin partially filled the prescription with 49 Demerol tablets. He told the woman that the remainder of the prescription would be ready by Wednesday, January 7.

Cordwin left a note and the Belt prescription for Ronald Degand, owner pharmacist of the LaVista Pharmacy. Degand called the state board of pharmacy. He asked if he could legally dispense the number of Demerol pills in the prescription. In addition, Degand called Dr. Soori's office. Melody Karnes, a registered nurse employed by Dr. Soori since November 1984, said she was familiar with Dr. Soori's patient, Frank Belt.

Karnes testified that Dr. Soori prescribed 500 Demerol tablets for his patient every 2 weeks. Typically, Belt would call and request the prescription. Karnes would verify it with Dr. Soori and then call K mart Pharmacy in Bellevue and place the order for the prescription. Dr. Soori would sign a prescription for Belt, and it would be mailed to the K mart Pharmacy.

Karnes related that Belt, on January 5, 1987, requested a refill of his Demerol prescription. Karnes said she wrote the prescription and when Dr. Soori came in, he signed it. Karnes placed the order for the prescription with K mart Pharmacy. She said she laid the written prescription in a pile to be mailed that night. In addition to Karnes, Dr. Soori also employed a part-time bookkeeper and a medical technician named Kammie Smith.

Karnes testified she never phoned the LaVista Pharmacy about someone picking up a prescription for 500 Demerol tablets for Frank Belt. She said she never removed the prescription from Dr. Soori's office or gave it to anyone. Karnes testified she did not know either Marco or his codefendant, Cynthia Marcault.

After Degand talked with Karnes, he telephoned the State Patrol. Before an officer arrived, Degand received a phone call from a female who identified herself as "Kammie" from Dr. Soori's office. "Kammie" asked Degand if the prescription for Belt was ready. Degand told her it was partially filled on

Monday and the rest of the pills were on order and would be in on Wednesday.

Approximately 10 minutes after the conversation with "Kammie," State Patrol Sgt. Paul R. Wagner arrived at the pharmacy to talk to Degand. At Sergeant Wagner's request, Degand called "Kammie" and told her that he could have the remainder of the Belt prescription ready in about an hour if that would help. "Kammie" said, "No, the Belts will pick it up tomorrow." "Tomorrow" was Wednesday, January 7.

About noon on January 7, 1987, while a State Patrolman, Robert Cooper, was stationed behind the prescription department, a male caller asked Degand if the Belt prescription was ready. Degand said it was and told the caller that a balance of $147 was owed on the prescription. The caller responded that "we" will be there shortly.

About 12:40 p.m., defendant's codefendant, Marcault, alighted from a maroon and white Chevrolet in front of the pharmacy and entered the store. The male driver, later identified as Marco, waited in the car. Marcault handed Degand the prescription bottle the pharmacy had partially filled on Monday. "Do you have the balance of the prescription filled and ready for Frank Belt?" she asked. Degand said he did and got the prescription. Marcault gave Degand three $50 bills. Degand introduced himself to Marcault and asked if she was Frank Belt's daughter. She responded, "No, I'm his sister." Marcault then left. Sergeant Wagner saw the Chevrolet stop in front of the pharmacy and saw Marcault get out and enter the store while Marco remained in the car. Wagner saw Marcault leave the store. He approached the vehicle and identified himself to Marco as a police officer. Outside the vehicle, Wagner conducted a pat-down search of Marco. Marco was told he and Marcault were under arrest for obtaining a controlled substance by fraud. Marco was then handcuffed. Wagner searched Marco's pockets and found a small plastic vial containing seven Demerol tablets.

We first examine whether Marco's motion to suppress evidence obtained by a search of Marco's person after his arrest should have been sustained by the trial court. In reviewing a court's ruling as the result of a suppression hearing, the

Supreme Court does not reweigh the evidence or resolve conflicts in the evidence. *State v. McCurry*, 228 Neb. 841, 424 N.W.2d 364 (1988). Cf. *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985).

At a hearing to suppress evidence, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

The Supreme Court will uphold the trial court's findings of fact in a suppression hearing unless those findings are clearly wrong. *State v. McCurry, supra*; *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988); *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988); *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

The record reflects that the search was made and controlled substances seized after a warrantless arrest of Marco. Marco argues there was no probable cause to arrest him, and, therefore, the subsequent search was unlawful.

The validity of a search, as an incident of a felony arrest without a warrant, depends on the presence or absence of probable cause for the arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a felony. *State v. Blakely, supra*.

When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Blakely, supra*. See, also, *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987); *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

*Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), explains that when a lawful arrest is made, "it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."

Evidence at the hearing to suppress controlled substances found on Marco's person after his arrest established that the

day before the arrest, owner pharmacist Degand had told Wagner that a prescription for 500 units of Demerol intended for one Frank Belt had been surreptitiously diverted from a medical doctor's office and presented to the LaVista Pharmacy by a person other than the patient for whom it was intended. Wagner knew that the prescription should have been presented to the K mart Pharmacy. He knew that the prescription had been partially filled at the LaVista Pharmacy and delivered to a woman on January 5, 1987, and that the address she gave the pharmacist was not a residential, but rather a commercial address. Wagner knew that the remainder of the prescription was to be picked up at the LaVista Pharmacy shortly before Marco was arrested. According to trial testimony, Wagner also knew that shortly before the arrest, a male had called the LaVista Pharmacy and asked whether the Belt prescription was ready. The male caller said "we" will be after the prescription. Wagner saw that Marco was the driver of the car that brought Marcault to the LaVista Pharmacy. There, she unlawfully obtained Frank Belt's prescription. Through a radio message and prearranged visual signal with another patrolman, who watched Marcault obtain the remainder of the Belt prescription, Wagner knew before Marco's arrest that the prescription had been obtained by Marcault, who was not authorized to obtain it.

Following a hearing, the trial judge overruled the defendant's motion to suppress evidence seized from Marco. At trial, Marco again objected to the introduction of the evidence seized from him because he claimed there was no lawful arrest. That objection was overruled and the evidence received at trial. Considering the evidence at the suppression hearing and at the trial, we cannot say the trial judge was clearly wrong in receiving the evidence seized from Marco at trial.

We next consider Marco's claim that it was error to instruct the jury on aiding and abetting. The instruction given tracked NJI 14.12. An aiding and abetting instruction is usually proper where two or more parties are charged with commission of the offense. See *State v. Gau*, 182 Neb. 114, 153 N.W.2d 298 (1967).

Both Marcault and Marco were charged with knowingly or

intentionally acquiring a controlled substance by misrepresentation, fraud, deception, or subterfuge. The defendant argues that there has to be a principal offender in order to aid and abet and that both of the defendants were charged as principal offenders, so there could be no aiding and abetting.

Neb. Rev. Stat. § 28-206 (Reissue 1985) provides, "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." See, *State v. Schreck*, 224 Neb. 650, 399 N.W.2d 830 (1987); *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985).

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

*State v. Schreck, supra* at 652, 399 N.W.2d at 831-32; *State v. Bennett, supra.*

From the evidence in this case, a jury could find beyond a reasonable doubt that Marco, on January 7, 1987, aided and abetted Marcault in obtaining meperidine, a controlled substance, by misrepresentation, fraud, deception, or subterfuge, from the LaVista Pharmacy. The evidence is undisputed that Marco provided $147 for the prescription and that he drove Marcault to the pharmacy to pick up the prescription. The jury could infer from the evidence that it was Marco who called the pharmacy and asked if the Frank Belt prescription was ready to be picked up. There was evidence from which it could be concluded that neither the defendant nor Marcault was authorized to have Frank Belt's prescription filled. These facts and inferences alone warrant the giving of an aider and abettor instruction. Marco's objection to the instruction has no merit.

In his next assignment of error, the defendant claims that the district court committed reversible error by refusing to instruct the jury on the defense of obtaining and possessing a controlled substance pursuant to a valid prescription. Section 28-416(3)

provides: "A person knowingly or intentionally possessing a controlled substance . . . unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner while acting in the course of his or her professional practice . . . shall be guilty of a Class IV felony." Neb. Rev. Stat. § 28-405 (Cum. Supp. 1986) identifies meperidine, the "scientific" term for Demerol, as a Schedule II controlled substance.

There is no evidence in the record that the seven Demerol tablets found on Marco's person when he was arrested were issued pursuant to a valid prescription. In regard to the Demerol tablets intended for Frank Belt, Marcault intentionally and knowingly obtained those through misrepresentation, fraud, deception, or subterfuge. By asking for Frank Belt's prescription and by saying she was his sister, Marcault represented that she was obtaining the prescription for Frank Belt and that she was authorized to do so when, in fact, none of those representations were true.

It is the duty of the trial court, upon request of the accused, to instruct the jury upon any valid defense if there is credible evidence to support it. See, *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986); *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). However, the trial court is not required to give an instruction where there is insufficient evidence to prove the facts claimed. *State v. Clayburn, supra*; *State v. Reeves, supra*; *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978).

The last assignment of error claims that the jury instructions, as a whole, failed to adequately state the law, misled the jury, and failed to cover the issues at trial, resulting in prejudicial error to the defendant.

Jury instructions or the failure thereof may be evaluated from the totality of the circumstances. See *Kentucky v. Whorton*, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979), *reh'g denied* 444 U.S. 887, 100 S. Ct. 186, 62 L. Ed. 2d 121.

The evidence against Marco on counts I and II of the information is overwhelming, and the trial court properly instructed the jury on those two counts. In determining the validity of Marco's convictions on counts I and II from the

totality of the circumstances, we find beyond a reasonable doubt that erroneously instructing on and submitting to the jury count III charging Marco with conspiracy was harmless error.

All of the instructions on counts I and II, when read together and taken as a whole, correctly state the law, do not mislead, and adequately cover the issues involved. Therefore, there was no prejudicial error. See, *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987). Marco's assignment of error as to jury instructions is without merit.

Defendant's sentence on count III is vacated, his conviction is reversed, and the charge of conspiracy is dismissed. Marco's convictions on counts I and II and his sentence on count II are affirmed. The cause is remanded for sentencing on count I.

AFFIRMED IN PART, REVERSED IN PART, AND IN PART REMANDED FOR FURTHER PROCEEDINGS.

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## BRYAN E. HIBBARD, SR., APPELLANT, V. THERESA A. HIBBARD, APPELLEE.

431 N.W.2d 637

Filed November 18, 1988. No. 87-1105.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and, on appeal, although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion.
2. _____: _____. An order concerning custody of children will not be modified unless there has been a material change of circumstances indicating that the person with custody of the children is unfit *or* that the best interests of the children require such action.
3. **Child Custody.** While a move from the jurisdiction does not by itself necessarily affect the best interests of the children, nevertheless, when considered in conjunction with other evidence, such a move may well be a key factor which

would warrant a modification.

4. **Armed Forces: Motions for Continuance.** The determination of an application for a stay under § 521 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §§ 501 et seq. (1982), depends upon the facts and circumstances of each case.
5. _____: _____. The Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §§ 501 et seq. (1982), cannot be construed to require a continuance on a mere showing that the defendant is in the military service.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

James E. Case, of Case, Reinsch & Slattery, P.C., for appellant.

Richard W. Harter, of Harter Law Offices, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, and FAHRNBRUCH, JJ., and REAGAN, D.J.

FAHRNBRUCH, J.

Bryan E. Hibbard, Sr., appeals a modification of a dissolution decree changing the custody of three minor children from Hibbard to the children's mother, Theresa Kirkland, formerly Theresa A. Hibbard. We affirm.

The Cass County District Court found that Hibbard denied the children's mother adequate visitation with the minor children and that the denial constituted a change of circumstances sufficient to grant a change of custody.

Child custody determinations are matters initially entrusted to the discretion of the trial court, and, on appeal, although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion. See, *Clark v. Clark*, 228 Neb. 440, 422 N.W.2d 793 (1988); *Staman v. Staman*, 225 Neb. 864, 408 N.W.2d 320 (1987).

We have held that an order concerning custody of children will not be modified unless there has been a material change of circumstances indicating that the person with custody of the children is unfit *or* that the best interests of the children require such action. *Clark v. Clark, supra*; *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986); *Hoschar v. Hoschar*, 220 Neb.

913, 374 N.W.2d 64 (1985).

There is no allegation that Hibbard, who is an American airman stationed in England, is an unfit parent. It, therefore, must be determined if the best interests of the three children require a change of custody. The record reflects Hibbard left the jurisdiction of the court with the children without the judge's permission. That alone is not sufficient to warrant a change of custody, but it is important in connection with other evidence.

"While a move from the jurisdiction does not by itself necessarily affect the best interests of the children, nevertheless, when considered in conjunction with other evidence, such a move may well be a key factor which would warrant a modification." *Clark v. Clark, supra* at 444, 422 N.W.2d at 796.

The record reflects that by removing the minor Hibbard children to England without permission of the court, by breaking promises in regard to visitation, by being uncommunicative and uncooperative, by hiding his whereabouts from the children's mother, by failing to comply with the court's visitation orders, and by being in contempt of court for disregarding visitation orders, Hibbard for nearly 3 years intentionally and effectively denied visitation of his minor children with their natural mother.

We have recognized that " ' "[v]isitation is a key ingredient of raising children, and it is in the best interests to be with their respective parents to the utmost . . . ." ' " *Clark v. Clark, supra* at 444, 422 N.W.2d at 796, quoting from *Heyne v. Kucirek*, 203 Neb. 59, 277 N.W.2d 439 (1979).

Children have the right to be treated as interested and affected persons and not as pawns or chattel of either or both parents. Except for unusual circumstances, children of divorced parents have the right to know the noncustodial parent and to have the benefit of that parent's love and guidance through adequate visitation. Hibbard for nearly 3 years denied his children the opportunity to know their mother and have the benefit of their mother's love and guidance. Such denial was not in the best interests of the children. The denial of visitation, together with the removal of the children from the United States without court approval, constitutes a material

change of circumstances justifying transfer of the children's custody from the father to the mother.

Hibbard's assignment of error regarding change of the children's custody to their mother is without merit.

Hibbard also complains that the trial court committed error by not granting his request for a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §§ 501 et seq. (1982). The act provides at § 521:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act . . . unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

The determination of an application for a stay under § 521 depends upon the facts and circumstances of each case. *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952); *Graves v. Bednar*, 167 Neb. 847, 95 N.W.2d 123 (1959). The act cannot be construed to require a continuance on a mere showing that the defendant is in the military service. *Sullivan v. Storz, supra*; *Boone v. Lightner*, 319 U.S. 561, 63 S. Ct. 1223, 87 L. Ed. 1587 (1943).

The record fails to reflect that Hibbard made any showing for a stay other than to state in his motion that he was in the armed forces on active duty in England and the conclusion that a failure to stay the proceedings would create a disadvantage to him. Hibbard's motion for a stay was not verified and was signed by his attorney. The record before this court does not reflect that Hibbard presented any competent factual evidence, by way of affidavit or otherwise, in support of the stay. Hibbard's motion contained a "mere showing" that the defendant was in the military service, and under *Sullivan, supra*, that is insufficient to obtain a stay.

In its order denying the stay, the trial court found from the

records and files that Hibbard removed the children from the jurisdiction of the court without authority; that on October 3, 1985, Hibbard was found in contempt of court for failing to comply with visitation privileges granted the mother; and that Hibbard failed to purge himself of contempt.

The modification hearing was originally set for July 23, 1987. The trial judge further noted that Hibbard was given a 38-day leave to return to the United States, from July 6 to August 12, 1987. Hibbard failed to contact the court as to any of the pending matters and failed to provide Kirkland visitation rights with her children. Kirkland's modification petition had been pending since November 19, 1985.

Under the circumstances of this case, we cannot say the trial judge abused his discretion in denying a stay under the Soldiers' and Sailors' Civil Relief Act.

There being no error, all of the trial judge's rulings should be affirmed.

AFFIRMED.

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ROSE MARIE DABBS, APPELLEE, V. JERRY LEE DABBS, APPELLANT.
431 N.W.2d 640

Filed November 18, 1988. No. 87-1137.

**Alimony: Child Support: Appeal and Error.** The granting of alimony and the amount of child support awarded are initially entrusted to the discretion of the trial judge. On appeal, such matters will be reviewed de novo on the record and affirmed in the absence of abuse of discretion.

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

Joseph B. Reedy for appellant.

Jerold V. Fennell for appellee.

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

PER CURIAM.

In this marriage dissolution action, Jerry Lee Dabbs appeals the granting of alimony to his wife of 20 years and the court's failure to require the wife, Rose Marie Dabbs, to pay child support for the parties' minor child. We affirm.

Three children were born of the marriage. Two were emancipated at the time of the dissolution, and custody of 17-year-old Arron was given to his father.

The granting of alimony and the amount of child support awarded are initially entrusted to the discretion of the trial judge. On appeal, such matters will be reviewed de novo on the record and affirmed in the absence of abuse of discretion. See, *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988); *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988).

After a de novo review of the record and considering the incomes and expenses of the parties, we cannot say that the trial court abused its discretion in requiring the husband to pay a minimal amount of alimony and in refusing to require the wife to pay child support.

The rulings of the trial court in this marriage dissolution action should be affirmed.

AFFIRMED.

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## BARBARA A. WHITE, APPELLANT, V. SEARS, ROEBUCK & CO., A CORPORATION, APPELLEE.

431 N.W.2d 641

Filed November 18, 1988. No. 87-1154.

1. **Workers' Compensation: Limitations of Actions.** Where an employee has sustained a compensable injury, and the employer has voluntarily paid compensation, and the employee claims additional compensation as a result of a material change in condition resulting in a substantial increase in disability, a petition claiming the additional compensation must be filed in the compensation court within 2 years from the time the employee knows or is chargeable with knowledge that the employee's condition has materially changed and there has been a substantial increase in disability such as to entitle the employee to additional compensation.

2. **Workers' Compensation: Appeal and Error.** Where the record does not support the judgment of the compensation court, the judgment will be modified, reversed, or set aside.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Law Offices of Cobb & Hallinan, P.C., for appellant.

Kathleen C. Smith, of Schmid, Mooney & Frederick, P.C., for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the Nebraska Workers' Compensation Act.

The plaintiff, Barbara A. White, was injured as the result of an accident on November 16, 1983, while employed as a salesperson by the defendant, Sears, Roebuck & Co. The accident occurred when the plaintiff was lifting a floor jack to place it in the trunk of a customer's automobile. As a result of the injury to her back, the plaintiff underwent a laminectomy and diskectomy on May 14, 1984. She did not return to work following the surgery until August 1984. During the time the plaintiff was off work, the defendant voluntarily paid compensation to the plaintiff, the last payment having been made in September 1984.

On February 20, 1987, the plaintiff filed a petition in the Nebraska Workers' Compensation Court alleging that since the spring of 1986, she had suffered a material change in her condition which necessitated additional medical care and for which she had suffered increased disability. The defendant's answer consisted of a general denial and an allegation that any claim for additional compensation was barred by the statute of limitations.

After a hearing before a single judge, the petition was dismissed. The compensation court found that the last payment of compensation to the plaintiff by the defendant was made on September 11, 1984, more than 2 years prior to February 20, 1987, the date on which the petition was filed, and that the

plaintiff "did not allege or attempt to prove that she suffered from a latent and/or progressive disability."

On rehearing, the petition was again dismissed. The compensation court again found that the last payment of compensation by the defendant to the plaintiff had been made more than 2 years prior to the date on which the petition was filed and that the previous order of dismissal should be affirmed. The plaintiff has now appealed to this court.

The plaintiff's principal assignment of error is that the compensation court erred in failing to find that the plaintiff sustained a material change in her condition in the spring of 1986 in accordance with Neb. Rev. Stat. § 48-141 (Reissue 1984).

The finding by the compensation court that the plaintiff did not allege and attempt to prove that she had sustained a material increase in disability is not supported by the pleadings or the evidence.

The petition alleged that commencing in the spring of 1986, the plaintiff had sustained a substantial increase in disability which entitled her to additional compensation. The plaintiff's evidence tended to prove that beginning in the spring of 1986 she had sustained a substantial increase in disability which was a direct result of the accident and injury on November 16, 1983. The medical evidence was that Dr. Louis Gogela, who had performed the surgery on the defendant's back, released her to return to work in 1984, stating, "Her nuerological [sic] examination is good. She has only some residual minor back discomfort." None of the reports at that time indicated any permanent disability. Without our attempting to fully summarize all of the medical evidence, the plaintiff's evidence is that she now has between a 5-percent and 12-percent permanent disability to the body as a whole as a result of the accident and injury in 1983.

There is no doubt as to the right of an injured worker to receive compensation for an increase in disability that occurs following a compensable injury. Where there has been a proceeding before the compensation court and there has been an award, the procedure is set out in § 48-141. Where there is no dispute about the compensable nature of the injury which the

worker sustained, and the employer has voluntarily paid compensation to the injured worker, the right to receive additional compensation in the event of a material increase in disability resulting from the injury is still available.

As stated in 3 A. Larson, The Law of Workmen's Compensation § 78.44 at 15-296 (1988):

> The entire question is the simple one of whether the claimant has any reasonable occasion to file a claim sooner than he did. If voluntary compensation was paid, this cancels out the initial disability as a reason for filing a claim, and the case becomes identical to any other latent-injury situation.

If the parties are unable to agree, the worker's remedy is to file a petition in the compensation court.

Such a petition must be filed within 2 years from the time the employee knows or is chargeable with knowledge that the employee's condition has materially changed, and there has been such a substantial increase in disability as to entitle the employee to additional compensation. Neb. Rev. Stat. § 48-137 (Reissue 1984); *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981). See, also, *Peek v. Ayers Auto Supply*, 157 Neb. 363, 59 N.W.2d 564 (1953). The petition in this case, which was filed February 20, 1987, was well within that period.

The judgment of the compensation court in this case did not respond to the pleadings and the evidence, and is not supported by the record. The judgment is reversed and the cause remanded for further proceedings.

It is unnecessary to consider the other assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# STATE OF NEBRASKA, APPELLEE, V. ROCHELLE SWIFT, APPELLANT.

431 N.W.2d 643

Filed November 18, 1988. No. 88-008.

**Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal 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, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Robert M. Spire, Attorney General, and Vanessa R. Jones for appellee.

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

FAHRNBRUCH, J.

Rochelle Swift appeals her felony jury convictions for manslaughter and the use of a knife to stab to death her estranged former live-in boyfriend, Eugene Vermont Williams. Swift's sole assignment of error claims her convictions were based upon insufficient evidence. We affirm.

On the manslaughter charge, the defendant was sentenced to not less than 4 nor more than 6 years' imprisonment, and a consecutive sentence of not less than 1 nor more than 3 years' imprisonment for using the knife in the killing.

Under Neb. Rev. Stat. § 28-305 (Reissue 1985), manslaughter is a Class III felony. A Class III felony is punishable by not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). Using a knife in the commission of a felony under Neb. Rev. Stat. § 28-1205 (Reissue 1985) is also a Class III felony, and the sentence must run consecutively to the underlying felony. Since Swift does not assign error in regard to the sentences, we shall not discuss them further.

In determining the sufficiency of the evidence to sustain a criminal 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, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988); *State v. Ladehoff*, 228 Neb. 812, 424 N.W.2d 361 (1988); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988).

The State elected to prosecute the defendant under that portion of § 28-305 which states in substance as follows: "A person commits manslaughter if he kills another without malice . . . upon a sudden quarrel . . . ."

The prosecution's evidence reflects that Swift and Williams, her former live-in boyfriend and father of her child, within 6 to 7 minutes engaged in three sudden quarrels during the early morning hours of June 17, 1987. The three arguments and stabbing took place in the area of North 23d Plaza and Charles Street in Omaha. A State's eyewitness testified that the first argument was over the couple's baby. Swift told police the first argument resulted from Williams' insistence that she engage in prostitution. At trial, Swift said Williams accused her of not going to see their baby. The next two arguments occurred when Williams was attempting to leave the scene and the defendant twice kicked the car in which the victim was riding. From the evidence, it is clear that had the defendant not provoked Williams and, as one State's witness testified, "[C]alled him out," the victim would have left the scene and no one would have been injured. A jury could find from the evidence that after the first and second quarrels Swift had an opportunity to retreat from the scene. From the testimony of a prosecution witness, a jury could also find that during the third quarrel, Swift, up until the time she stabbed Williams in the chest, also had an opportunity to retreat from the scene. It was during the third quarrel that Williams was fatally stabbed.

Swift was already in the area where the quarrels and stabbing took place. Williams had been driving his current girlfriend's car near downtown Omaha when he picked up Milton Felder, a

longtime friend, whom he permitted to drive the car. Felder began driving toward his home located near where the fatal stabbing occurred. Williams was in the front passenger seat. Felder testified that when they approached where Swift was located, Swift called out to Williams, the car was stopped, and Williams got out and talked to Swift. The defendant testified that Williams called to her. Conversation between the couple degenerated into an argument and name calling by both parties. Felder convinced Williams to leave, and the victim got back into the car. At this point, Swift kicked the car door. Felder testified that Williams again left the vehicle, and more words and name calling were exchanged between the defendant and victim. Williams reentered the vehicle to leave the area. Swift again kicked the car as it was slowly leaving the scene. Williams left the vehicle while it was still moving. The quarrel between the defendant and victim again became heated.

It was undisputed that soon after the third time Williams left the vehicle in which he was riding, Swift pulled an already opened switchblade knife from her purse. Swift began swinging the knife at the unarmed Williams. Williams was stabbed on his right forearm. Williams wrapped his sweatshirt around his forearm, then used the wrapped arm to bat at Swift's knife in an apparent attempt to knock the knife from her hand. Williams had not been wearing the sweatshirt, but had it tied by its arms around his neck. The pathologist who performed the autopsy described the forearm wound as being consistent with Williams' acting defensively.

From Felder's testimony, the jury could find beyond a reasonable doubt that as Swift was swinging her knife, Williams backed across the street from where the quarrel started and that Swift, still swinging the knife, continued to charge Williams. Swift also stabbed Williams in the left chest, perforating his pulmonary artery and puncturing the upper lobe of his left lung, which caused internal bleeding. After receiving the chest stab wound, Williams kicked at the knife and threatened to kill Swift.

Felder rushed the wounded man to the hospital. Williams died as a result of the stab wound in the chest.

Much of the State's evidence was corroborated by Swift's

own testimony and her version given to the police after she hid for some 14 hours after the stabbing. At trial, the defendant claimed that Williams threatened to kick her and that she stabbed him in self-defense. Swift claimed Williams slapped her during the third quarrel.

Swift testified that she had previously been beaten and choked by Williams and that he had threatened to kill her. Swift stated that she began carrying the knife because she was afraid of Williams. Swift had never contacted the police or required medical treatment because of the injuries she claimed were inflicted by Williams. She testified she was not drunk, but "high" from alcohol at the time of the stabbing.

Swift's self-defense claim is controlled by Neb. Rev. Stat. § 28-1409 (Reissue 1985), which provides:

> (1) . . . the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death [or] serious bodily harm . . . nor is it justifiable if:
>
> (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . .

The jury was properly instructed and obviously found the State had proven beyond a reasonable doubt the elements of the crimes charged. It is also obvious that the jury found that Swift's actions were not justified under § 28-1409. The evidence was sufficient to convict Swift of the two crimes charged.

AFFIRMED.

# L. J. VONTZ CONSTRUCTION CO., INC., APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

432 N.W.2d 7

Filed November 18, 1988. Nos. 88-156, 88-157.

1. **Pleadings: Actions: Contracts: Torts.** To determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading.
2. **Actions: Contracts: Torts: Words and Phrases.** Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded with direction.

Jeff C. Miller, of Young & White, for appellant.

Robert M. Spire, Attorney General, Warren D. Lichty, Jr., and Sharon M. Lindgren for appellee.

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

SHANAHAN, J.

The appeals by L. J. Vontz Construction Co., Inc., pertain to Vontz' two claims filed with the Director of Administrative Services, who found that Vontz' claims were not based on contracts with the Department of Roads of the State of Nebraska, but were tort claims for which the director lacked jurisdiction to determine whether the claims were meritorious.

In April 1983, Vontz entered two construction contracts with the State's Department of Roads (DOR) to repair asphalt shoulders on roads in Platte and Fillmore Counties, including asphalt removal, compacting the subgrade soil, recycling the removed asphalt, and replacing asphalt on road shoulders. Each of the Vontz-DOR contracts contained a clause incorporating "the general and detailed plans, the 1973 Standard Specifications for Highway Construction . . . ; the

contractor's bond; the proposal; all special provisions; and all supplemental agreements" into the contract. Section 102.07 of the DOR's 1973 Standard Specifications for Highway Construction provides in part that the DOR "will prepare full, complete, and accurate plans and specifications giving such directions as will enable any competent mechanic or contractor to carry them out." The contracts also provided that Vontz "shall not do any work . . . not covered and authorized by this contract, unless ordered in writing by the Engineer."

On May 27, 1983, Vontz began removing the asphalt shoulders in the Fillmore County project and encountered "very wet subgrade soil conditions," which made mechanical soil compaction impossible without DOR's further directions. In spite of Vontz' repeated requests, DOR provided no further directions until June 24, 1983, when DOR directed Vontz to remove, mix, dry, and recompact the wet subgrade soil. When Vontz encountered further unstable subgrade soil conditions during the "lay-down" phase of the project in Fillmore County, DOR's project engineer required that the unstable areas be "cored out" and filled with recycled asphalt. As a result of the subgrade soil conditions, the Fillmore County project was substantially delayed and required Vontz to use additional road barricades and safety equipment, which cost in excess of $5,000.

On August 16, DOR informed Vontz that 33 percent of the allotted time for completion of the Platte County project had expired, but no work had been completed on the project. According to Vontz, DOR knew that Vontz contemplated completion of the Fillmore County project before Vontz would move its equipment to the Platte County project. Since the Fillmore County project was delayed by DOR's tardy responses to the problems involving subgrade soil conditions, the Platte County project was not underway according to schedule.

On August 17, Vontz completed major items of the Fillmore County project but was unable to finish the entire project because irrigation runoff had flooded the site for construction of a culvert. Vontz claimed that DOR's conduct in administering and engineering the Fillmore County project had delayed major asphaltic work for 30 days and minor work for

"several months."

On receipt of DOR's notice about lack of progress on the Platte County project, Vontz began work on the project by surface-milling the shoulders as required by a supplemental agreement with DOR. After milling for 4 days, Vontz had to stop because another contractor's work on a requisite culvert had not been completed. Vontz maintained that DOR failed to require the culvert contractor to expedite its work in compliance with the specifications for the Platte County project. Further, Vontz claimed that it could have moved its milling operations to the other side of the culvert and continued operations if DOR had provided a stockpile area. In spite of Vontz' requests, DOR did not provide a stockpile area until June 14, 1984.

Vontz further contended that DOR's plans and specifications were incorrect in the assessment of water levels in four designated "borrow pits" specified for the projects. As a result of the water level discrepancies, Vontz was able to remove less material than needed from the pits and also had to use special equipment to remove wet material, which had to be hauled to a site for drying and processing before use in the projects.

Vontz also claimed that DOR's project inspector, without good reason, repeatedly rejected Vontz' work on the Platte County project and even suspended project operations on November 9, 1983. DOR's final inspection of the Platte County project occurred on October 1, 1985.

In its claims, Vontz asserted that DOR's initial plans and specifications were inadequate and, consequently, necessitated additional compaction work. Vontz also asserted that DOR erroneously computed the amounts due under the contracts. For the Fillmore County project, Vontz claimed that DOR incorrectly deducted in excess of $18,000 under the contract's provision for liquidated damages. For the Platte County project, Vontz asserted that the DOR "required the Claimant to perform work under bid items, but beyond the plans and specifications and made no measurement or payment of these items."

Containing statements of the facts and circumstances set forth above in relation to the construction contracts, Vontz'

claims were filed with the Director of Administrative Services pursuant to Neb. Rev. Stat. § 81-1170 (Reissue 1987), which provides in part:

> All persons having claims against the state, except claims for overpayment of estate taxes and except claims within the jurisdiction of the State Claims Board, shall exhibit the same, with the evidence in support thereof, to the Director of Administrative Services to be audited, settled, and allowed within two years after such claims shall accrue.

Alleging that the Director of Administrative Services lacked jurisdiction to dispose of the claims, DOR requested dismissal of Vontz' claims. The Director of Administrative Services concluded:

> The question before the Director of Administrative Services is whether the Director has jurisdiction over these claims as contract claims. The issue for decision is whether the claims are tort claims or contract claims.
>
> Tort claim is defined in Neb. Rev. Stat. §81-8,210(40 [sic] (Reissue 1981) which, in part provides: "Tort claim shall mean any claim against the State of Nebraska 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 state, while acting within the scope of his office or employment. . . ."
>
> The claimant has contended that the state was negligent in drafting contract specifications, special provisions, and construction plans; and interference with claimants [sic] performance of the contract. Clearly, the claims are tort claims as that term is defined in Neb. Rev. Stat. §81-8,210(4) (Reissue 1981) of the Tort Claims Act.
>
> The State Claims Board has the exclusive jurisdiction to initially consider tort claims brought against the state. The Director of Administrative Services does not have concurrent jurisdiction to consider claims properly before the State Claims Board. Neb. Rev. Stat. §84-306 (Reissue 1981) provides that all claims shall be exhibited to the Director of Administrative Services ". . . except claims

> within the jurisdiction of the State Claims Board. . . ." Accordingly, the claims are tort claims as that term is defined in the Tort Claims Act and the Director of Administrative Services does not have jurisdiction to consider these claims.
>
> For these reasons, the Motions to Dismiss are granted and the claims thereby denied.

On the basis of Neb. Rev. Stat. § 24-319(1) (Reissue 1985), concerning appellate jurisdiction of the district courts over claims presented to the Director of Administrative Services, Vontz appealed to the district court and filed petitions in conformity with Neb. Rev. Stat. § 24-320 (Reissue 1985). There is no question that Vontz' appeals have been perfected in accordance with the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1987), and in compliance with Neb. Rev. Stat. § 77-2407 (Supp. 1987) (aggrieved party's appeal authorized under the Administrative Procedure Act). After determining that Vontz' appeals were governed by the Administrative Procedure Act, the district court found:

> The Director of Administrative Services dismissed the claim presented as being a tort claim and the Director of Administrative Services did not have jurisdiction over tort claims. Upon review of the record made, the Court further finds and determines that the dismissal of the claim was correct in all respects.

The district court then affirmed the order of the Director of Administrative Services, dismissing Vontz' claims.

On appeal to this court, Vontz contends that the district court erred in (1) affirming the order that the director of the Department of Administrative Services lacked jurisdiction to hear the claims in question; (2) conducting a review under the standard prescribed by § 84-917 of the Administrative Procedure Act; and (3) denying a "hearing and determination" pursuant to § 24-319.

Fundamental to a disposition of this appeal is the nature of Vontz' claims. If the claims are negligence claims rather than contract claims, the Director of Administrative Services lacked subject matter jurisdiction because, by virtue of Neb. Rev. Stat. § 81-8,211 (Reissue 1987), the State Claims Board has the

power "to consider, ascertain, adjust, compromise, settle, determine, and allow any tort claim" based on negligence of the State of Nebraska, by which a claimant seeks "money only on account of damage to or loss of property or on account of personal injury or death." See Neb. Rev. Stat. § 81-8,210(4) (Reissue 1987). However, if Vontz' claims are based on contract, the director of the Department of Administrative Services had jurisdiction to determine the merits of the claims pursuant to § 81-1170, which in pertinent part provides: "All persons having claims against the state . . . except claims within the jurisdiction of the State Claims Board, shall exhibit the same, with the evidence in support thereof, to the Director of Administrative Services to be audited, settled, and allowed . . . ." Also, if Vontz claims negligence for which the State may be liable, Vontz has not fulfilled a condition precedent to the district court's determination of a negligence claim, namely, filing the claim with the "Risk Manager of the State Claims Board." Neb. Rev. Stat. § 81-8,212 (Reissue 1987). Cf. *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988) (necessity of a timely filed claim under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), as a condition precedent to a negligence suit against a political subdivision).

In *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 437, 345 N.W.2d 300, 304-05 (1984), we stated:

> Although the dividing line between breaches of contracts and torts is often dim and uncertain, it has been said that the character of an action as one in tort or on contract is determined by the nature of the grievance, not by the form of the pleadings, with consideration being given to the facts which constitute the cause of action. *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954). . . .

Thus, to determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading.

Contract actions, which arise from a breach of a duty

imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property. *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958); *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954); *McNeel v. State*, 120 Neb. 674, 234 N.W. 786 (1931).

The gist of Vontz' claims is that, notwithstanding DOR's contractual duty to prepare "full, complete, and accurate plans and specifications" and provide "directions" to enable Vontz to carry out the planned projects, DOR furnished inadequate and misrepresented engineering and design for the projects, which resulted in substantial project delays and increased Vontz' costs to complete the projects. Although Vontz alleged that DOR failed to properly administer the contracts during Vontz' work under the contracts, all the problems regarding Vontz' performance stem from allegedly inadequate plans, specifications, and engineering supervision for the projects.

In response, DOR maintains that its duty to prepare plans and specifications for the projects is a duty imposed by Neb. Rev. Stat. § 39-1316 (Reissue 1984), which provides in part: "The department shall be responsible for the preparation and adoption of plans and specifications for the establishment, construction, and maintenance of the state highway system." Because the duty to prepare adequate plans and specifications is imposed by statute, DOR argues, any failure to carry out that duty constitutes a tort rather than a breach of contract.

However, DOR's position and argument ignore the nature of the claims filed by Vontz. While DOR fulfilled its statutory duty to prepare the plans for the projects, the contract with Vontz involved more than DOR's statutory duty under § 39-1316. In its contract with Vontz, DOR agreed to prepare project plans and specifications and then incorporated § 102.07 of the 1973 standard specifications, which obligated DOR to "prepare full, complete, and accurate plans and specifications," and provide "directions" to enable the contractor to carry out plans and specifications for a project.

The precise nature and degree of DOR's noncompliance with the requirement to provide full, complete, and accurate plans, as well as furnish appropriate directions, relate to DOR's failure to comply with an express contractual provision in the agreements between Vontz and DOR. Consequently, Vontz' claims are based on a breach of an express contractual duty, not a breach of a statutory duty, and, therefore, are contractual in nature.

Additionally, Vontz contends that the State, relying on the contracts' provisions for liquidated damages, deducted amounts from the totals otherwise payable under the construction contracts. Liquidated damages may have a bearing on the ultimate amounts due Vontz under the construction contracts. However, while liquidated damages, as an expressly stipulated amount to secure performance of a contract, may be recoverable on breach of a contract, liquidated damages are foreign to the damages recoverable in a negligence action. The question about liquidated damages raised in Vontz' claims in relation to the damages sought by Vontz strengthens our conclusion that Vontz based its recovery on contract rather than in tort.

Our conclusion that Vontz' claims are based on contract rather than tort is consistent with the definition of a "tort claim" under the State Tort Claims Act. As already noted, § 81-8,210(4) characterizes a tort claim as one "on account of damage to or loss of property or on account of personal injury or death . . . ." In its claims, Vontz does not seek money from the State on account of "damage to or loss of property," but, rather, requests remuneration for services rendered pursuant to contracts with DOR.

Because Vontz' claims are based on contracts with DOR and not on DOR's negligence, the Director of Administrative Services had the power to determine the merits of the claims by Vontz, that is, the director had jurisdiction to audit, settle, and allow Vontz' claims by virtue of the authority conferred by § 81-1170. The order of the Director of Administrative Services, rejecting jurisdiction concerning Vontz' claims, and the district court's judgments, affirming that order of the Director of Administrative Services, are incorrect as a matter of

law. Therefore, we reverse the judgments of the district court and remand this matter to the district court with direction to set aside the order of the Director of Administrative Services, thereby restoring this matter to the Director of Administrative Services for further proceedings provided by law.

In view of our disposition on the jurisdictional issue and because the Director of Administrative Services has not determined whether the Vontz claims are meritorious, we need not, and do not, consider Vontz' contention that the district court should have granted an evidential hearing on the merits of the contractual claims.

REVERSED AND REMANDED WITH DIRECTION.

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KENNETH R. KLEIN, APPELLEE, V. BARBARA J. KLEIN, APPELLANT.
431 N.W.2d 646

Filed November 18, 1988. No. 88-357.

1. **Courts: Jurisdiction: Adoption: Minors.** The consent granted by the district court pursuant to the provisions of Neb. Rev. Stat. § 43-104 (Cum. Supp. 1986) does nothing more than permit the county court, as the tribunal having exclusive original jurisdiction over adoption matters, to entertain such proceedings.
2. **Courts: Jurisdiction: Adoption: Abandonment.** For the purpose of adoption, the issue of abandonment is exclusively for the county court.
3. **Final Orders: Words and Phrases.** An order is final when it affects a substantial right and determines the action.

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

Eileen A. Hansen and Wilbur C. Smith, of Smith & Hansen, for appellant.

Jeffrey D. Toberer and Thomas D. Wulff, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

CAPORALE, J.

Respondent mother, appellant Barbara J. Klein, assigns a number of errors to the district court's consent "to the filing [by petitioner father, appellee Kenneth R. Klein] of a Petition" for the adoption of the parties' minor daughter by the father's present wife. We dismiss the appeal for lack of jurisdiction.

A January 17, 1983, decree of the district court dissolved the marriage of the parties and awarded custody of their now 7-year-old daughter to the father. The father later, on June 23, 1984, married the present Christine Klein. Subsequently, on February 9, 1988, he filed an application in the dissolution action, seeking the consent described earlier, alleging that the mother had abandoned the daughter for more than 6 months prior to the filing of the application and that the adoption would be in the daughter's best interests.

The application was filed in accordance with Neb. Rev. Stat. § 43-104 (Cum. Supp. 1986), the pertinent portions of which provide: "[N]o adoption shall be decreed unless the petition therefor is accompanied by written consents thereto executed by . . . (2) any district court . . . having jurisdiction of the custody of a minor child by virtue of divorce proceedings had in any district court . . . in the State of Nebraska . . . ."

The consent granted by the district court does nothing more than permit the county court, as the tribunal having exclusive original jurisdiction over adoption matters, Neb. Rev. Stat. § 24-517(8) (Cum. Supp. 1988), to entertain such proceedings. Thus, the question arises as to whether the consent of the district court constitutes a final appealable order, notwithstanding the fact it is the last act the district court is capable of performing, as the question of whether the mother did in fact abandon the daughter, for the purpose of adoption, is exclusively for the county court. *In re Guardianship of Sain*, 211 Neb. 508, 319 N.W.2d 100 (1982).

Neb. Rev. Stat. § 25-1902 (Reissue 1985) defines a final order, for purposes of review by appeal, to be "[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after

judgment . . . ." In construing the foregoing statute, we have said that for a decree to be final, it must dispose of the whole merits of the case, and leave nothing for the further consideration of the court.

> " 'An order is final when it affects a substantial right and determines the action. . . . When no further action of the court is required to dispose of the cause pending, it is final; when the cause is retained for further action . . . it is interlocutory.' "
>
> When a substantial right is undetermined and the cause is retained for further action, the order is not final.

*Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 574, 324 N.W.2d 660, 662 (1982).

The fact there is nothing more the district court can do does not alter the reality that its granting of consent to the adoption proceedings does not resolve the issue of adoption. The consent of the district court means only that the mother must defend against the adoption sought in the county court. Should the adoption be granted by that latter court, the mother would then be free to appeal that decision as provided by law. At the moment, she is in no different position from any other person called upon to defend against judicially cognizable allegations.

To be sure, a district court denial of consent would prevent the county court from entertaining adoption proceedings; thus, such a denial would affect and determine the substantial right of the party seeking the consent. Accordingly, the denial of consent by the district court would constitute a final order appealable by the affected party. That a denial of consent would be appealable whereas the granting of consent is not appealable does not present a unique situation. For example, while the granting of a plea in bar is final and appealable, the denial of such a plea is not; while the granting of a summary judgment which fully disposes of a case is final and appealable, the denial of a summary judgment is not final and appealable. *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988).

This court has jurisdiction to hear appeals only from final orders. Neb. Rev. Stat. § 25-1911 (Reissue 1985); *Gruenewald v. Waara, supra*. Accordingly, this appeal must be, and hereby is, dismissed.

APPEAL DISMISSED.

BOSLAUGH, J., dissenting.

I dissent only because I believe the order of the district court should have been affirmed instead of the appeal dismissed. The order was final because there was nothing further for the district court to do in regard to the matter.

An order overruling a plea in bar or a motion for summary judgment is clearly interlocutory because the action then proceeds in the same court to judgment.

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## IN RE INTEREST OF M.M., C.M., AND D.M., CHILDREN UNDER 18 YEARS OF AGE.
## STATE OF NEBRASKA, APPELLEE, V. C.M., APPELLANT.

431 N.W.2d 611

Filed November 18, 1988. Nos. 88-361, 88-362, 88-367.

**Parental Rights: Guardians Ad Litem.** In a proceeding for the termination of parental rights, where it is alleged that the parent is unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe such condition will continue for a prolonged indeterminate period, it is mandatory that a guardian ad litem be appointed for the parent even though the parent is represented by appointed counsel throughout the proceeding.

Appeal from the County Courts for Butler County and Seward County: ALAN G. GLESS, Judge. Reversed and remanded for further proceedings.

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

Frank J. Skorupa, guardian ad litem.

No appearance for appellee.

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

PER CURIAM.

This is an appeal from the orders of the county courts for Butler and Seward County, Nebraska, terminating the parental

rights of the appellant to her three children.

The petition for termination, which was filed January 13, 1987, alleged in part that the appellant was "afflicted with a bipolar disorder with a manic-depressive phase complicated by a possible anti-social tendency and symptoms of multiple psychological difficulty." The petition also alleged that the appellant "is at times overcome by a delusional process which aggravates the potential for anti-social behavior and is complicated by grandiose thinking, a total lack of insight into her problems and a complete refusal to obtain meaningful therapy." The petition further alleged that the appellant "is unable to parent due to mental illness or mental deficiency and there are reasonable grounds to believe the conditions precenting [sic] her from parenting will continue for a prolonged and indeterminate period."

Neb. Rev. Stat. § 43-292 (Reissue 1984) provides in part: "When termination of the parent-juvenile relationship is sought under subdivision (5) of this section, the court shall appoint a guardian ad litem for the alleged incompetent parent." Subdivision (5) of the statute relates to parents unable to discharge "parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period."

In *Orr v. Knowles*, 215 Neb. 49, 51-53, 337 N.W.2d 699, 701-03 (1983), in response to questions certified to this court by the U.S. District Court, we stated:

> A review of Nebraska law indicates that there is no clear statement of what the duties or role of a guardian ad litem is. Several Nebraska statutes dealing with minors provide for the appointment of guardians ad litem.
>
> . . . .
>
> Generally speaking, a guardian ad litem appears to be an individual who steps into the position of the minor and, after considering the alternatives, asserts the right of the minor as the guardian ad litem sees fit. . . .
>
> . . . .
>
> It seems from these statutes and this general discussion that the role of a guardian ad litem is something akin to the

> role of an attorney acting as legal counsel, but it is somewhat different. The Code of Professional Responsibility establishes that an attorney must zealously represent the wishes of his or her client. See Canon 7. It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law. EC 7-7.
>
> In response to this first question, based upon the above discussion, we feel the duties and responsibilities of a guardian ad litem, as provided under § 28-347(2), are *not* coextensive with those of an attorney who might represent a minor in proceedings under this section. A guardian ad litem is to determine the best interests of the minor without necessary reference to the wishes of the minor.

Although the appellant in these cases has been represented by appointed counsel throughout the proceedings, it is the opinion of the court that the appointment of a guardian ad litem under § 43-292 is mandatory and that the failure to appoint a guardian ad litem for the appellant in these cases is plain error which requires that the judgments be reversed.

The judgments are reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., dissenting.

The failure of the trial court to appoint a guardian ad litem for the appellant in these cases was plain error, but I am unable to discern how it could in any way have been prejudicial to the appellant.

The appellant has been represented throughout this proceeding by appointed counsel. I do not believe the appellant, under the circumstances in these cases, would have benefited in any way by the appointment of another lawyer at public expense.

HASTINGS, C.J., joins in this dissent.

# WILLIAM R. AND THELMA C. BROWN, APPELLANTS, V. JAMES R. AND MARY J. BORLAND, APPELLEES.

432 N.W.2d 13

Filed November 23, 1988. No. 86-823.

1. **Debtors and Creditors: Conveyances: Fraud: Equity.** A creditor's action to declare a conveyance fraudulent invokes the equity jurisdiction of a trial court.
2. **Equity: Appeal and Error.** On appeal to this court, an equity action is reviewed de novo on the record, subject to the rule that where the credible evidence is in conflict, the Supreme Court may consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Fraud: Presumptions: Conveyances.** Existing rules on badges of fraud and their presumptions are still in effect under the Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. §§ 36-601 to 36-613 (Reissue 1984).
4. **Fraud: Presumptions: Conveyances: Marriage: Proof: Consideration.** When property is transferred from one spouse to another, a presumption arises that the conveyance was fraudulent as to existing creditors. Once that presumption is established, the burden of proving that the transfer was made for fair consideration shifts to the defendants. If the defendants establish that property was conveyed for fair consideration, the burden then shifts to the plaintiffs to prove by clear and convincing evidence that the transfer was not made in good faith.
5. **Marriage: Joint Tenancy: Consideration: Gifts: Presumptions.** When a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other who did not. This presumption is rebuttable.

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

Gregory M. Schatz for appellants.

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

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

FAHRNBRUCH, J.

To enforce the judgment awarded them on account of intentional tortious conduct of the defendant James R. Borland, plaintiffs, William R. and Thelma C. Brown, sued to set aside a quitclaim deed from Borland to his wife, Mary J. Borland.

The Sarpy County District Court refused to set aside the deed

as a fraudulent conveyance to defeat creditors. We reverse.

The Borlands were married in 1978 and purchased their home on land contract as joint tenants with rights of survivorship in 1980.

In January 1985, James Borland was convicted of a felony and sentenced to prison for 3 to 5 years. On March 28, 1985, the Browns, victims of crimes committed by James Borland and two others, filed a tort lawsuit against the trio for damages.

On July 26, 1985, Mary Borland filed for a legal separation from James. On August 2, 1985, the Borlands entered into a "Child Custody and Property Settlement Agreement." In part, the agreement provided that James would convey his interest in the family home to Mary. She, in turn, agreed to pay both parties' outstanding debts, to waive future support for herself, and to forgo pursuing child support until James was suitably employed or until a court ordered that support be paid. There was no mention in the property settlement of any antecedent debt owed by the husband to the wife.

On October 18, 1985, the district court for Sarpy County granted the Borlands a legal separation. The court made no finding as to alimony, child custody, visitation, or the parties' property settlement agreement. The next day, James Borland executed a quitclaim deed conveying his interest in the family home to Mary Borland. This deed was recorded October 25, 1985.

Trial on Browns' civil action against James Borland and two others commenced on October 28, 1985. After trial, the jury awarded the Browns $17,500.

In their petition, the Browns claim they have attempted to collect their judgment, but have been unable to do so. They allege James Borland's interest in the Borland home is the only property available to pay the judgment. The Browns brought this action seeking to have the conveyance of James Borland's interest in the home set aside as fraudulent. If the conveyance is set aside, it would permit the Browns to levy execution on James Borland's interest in the home. The trial judge held the conveyance was made in good faith by Mary and James Borland.

A creditor's action to declare a conveyance fraudulent

invokes the equity jurisdiction of a trial court. See, *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986); *First Nat. Bank v. First Cadco Corp.*, 189 Neb. 553, 203 N.W.2d 770 (1973). On appeal to this court, an equity action is reviewed de novo on the record, subject to the rule that where the credible evidence is in conflict, the Supreme Court may consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988); *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

Distilled, the Browns' five assignments of error complain that James Borland quitclaimed his interest in the family home to his wife, Mary, without her paying fair consideration, and therefore the conveyance was fraudulent.

The trial court found that Mary Borland paid the majority of the $10,000 downpayment and all of the installment payments, taxes, and insurance on the couple's home and that James' interest in the house was less than $3,500. The trial court made no specific finding as to whether Mary's payments and assumption of indebtedness constituted fair consideration from Mary to James. However, implicit in the trial court's general holding for the defendants and against the plaintiffs is a finding either that Mary gave fair consideration or that the plaintiffs failed to meet their burden of proving by clear and convincing evidence that Mary did not give fair consideration. See, *Gifford-Hill & Co. v. Stoller, supra*; *Gelbard v. Esses*, 96 A.D.2d 573, 465 N.Y.S.2d 264 (1983).

Nebraska's Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. §§ 36-601 to 36-613 (Reissue 1984), enacted in 1980, together with Nebraska's case law, is controlling. This is the first case requiring this court's interpretation of the uniform act. Section 36-604 provides, "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his or her actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

Under the uniform act, a creditor is "a person having any claim, whether matured or unmatured, liquidated or

unliquidated, absolute, fixed, or contingent." § 36-601. The conveyance from James to Mary Borland was made after James committed the criminal acts against the Browns. When the conveyance was made, the Browns had a claim against James Borland and were, therefore, creditors of James at that time. See, *Jahner v. Jacob*, 252 N.W.2d 1 (N.D. 1977); *Churchill v Palmer*, 57 Mich. App. 210, 226 N.W.2d 60 (1970); *Ashbaugh v. Sauer*, 268 Mich. 467, 256 N.W. 486 (1934). This is true even though the claim has not been reduced to a judgment. See, *Jahner v. Jacob, supra*; *Churchill v Palmer, supra*.

Mary Borland's testimony established that her husband was rendered insolvent by the conveyance. Therefore, next to be examined is whether Mary gave fair consideration for the conveyance. Section 36-603 provides:

> Fair consideration is given for property, or obligation,
>
> (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
>
> (b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Under the old conveyances to defraud creditors act, every conveyance made with intent to defraud creditors was void. Case law interpretation provided that a conveyance made in good faith and for adequate consideration was not made with intent to defraud. Section 36-603 of the uniform act also requires adequate consideration and good faith dealings to prove a conveyance was not fraudulent. Therefore, we see no reason why past case law rules on good faith and adequate consideration should not remain in effect.

The same is true for case law regarding "badges of fraud" and the presumptions arising therefrom. See *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986). The former act did not speak to when a conveyance was presumed fraudulent. It is through case law that the badges of fraud and presumptions were developed. The current uniform act, in § 36-307, preserves distinction of "intent presumed at law" from "intent to defraud." Therefore, we find that existing rules

on badges of fraud and their presumptions are still in effect under the uniform act.

Because the transfer of the Borland home was between spouses, at trial the Browns, as creditors, were entitled to a presumption that the conveyance was fraudulent. See *Gifford-Hill & Co. v. Stoller, supra*. Once that presumption was established, the burden of proving that the transfer was made for fair consideration shifted to the defendants. *Creason v. Wells*, 158 Neb. 78, 62 N.W.2d 327 (1954). If the defendants established that James Borland's interest in the property was conveyed for fair consideration, the burden would then shift to the Browns to prove by clear and convincing evidence that the transfer was not made in good faith. *Gifford-Hill, supra*.

The question then is whether the Borlands presented sufficient evidence that the conveyance was supported by fair consideration, thereby overcoming the presumption. We find they did not.

This court has held that when a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other who did not. This presumption is rebuttable. *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976). See, also, *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W.2d 185 (1958); *Hoover v. Haller*, 146 Neb. 697, 21 N.W.2d 450 (1946). The evidence is not sufficient to rebut the presumption that the downpayment and monthly payments made by Mary were, in part, gifts to James. Those payments cannot be considered as consideration for the quitclaim deed.

The trial judge found that Mary assumed (1) the couple's indebtedness under the land contract for their home, (2) medical and dental expenses for herself and the couple's minor child, and (3) a Visa bill. Mary's assumption of these debts is not fair consideration for James' interest in the property.

Mary's assumption of the remaining indebtedness on the couple's home is not consideration because, as a party to the land contract, Mary was already liable for the debt. Nor is Mary's payment of the medical and dental bills consideration. Even though James may have been primarily liable for these

bills, because the expenses were for necessities of life, Mary was liable in the event James did not pay them. See Neb. Rev. Stat. § 42-201 (Reissue 1984).

In regard to the Visa bill totaling about $1,300, there is no evidence in the record whether Mary was already either contractually liable for this bill or liable under § 42-201 because the items charged were necessities of life. Even if it is assumed that Mary was not liable for the Visa bill prior to her property settlement agreement, the amount of the bill is not sufficient consideration for James' interest in the property.

Delivery of the quitclaim deed made James insolvent, and he had no immediate prospect of employment at the time of the conveyance due to his prison term. Mary could not rely on him for support for herself or the minor child of the parties. There is scant likelihood that James could or would have paid the bills Mary assumed and for which she was secondarily liable.

Mary also argues that her waiver of future alimony and agreement not to pursue child support is fair consideration for the conveyance. Considering James' past work history, his insolvency, and his prison sentence, and considering that Mary owned and operated a liquor store, there is little chance, if any, that a court would grant Mary Borland alimony. For the same reasons, the court most likely would grant only future child support. Therefore, Mary's waiver of future alimony and her agreement not to pursue future child support cannot be considered as "fair consideration" for the conveyance. Moreover, since the agreement related only to future support for Mary and the minor child, that support could not be considered an antecedent debt as required under § 36-603.

The Borlands failed to prove that fair consideration was paid by Mary to James. The evidence was insufficient to overcome the presumption that the conveyance was fraudulent as to existing creditors.

The decision of the trial court must be reversed and the cause remanded, and the trial court is instructed to set aside James Borland's quitclaim deed to his wife, Mary Borland.

REVERSED AND REMANDED WITH DIRECTIONS.

# J. Q. OFFICE EQUIPMENT OF OMAHA, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. MORT D. SULLIVAN AND MORT ASSOCIATES, LTD., APPELLANTS AND CROSS-APPELLEES.

432 N.W.2d 211

Filed November 23, 1988. No. 86-1068.

1. **Constitutional Law: Presumptions.** A prior restraint on speech is not per se unconstitutional, but there is a heavy presumption against its constitutional validity.
2. **Constitutional Law.** To be lawful, a prior restraint on speech must fit within one of the narrowly defined exceptions to the prohibition against prior restraints.
3. _____. Content-based restrictions on commercial speech are permissible.
4. **Constitutional Law: Words and Phrases.** Commercial speech is speech related solely to the economic interests of the speaker and the audience, or speech which does no more than propose a commercial transaction.
5. **Constitutional Law.** Speech intended to exercise a coercive impact is not removed from the reach of the first amendment.
6. **Vendor and Vendee: Sales.** Even where there is no contract, a supplier of goods and services is entitled to receive reasonable market value of goods and services provided.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part as modified, and in part reversed.

Dennis L. Wills for appellants.

Paul R. Stultz, of Martin & Martin, for appellee.

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

WHITE, J.

Appellants, Mort D. Sullivan and Mort Associates, Ltd., appeal from a Douglas County District Court order enjoining them from issuing any telephone or telecommunications messages or any unsolicited communications concerning the appellee, J. Q. Office Equipment of Omaha, Inc. The appellee cross-appeals the district court's award of $456.54 in damages for services rendered by appellee to appellant Mort Associates.

In December of 1984, Mort Associates purchased a Ricoh photocopying machine from appellee, which at that time was the authorized dealer for Ricoh in Omaha. The purchase

included a 90-day warranty for parts and labor. Between January 23 and August 1, 1985, Sullivan, president and sole shareholder of Mort Associates, experienced numerous difficulties with the copier and requested appellee to service the machine.

The record shows that appellee provided Mort Associates with paper products, which were not included under the warranty, and made several service calls after the warranty period had expired. Invoices for these items, which were never paid for by Mort Associates, totaled $865.42.

On August 1, 1985, appellee's service technician informed Sullivan that a drum located in the interior of the copier was damaged and replacement was necessary. Sullivan, believing that the damage to the drum was caused by a service technician on a prior visit, requested that it be replaced at the expense of the appellee. When appellee refused to replace the drum at its expense, Sullivan told appellee that he had access to automatic telephone dialing machines and that he would use the machines to make public his belief concerning the damage to the copier. The evidence shows that the dialing machines had the capability of making 6,000 calls a day, though the record is not specific on how many calls the machines actually made when Sullivan turned them on.

Colin Hurley, a 16-year-old area resident and the recipient of a phone call from an automatic dialing machine, testified that the machine played the following message: "I am Mort Sullivan and I am a businessman. I just recently purchased a Ricoh copier from Joe Quirk [of J. Q. Office Equipment]. This machine broke down. I think they are the worst copiers, repeat, the worst copiers and I advise you not to purchase one." The record also reflects that Sullivan had used similar methods to induce settlement of disputes with a Ford dealership and a John Deere tractor dealership.

In September of 1985, appellee learned that Sullivan had made plans to attend an exhibitors' show for office equipment in Omaha and publicize his dispute with the appellee. Sullivan's plan was to "congest the area" around appellee's booth with 15 friends equipped with bullhorns that also played the "Go Big Red" theme, and to have them broadcast a message that Ricoh

copiers were bad machines and not to buy them from J. Q. Office Equipment. Appellee then filed suit in the district court requesting an injunction be issued against appellants and praying for $865.42 in damages for services rendered. The court, without citing any reason, awarded $456.54 in damages. The court also issued an injunction enjoining appellants from "instigating, promoting, or in any manner issuing derogatory messages concerning the plaintiff or plaintiff's merchandise by any other automatic device, or by bullhorn, or any other loud or disruptive device."

Appellants assign two errors. First, the issuance of the injunction by the district court was an unconstitutional prior restraint of the appellants' right of freedom of speech guaranteed by the first amendment to the U.S. Constitution and by art. I, § 5, of the Nebraska Constitution. Second, the appellee failed to establish at trial that it had no adequate remedy at law. We vacate the district court's injunction on constitutional grounds and therefore do not address the appellants' second assignment of error. We also note that neither party raises the possible applicability of Neb. Rev. Stat. §§ 87-307 to 87-311 (Reissue 1987), regulating automatic dialing machines, and therefore limit our discussion to constitutional issues.

A prior restraint is not per se unconstitutional, but there is a "heavy presumption" against its constitutional validity. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971). The U.S. Supreme Court has not set out a test to determine the validity of prior restraints. Rather, to be lawful a prior restraint must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. *Southeastern Promotions, Ltd. v. Conrad, supra.* Those exceptions include speech or activity not protected under the first amendment and expressions that would impact "military security" such that disclosure would " 'surely result in direct, immediate, and irreparable damage to our Nation or its people' " or " 'inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a

transport already at sea . . . '." (Emphasis omitted.) *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 593, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (Brennan, J., concurring).

Other exceptions recognized by the courts are that the restraint is reasonably incidental to the achievement of another valid governmental purpose and that the activity restrained poses a serious and imminent threat to some protected competing public interest or will irreparably damage a private interest. *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976); *CBS Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *K. D. v. Educational Testing Service*, 87 Misc. 2d 657, 386 N.Y.S.2d 747 (1976). Justice Brennan further noted that as a matter of procedural safeguards and burden of proof, prior restraints, even within a recognized exception to the rule against prior restraints, will be extremely difficult to justify. *Nebraska Press Assn. v. Stuart, supra.*

In the case at bar there is no evidence in the record establishing the existence of a recognized exception. However, appellee, in its brief, argues that the speech enjoined was "commercial speech" and therefore not subject to the full protection of the first amendment and the narrow rules relating to prior restraints and the attendant exceptions. Appellee is correct in that content-based restrictions on commercial speech are permissible, *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986), and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983), but here the speech enjoined is not commercial speech. The U.S. Supreme Court has defined commercial speech as expression which is related solely to the economic interests of the speaker and the audience or speech which does no more than propose a commercial transaction. *Posadas de Puerto Rico Assoc. v. Tourism Co., supra*; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

Sullivan's message is not a solicitation for the sale or purchase of a product or service, nor is the message a mere advertisement, since it is not being published for profit. See *Matter of Nat. Service Corp.*, 742 F.2d 859 (5th Cir. 1984). Sullivan's message is not related to a commercial transaction,

but is the communication of an opinion or the propagation of a view, i.e., "I think they are . . . the worst copiers and I advise you not to purchase one," and therefore falls under the full protection of the first amendment and the prohibition against prior restraints. *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988).

Finally, appellee argues that Sullivan's speech is "designed to coerce and blackmail appellee" into settlement of the dispute and is therefore not protected under the Constitution. Brief for appellee at 11. Protection of coercive speech under the first amendment has been addressed by the U.S. Supreme Court. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971), respondent, a real estate broker, tried to enjoin the petitioners from distributing leaflets critical of respondent's real estate practices. For example, some leaflets contained alleged quotes by the respondent such as "I only sell to Negroes." 402 U.S. at 417. Other leaflets contained respondent's home phone number and urged recipients to call respondent and demand he sign an agreement not to solicit property by phone, flyer, or visit in the community. The Court stated:

> The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. [Citations omitted.] Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.
>
> . . . No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court.

402 U.S. at 419. Accordingly, the injunction issued by the Douglas County District Court is vacated.

Addressing appellee's cross-appeal for damages, we note that even though there was no contract, appellee is entitled to receive reasonable market value for goods and services provided to appellants. *Senften v. Church of the Nazarene*, 214 Neb. 708, 335 N.W.2d 753 (1983). At trial appellee put on testimony and introduced evidence showing that appellant Mort Associates owed appellee $865.42 for goods and services provided which were not covered by warranty. Appellants offered no evidence at all with respect to the amount of money due. The court, in awarding appellee only $456.54, did not explain why appellee's claim was not allowed in full. We believe the district court's determination is incorrect based on the evidence in the record, and therefore modify the court's award to $865.42.

AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED.

BOSLAUGH, J., concurring.

I concur in the judgment of the court but on a different ground.

Injunction is an extraordinary remedy available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984).

The purpose of an injunction is preventive, protective, and prohibitory. It will not issue against discontinued acts unless there are probable grounds to believe there will be a resumption of the activity to be enjoined. *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987).

The motivation for the defendant's threatened activities, some of which were carried out, was to force a settlement of a claim he or his corporation had relating to an alleged defective copying machine that had been purchased from the plaintiff. After the action had been commenced, but before the trial on the merits in the district court, the defendant completed a settlement with the manufacturer of the copying machine.

The evidence shows that all of the threats and telephone calls which the defendant made were made before the settlement took place. As I view the record, it fails to show probable grounds to believe that the defendant will resume the activities

which the plaintiff sought to enjoin. As in *Stuthman v. Lippert*, 205 Neb. 302, 287 N.W.2d 80 (1980), the alleged activities have ceased and are not likely to be resumed. For that reason, that part of the judgment of the district court granting the injunction should be reversed.

HASTINGS, C.J., and GRANT, J., join in this concurrence.

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COUNTY OF YORK, NEBRASKA, APPELLEE, V. RAY A. C. JOHNSON, STATE OF NEBRASKA AUDITOR OF PUBLIC ACCOUNTS, APPELLANT.
432 N.W.2d 215

Filed November 23, 1988. No. 87-102.

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. **Public Meetings: Counties: Actions.** Under the Public Meetings Act, Neb. Rev. Stat. §§ 84-1408 et seq. (Reissue 1987), a county lacks capacity to maintain an action to declare its official conduct "void" for noncompliance with the act.
3. **Public Officers and Employees: Counties: Fees.** The state Auditor of Public Accounts, pursuant to Neb. Rev. Stat. §§ 23-1608 and 23-1613 (Reissue 1983) and 84-304(4) (Cum. Supp. 1984), has authority to conduct an audit of a county's records and, on behalf of the State of Nebraska, charge for the services rendered in conjunction with that audit.
4. **Public Officers and Employees: Counties: Contracts.** Pursuant to Neb. Rev. Stat. §§ 23-104(6) and 23-106(1) (Reissue 1987), a county, through its county board, has the authority to enter an agreement with the state Auditor of Public Accounts to achieve a county audit required by Neb. Rev. Stat. § 23-1608 (Reissue 1983).
5. **Contracts: Fees.** When services are furnished to a party and knowingly accepted by that party, the law implies a promise to pay the reasonable value of the services rendered.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with direction.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellant.

Charles W. Campbell, York County Attorney, and Vincent

Valentino for appellee.

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

SHANAHAN, J.

As a political subdivision, County of York ("York County") brought a declaratory judgment action against Ray A. C. Johnson (State Auditor), the Auditor of Public Accounts of the State of Nebraska, to determine whether York County had to pay for an audit conducted by the State Auditor's office. The State Auditor appeals from the judgment that his audit agreement with York County is "void and has no force and effect" and that York County "is not liable for the cost of said audit."

## STANDARD OF REVIEW

As the result of stipulated facts, only questions of law are presented. 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. *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

## FACTUAL BACKGROUND

Before 1985, the Nebraska Legislature appropriated funds for the State Auditor regarding audits of counties. Consequently, the State Auditor, without charge, had annually audited counties. However, during its 1985 session, the Legislature reduced the appropriation for the State Auditor relative to county audits. In view of the reduced appropriation, the State Auditor formulated a policy for county audits whereby counties were offered the alternative of contracting with the State Auditor or a private accounting firm licensed by the State of Nebraska.

On June 17, 1985, the State Auditor wrote the York County commissioners:

> [The] Legislature has removed the funding for auditing County offices. As a result of this action, my office will no longer perform this service as we have done in the past.

Under my supervision, you are directed to obtain an audit of all of the County offices through the fiscal year ending June 30, 1985. This can be done by contracting with my office, or you can obtain the services of an accounting firm licensed to do business in Nebraska.

When the audit is completed, it will be filed with my office for review and approval by my staff.

Please advise my office whether you wish to contract with the Auditor's office or obtain the services of an accounting firm by July 1, 1985. This will assist me in determining the staff that will be necessary.

Guidelines will be provided for obtaining proposals from firms and for including statutory, compliance and single audit requirements.

Very truly yours,
/s/ Ray A. C. Johnson
Ray A. C. Johnson
Auditor of Public Accounts

The agenda for the York County board's June 25 meeting did not include a prospective audit as an item of the board's business for the meeting. Nevertheless, on June 25, in response to the State Auditor's letter, the York County board voted "that the Board contract with the State Auditor's office to do an audit of all the County office [sic] through the fiscal year ending June 30, 1985." On June 26, the York County clerk wrote the State Auditor:

The York County Board of Commissioners did vote at their regular meeting on June 25, 1985, to contract with the State Auditor's office to do an audit of all of the County offices through the fiscal year ending June 30, 1985.

The Commissioners would like an estimate for budget purposes, of the number of hours it would take and the fee you will charge for auditing our county,

Sincerely,
/s/ Evelyn M. Folts
Evelyn M. Folts, County Clerk
York County, Nebraska

In his June 28 letter to the York County commissioners, the

State Auditor answered the county clerk's letter of June 26:

> You have requested that we audit the financial statements of York County as of and for the year ending June 30, 1985. We are pleased to confirm our acceptance and our understanding of this engagement by means of this letter.
>
> . . . .
>
> Based upon our understanding of the engagement, we estimate our fee to be $10,065.00. However, this is an estimate and the actual cost may be less or may exceed this amount.
>
> We agree to notify you if it becomes evident that the cost will exceed the above amount. Such notification shall include a statement of reasons why we will be unable to complete the services for $10,065.00 and a statement of the additional funds necessary to complete the services.
>
> . . . .
>
> Sincerely,
> /s/ Ray A. C. Johnson
> Ray A. C. Johnson
> Auditor of Public Accounts

At the bottom of the June 28 letter, the State Auditor inserted:

> If the terms of this engagement, as set forth in this letter, are acceptable to you, please sign this copy of the letter and return it to us.
>
> _____ _____
> Date

Without authorization from the York County board, Evelyn M. Folts, as county clerk, on July 1 signed the audit engagement contained in the State Auditor's letter of June 28.

The State Auditor then conducted an audit of York County's records, compiled and submitted a 28-page report containing specific comments and recommendations, and, on September 23, 1985, billed York County $10,065 for the audit and report.

According to the audit, on July 1, 1984, York County held $59,990 in trust for the state, received $739,820 on behalf of the

state during the fiscal year 1984-85, disbursed $748,038 to the state throughout the fiscal year, and, on June 30, 1985, held $51,772 in trust for the state.

In addition to York County's collection of money for the state, whether remitted to the state or held in trust by the county, the audit reflected other monetary matters involving York County, such as over $8 million collected for and disbursed to school districts, nearly $2 million collected for and disbursed to municipalities within the county, and other moneys collected for and disbursed to other governmental units. The audit pointed out deficiencies in the fiscal conduct of certain county offices. One such instance was a failure to collect distress warrants, resulting in "a loss of tax dollars to various governmental subdivisions, which must be borne by other taxpayers of the County." The audit covered disposition of York County's own funds, including its general fund, special revenue funds, and the capital projects fund, and showed a balance of $2,346,490 in those funds on July 1, 1984. For those three funds during the fiscal year ending on June 30, 1985, the audit reflected receipts of $4,012,759, disbursements of $3,250,225, and a balance of $3,109,024 at the close of the fiscal year. The audit report gave a breakdown of receipts and disbursements pertaining to various county funds and accounts. The audit report also dealt with activities in the funds or accounts of various county officials.

Instead of paying the State Auditor's bill, York County filed a declaratory judgment action, seeking a declaration of the "rights, status and other legal responsibilities, relations or obligations of the parties" and requesting that the court "hold void or of no force and effect the agreement of July 1, 1985," concerning the audit rendered by the State Auditor. See the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985).

## NEBRASKA CONSTITUTION AND APPLICABLE STATUTES

Neb. Const. art. XV, § 18, states:

> The state or any local government may exercise any of its powers or perform any of its functions, including financing the same, jointly or in cooperation with any

other governmental entity or entities, either within or without the state, except as the Legislature shall provide otherwise by law.

In 1985, statutes pertaining to county audits included:

> An examination of the books, accounts, records and affairs of all county officers in every county in the state shall be made, by the direction and under the supervision of the Auditor of Public Accounts, at such times as the Auditor of Public Accounts shall determine. A complete and comprehensive audit of the books, accounts, records and affairs of all county officials in each county shall be made by the direction and under the supervision of the Auditor of Public Accounts. No notice of the examination or audit shall be given the officer or any person connected with the office to be examined or audited prior to its commencement.

Neb. Rev. Stat. § 23-1608 (Reissue 1983);

> The Auditor of Public Accounts is authorized to deputize or empower competent accountants to make the examinations and audits provided for in section 23-1608, and to establish uniformity in the system of keeping accounts at salaries to be fixed by such auditor. The Auditor of Public Accounts is further authorized to employ one assistant for each accountant at a salary to be fixed by such auditor. The salaries of accountants and their assistants shall be paid out of such fund as the Legislature may specifically appropriate for that purpose during any biennium.

Neb. Rev. Stat. § 23-1613 (Reissue 1983); and

> It shall be the duty of the Auditor of Public Accounts:
>
> . . . .
>
> (4) Conduct audits and related activities for state agencies, political subdivisions of this state, or grantees of federal funds disbursed by a receiving agency on a contractual or other basis for reimbursement to assure proper accounting by all such agencies, political subdivisions, and grantees for funds appropriated by the Legislature and federal funds disbursed by any receiving agency. The auditor shall deposit the receipts for such

audits and services in the cash fund maintained for the making of cooperative audits.

Neb. Rev. Stat. § 84-304 (Cum. Supp. 1984).

We note amendments to §§ 23-1608 and 84-304(4):

> Each county board shall cause an examination and a complete and comprehensive annual audit to be made of the books, accounts, records, and affairs of all county officers in the county. The audits shall be conducted annually, except that the Auditor of Public Accounts may determine an audit of less frequency to be appropriate but not less than once in any three-year period. Each county board may contract with the Auditor of Public Accounts or select a licensed public accountant or certified public accountant or firm of such accountants to conduct the examination and audit and shall be responsible for the cost of the audit pursuant to the contract. The original copy of the audit shall be filed in the office of the Auditor of Public Accounts.

§ 23-1608 (Reissue 1987), and

> Conduct audits and related activities for state agencies, political subdivisions of this state, or grantees of federal funds disbursed by a receiving agency on a contractual or other basis for reimbursement to assure proper accounting by all such agencies, political subdivisions, and grantees for funds appropriated by the Legislature and federal funds disbursed by any receiving agency. *The Auditor of Public Accounts may contract with any political subdivision to perform the audit of such political subdivision required by or provided for in section 23-1608 or 79-2210.04 or this section and charge the political subdivision for conducting the audit. The fees charged by the auditor for conducting audits on a contractual basis shall be in an amount sufficient to pay the cost of the audit. The fees remitted to the auditor for such audits and services shall be deposited in the Auditor of Public Accounts Cash Fund.*

§ 84-304(4) (Supp. 1987) (amendatory wording emphasized).

## DISTRICT COURT'S JUDGMENT

The district court concluded that the State Auditor had no

duty to conduct county audits under § 23-1608 (Reissue 1983), but only discretion to do so, and that the Legislature effectively repealed any county audit program by eliminating funds for county audits. To support its conclusion that elimination of appropriation was a legislative action tantamount to repeal of the statute concerning county audits, the district court pointed out that the statutory scheme for county audits was amended after the audit in question and expressly allows the State Auditor to charge counties for auditing services. See § 84-304(4) (Supp. 1987).

The State Auditor contends that York County and he, as Auditor of Public Accounts, were authorized to enter a contract for an audit and, therefore, the county is obligated to pay for the audit rendered. To counter the State Auditor's claim, York County asserts that neither the State Auditor nor the county had statutory authority to achieve a county audit; hence, York County is not obligated to pay for the audit rendered. Also, York County contends that the agenda for the June 25, 1985, meeting of the York County board did not include the subject of an audit, which omission nullifies York County's action regarding the audit. Neb. Rev. Stat. § 84-1411(1) (Reissue 1987), in reference to a notice of a meeting governed by the "Public Meetings Act," Neb. Rev. Stat. §§ 84-1408 et seq. (Reissue 1987), requires that the "notice shall contain an agenda of subjects known at the time of the publicized notice . . . ." In reference to § 84-304(4) (Cum. Supp. 1984), validity of the "cash funds" and use or disposition of such funds are not issues pertinent to disposition in the case now presented for review.

Perhaps recurrence of some of the questions raised in this appeal will be unlikely in view of legislation enacted after the audit in question. Nevertheless, in view of the extant law at the time of the audit, questions remain for resolution in the present appeal.

First, we address York County's contention that the deficient agenda permits the county to maintain an action to declare the audit agreement "void" on account of deviation from the Public Meetings Act regarding content of an agenda. See § 84-1414(1) (declaration by a district court that a public body's

action is "void" as the result of failure to comply with the Public Meetings Act).

We note, however, that the Public Meetings Act provides: "The Attorney General and the county attorney of the county in which the public body ordinarily meets shall enforce the provisions of [the Public Meetings Act]," § 84-1414(2), and "Any citizen of this state may commence a suit [under the Public Meetings Act] for the purpose of declaring an action of a public body void," § 84-1414(3).

Nebraska's Attorney General is not involved as a party to these proceedings. Thus, we are not required to consider those situations in which the Attorney General may properly maintain an action to enforce the provisions of the Public Meetings Act. The county attorney of York County appears in these proceedings only in a representative capacity, a lawyer-client relationship concerning York County as a political subdivision. Therefore, the party actually maintaining the action is York County, not the county attorney in his official capacity on behalf of the State of Nebraska or in his personal capacity as a private citizen of Nebraska. Under the Public Meetings Act, a county lacks capacity to maintain an action to declare its official conduct "void" for noncompliance with the act. See § 84-1414(2) and (3). The Public Meetings Act and any action thereunder are inapposite to the disposition of the State Auditor's appeal.

Consequently, the only real issue is whether the State Auditor can charge York County for the audit rendered.

Section 23-1608 (Reissue 1983) requires an audit of every county's "books, accounts, records and affairs." The time or date for undertaking and completing the mandatory audit rests in the State Auditor's discretion, which is exercisable under § 23-1608. Although in 1985 the Legislature withheld funds for county audits, the Legislature has yet to withdraw, by amendment or repeal of § 23-1608, the State Auditor's authority concerning mandatory county audits. Nothing in § 23-1608 serves as a basis for the premise or conclusion that the State Auditor lacks the official capacity or authority to render an audit for a county. Also, Neb. Const. art. XV, § 18, authorizes the "state or any local government," in furtherance

of a governmental purpose, to exercise its powers in cooperation "with any other governmental entity or entities." As the statute existed in 1985, § 84-304(4) (Cum. Supp. 1984) expressly obligated, and, therefore, empowered the State Auditor to "[c]onduct audits and related activities for state agencies [and] political subdivisions," which obviously included York County as a political subdivision of the State of Nebraska. Further, § 84-304(4) (Cum. Supp. 1984) requires that the "auditor shall deposit the receipts for such audits and services in the cash fund maintained for the making of cooperative audits." If the State Auditor is obligated to deposit such receipts as directed and described in § 84-304(4), the State Auditor necessarily has the power to charge for services producing those receipts. Otherwise, the State Auditor's only receipts from counties for audits would be gratuities or donations, a highly unlikely situation. Under the circumstances, by directing that there be an audit of York County's records, the State Auditor was exercising authority expressly conferred by § 23-1608. In furtherance of Neb. Const. art. XV, § 18, the statutory duties of the State Auditor, prescribed in § 84-304(4), include conducting or carrying out an audit for counties and depositing payments for audit services into a specified account pertaining to "cooperative audits." We, therefore, hold that the State Auditor, pursuant to §§ 23-1608, 23-1613, and 84-304(4), has authority to conduct an audit of a county's records and, on behalf of the State of Nebraska, charge for the services rendered in conjunction with that audit.

Did the county have the authority to enter an agreement for the audit which is the subject of the present proceedings?

Neb. Rev. Stat. § 23-104 (Reissue 1987) provides in part: "Each county shall have power . . . (6) to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." Neb. Rev. Stat. § 23-106(1) (Reissue 1987) directs: "The county board shall manage the county funds and county business except as otherwise specifically provided."

In *Thiles v. County Board of Sarpy County*, 189 Neb. 1, 200 N.W.2d 13 (1972), we held that §§ 23-104(6) and 23-106(1) confer on a county the powers necessary to carry out the

county's governmental duties. In *Thiles*, the court held that a county board has implied authority to hire an administrative assistant. See, also, *Speer v. Kratzenstein*, 143 Neb. 310, 12 N.W.2d 360 (1943) (a county board has implied authority to hire a real estate appraiser to assist the county board of equalization).

As we have already stated, the State Auditor's auditing a county's records is a statutorily authorized activity. When the State Auditor ordered that York County's records be audited, obtaining an audit was mandatory under § 23-1608, and not a discretionary matter for the county board.

In *Thiles*, we said: "[C]ounty boards may not hire a person to perform (1) unauthorized acts, (2) official discretionary duties of the board, or (3) statutory official duties of the board or another county or state official." 189 Neb. at 6, 200 N.W.2d at 18. In construing the statutory predecessor of § 84-304, this court, in *Campbell v. Douglas County*, 142 Neb. 773, 7 N.W.2d 764 (1943), pointed out the alternatives regarding an audit—one conducted by the State Auditor or by a qualified accountant. In *Campbell*, this court also recognized that audits of governmental offices or agencies were "conducted by and primarily for the interests of the state." 142 Neb. at 777, 7 N.W.2d at 767. Forgoing an illustrative description of a county's or county official's accountability and potential liability to various governmental entities, such as the State of Nebraska, school districts, and other public bodies authorized to levy taxes, we believe York County, as any other county, derives a benefit from an audit of county activities concerning collection, disbursement, and retention of tax revenues. Without a metaphysical analysis of the degree to which the state and county government benefit from a cooperative audit, suffice it to say that a county unquestionably receives a benefit from an audit of its activities involving public moneys. Consequently, we hold that, pursuant to §§ 23-104(6) and 23-106(1), a county, through its county board, has the authority to enter an agreement with the State Auditor to achieve a county audit required by § 23-1608.

When the State Auditor ordered the audit of York County's records, the county had authority to obtain accounting services

to effect the mandatory audit. At its meeting on June 25, 1985, the county board accepted the State Auditor's offer to conduct the mandatory audit. The State Auditor conducted the audit and reported to the county board, which has not negated or disavowed receipt of a benefit consequent to the official audit but has only denied the State Auditor's authority to render the audit. True, the State Auditor and York County lacked an agreement specifying payment for the audit. However, when services are furnished to a party and knowingly accepted by that party, the law implies a promise to pay the reasonable value of the services rendered. *Ruzicka v. Petersen*, 213 Neb. 642, 330 N.W.2d 913 (1983); *Denton v. Nelson*, 205 Neb. 833, 290 N.W.2d 462 (1980).

Under the circumstances, York County is liable for the reasonable value of the audit services rendered by the State Auditor. The district court should have entered declaratory judgment accordingly. Therefore, we reverse the district court's judgment and direct that judgment be entered in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

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NORFOLK IRON & METAL CO., A CORPORATION, SUCCESSOR IN INTEREST TO NIMCO STEEL PROCESSORS, INC., APPELLANT, V. LARRY L. BEHNKE, P.C., AND LARRY L. BEHNKE, INDIVIDUALLY, APPELLEES.

432 N.W.2d 18

Filed November 23, 1988. No. 87-127.

1. **Limitations of Actions: Appeal and Error.** Upon review of a district court's judgment on the issue of the statute of limitations, the findings and decision of that court, unless clearly wrong, will not be set aside.
2. **Appeal and Error.** Where a law action is tried to the court without a jury, the findings of the court have the effect of a verdict and will not be disturbed on appeal unless clearly wrong.

3. _____. In an action at law tried without a jury, it is not the role of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence, and it will presume that the trial court resolved any controverted facts in favor of the successful party and will consider the evidence and permissible inferences therefrom most favorably to that party.
4. **Limitations of Actions: Words and Phrases.** Discovery, as applied to 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 court.
5. _____: _____. Discovery, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer.
6. **Limitations of Actions: Damages: Negligence.** Nondiscovery of all damages is not the equivalent of nondiscovery of a cause of action as set out in Neb. Rev. Stat. § 25-222 (Reissue 1985) relating to the limitations of actions for professional negligence.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

David A. Domina, of Domina, Gerrard & Copple, P.C., and J. Michael Fitzgerald for appellant.

William Jay Riley, of Fitzgerald & Brown, for appellees.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and MORAN and BROWER, D. JJ.

HASTINGS, C.J.

Plaintiff has appealed from a judgment of the district court favoring the defendants, Larry L. Behnke, P.C., and Larry L. Behnke, individually, on the issue of the statute of limitations in a suit alleging professional negligence.

The plaintiff, Norfolk Iron & Metal Co., was the successor in interest to Nimco Steel Processors, Inc., having acquired the remaining 30 percent of the capital stock of Nimco by April of 1983. The Robinson family, including Richard, the president, had been and were the sole owners of Norfolk Iron. Behnke had performed certain accounting services for Nimco, including the preparation of monthly unaudited statements and regular annual audits from 1976 through June 30, 1983. It was on that latter date that Behnke last performed any services for Nimco. On July 1, 1983, Nimco was merged into Norfolk Iron.

The annual audit of the Nimco division for fiscal yearend June 30, 1984, performed by another accountant, disclosed a

scrap metal inventory shortage of approximately 27.5 million pounds (about 344 railroad carloads) valued at about $426,703. This amounted to somewhere in the neighborhood of 75 percent of its total stated inventory. The physical inventory for the 1984 annual audit was taken on July 25, 1984.

This disclosure resulted in the filing of the present lawsuit, alleging professional negligence on the part of Behnke causing a previous overstatement of the inventory. The petition in the case was filed on May 21, 1985. It was plaintiff's theory that it could not determine when the error(s) occurred producing the 1984 discovered shortage, but it claimed that Behnke's relationship was a continuing one and the fact of negligence was not discovered or discoverable until the July 25, 1984, physical inventory. Behnke denied all negligence, but specifically alleged that Nimco's inventory changed essentially from one business day to the next; that each annual audit was a distinct occurrence; and that, therefore, plaintiff's claims as to any deficiency in audits before June 30, 1983, were barred by the applicable statute of limitations.

Neb. Rev. Stat. § 25-222 (Reissue 1985) provides:

> Any action to recover damages based on alleged professional negligence . . . shall be commenced within two years next after the alleged act or omission . . . *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

Trial of the matter was bifurcated, and following a bench trial on the affirmative defense of the statute of limitations, the court made the following findings:

(1) Each annual financial statement required a separate physical inventory, and each separate physical inventory was furnished by Behnke.

(2) Once a year Behnke went out to the yard, took measurements, verified the measurements with books and records, and checked with employees of Nimco to verify the same.

(3) Other than the monthly and annual statements, Behnke did not perform bookkeeping functions for Nimco, nor did Behnke set up, establish, or maintain Nimco's records.

(4) The inventory maintained by Nimco changed essentially from one business day to another.

(5) Each annual audit was a distinct occurrence.

The court then found that the 2-year limitation prescribed by § 25-222 is applicable and that all claims of Norfolk Iron based on any alleged negligence of Behnke that occurred prior to May 21, 1983, are barred by § 25-222. In addition, any cause of action relating to the purchase of stock from shareholders of Nimco in preparation for the merger is barred by § 25-222. Trial on the remaining claims and allegations of damages would be limited to those occurring on or after May 21, 1983.

Appellant's assignments of error may be stated generally as follows:

(1) The trial court erred in holding that § 25-222 bars the appellant's claims based on alleged acts of professional negligence committed more than 2 years before the date when suit was commenced, even though the acts were not discovered, and could not have been reasonably discovered, until less than 1 year before suit was filed.

(2) The trial court erred in failing to hold that the relationship of Behnke with Nimco was undiscoverable until less than 1 year before suit was commenced. (Appellant's contention in this regard is somewhat foggy.)

(3) The trial court erred in concluding that Behnke had made annual inspections of the physical inventory of Nimco, and in concluding that separate engagement letters were used for each year Behnke performed audits.

Upon review of a district court's judgment on the issue of the statute of limitations, the findings and decision of that court, unless clearly wrong, will not be set aside. *Georgetowne Ltd. Part. v. Geotechnical Servs., ante* p. 22, 430 N.W.2d 34 (1988); *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985).

## TWO-YEAR STATUTE OF LIMITATION PERIOD

Norfolk Iron first contends that the trial court erred in concluding that the 2-year limitation prescribed by § 25-222 applies to this case, because the cause of action was not

discovered and could not have been reasonably discovered within the 2-year period. Although Behnke argues that Norfolk Iron alleged negligence on Behnke's part only in his failure to conduct a physical inventory when performing the 1983 audit, this is not accurate. Construing paragraph 9A and E of Norfolk Iron's petition, it is quite apparent that although the alleged negligence in the year 1983 was described in greater detail, those allegations as a whole encompassed the entire period of time that Behnke provided accounting services for Nimco. Therefore, it is necessary to examine in some detail the various aspects of the trial on the issue of the statute of limitations.

Behnke was the only witness called to testify. All other evidence was presented to the trial judge in the form of exhibits, many of which were depositions. The trial judge, considering Behnke's in-court testimony as well as his deposition, the depositions of employees of Nimco, and the depositions of directors of Norfolk Iron, resolved controverted facts in favor of the appellees. The trial judge found specifically as previously stated.

Where a law action is tried to the court without a jury, the findings of the court have the effect of a verdict and will not be disturbed on appeal unless clearly wrong. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). In an action at law tried without a jury, it is not the role of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence, and it will presume that the trial court resolved any controverted facts in favor of the successful party and will consider the evidence and permissible inferences therefrom most favorably to that party. *Id.*

The trial court's findings of fact are not clearly wrong. The following is evidence in the record that supports the trial court's findings of fact:

(1) Behnke testified at trial that each audit each year required a separate and distinct physical inventory and that he conducted a physical inventory of the scrap metal once a year. William Kralicek, Nimco's yard foreman, testified during his deposition that he remembered Behnke's coming out to look at the inventory for yearend audits, and, to the best of his recollection, Behnke was there each year he did an audit.

Additionally, during his deposition Behnke testified that during the middle of June 1983, Nimco stopped shipping to Nucor, its principal purchaser. As a consequence, Nimco had a pile of slabs that had been processed through its equipment and piled on the ground by the office. It is a fair inference that Behnke would not have known these facts unless he had actually been out in the yard and observed the slabs piled by the office.

(2) Behnke testified at trial that for the 1983 yearend audit, he went out to the Nimco yard to examine the scrap metal inventory, took measurements, verified it with the books and records of Nimco, and checked with Kralicek to verify his findings. According to Behnke, this is the same procedure he used each year he did an audit.

(3) Several people involved with Nimco, including Lois Asmus, the bookkeeper, testified in their depositions that Asmus was responsible for keeping the daily books for Nimco. In addition, from Asmus' testimony during her deposition, it is clear that Nimco's books were established before Behnke began doing work for Nimco. Asmus maintained the Nimco books, not Behnke. Behnke's monthly work included checking up on Asmus' work. If an adjustment needed to be made, Behnke pointed it out and explained it to Asmus, and the adjustment would be made. Although Behnke may have adjusted the books, that is not the same as maintaining the books.

(4) Everyone agreed that Nimco's inventory changes day to day.

(5) The finding that each annual audit was a distinct occurrence follows naturally from the preceding findings. Once an audit of a fiscal year was completed and the adjustments were made, Behnke did not go back and do further work with the Nimco books and records covering that fiscal year. Each audit covered only the transactions that occurred since the last audit. As far as numbers from the previous audit appearing in Behnke's yearend audits, he testified that they were included solely for the purpose of comparison.

The trial judge found that the 2-year limitation prescribed by § 25-222 applied to this case. Given the five findings of fact listed above and the finding that the 2-year limitation rather

than the 1-year discovery limitation applied, it can be inferred that the trial judge thought that if Behnke had been negligent throughout the 8 years he was employed by Nimco, any act of negligence could have been discovered within 2 years of the occurrence of the act. Whether a claim could have been discovered within 2 years of the occurrence of an alleged negligent act is a question of fact and, as such, will be upheld on appeal unless clearly wrong.

After the fiscal yearend financial statements were completed, Behnke gave them to the Robinsons. Richard Robinson was aware of the contents of the financial statements. Although not an onsite manager, Robinson did go to Nimco every once in a while to observe the operation. Additionally, it is clear that Robinson was capable of observing the scrap metal inventory and estimating how much was there. Robinson, therefore, had the ability to personally check the scrap metal inventory to verify Behnke's numbers. There is no allegation that Behnke concealed or attempted to conceal anything such that Robinson would not be able to discover any errors had he attempted to do some checking. Therefore, it appears that if Behnke was negligent in the performance of an audit, a claim could have been discovered within 2 years of the occurrence of that negligence. The trial court's finding that the 2-year limitation of § 25-222 applies in this case is not clearly wrong.

Norfolk Iron, citing *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985), argues that the question of when the statute of limitations began to run is a question of law to be determined by this court independently of the trial court's decision. In its brief, Norfolk Iron quotes the following, " '[T]he issue as to when the professional negligence statute of limitations began to run is a question of law.' 221 Neb. at 550." Brief for appellant at 31. By eliminating the first part of the quote, Norfolk Iron has misstated the proposition of law. In *Tiwald*, this court said, "*Since the facts in the present case are undisputed*, the issue as to when the professional negligence statute of limitations began to run is a question of law." (Emphasis supplied.) 221 Neb. at 550, 378 N.W.2d at 673. In the instant case, the facts are in dispute. Therefore, the proposition of law found in the *Tiwald* case is inapplicable.

## ONE-YEAR DISCOVERY EXCEPTION

If the trial judge was, as Norfolk Iron contends, wrong about Norfolk Iron's claims being discoverable within 2 years of the occurrence of any alleged negligent act, then the discovery provision of § 25-222 would apply. Discovery, as applied to 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 court. *Georgetowne Ltd. Part. v. Geotechnical Servs., ante* p. 22, 430 N.W.2d 34 (1988).

If the discovery exception applies, Norfolk Iron would have had to file the petition within 1 year from the date of discovery of the cause of action or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. Norfolk Iron contends that the date of discovery was in July of 1984, when a physical inventory was taken for the 1984 fiscal yearend financial statement. Therefore, according to Norfolk Iron, since the petition was filed on May 21, 1985, the suit was commenced within 1 year after discovery.

Behnke, on the other hand, contends that discovery occurred sometime in the summer of 1983, after the merger of Nimco and Norfolk Iron. He argues that Richard Robinson admits that, after the merger, he went out to Nimco and, after looking around, felt that the inventory was not there. At that point in time, according to Behnke, Norfolk Iron had discovered facts which would reasonably lead to discovery of the cause of action.

In Robinson's first deposition, the following exchange occurred:

> Q When was it that it came to your attention that the shortages that you have alleged in this case may have existed?
>
> A Well, the specific number of shortage, 400-some thousand dollars was brought to my attention during our audit after June of 84 and that's, as I stated in the interrogatories, when the exact numbers were brought to our attention. Throughout the year prior to that, I spent a lot more time at Nimco because it was now a wholly-owned subsidiary of Norfolk Iron & Metal and a part of our corporation and it became very apparent that

the inventory was not what was stated.

Q When did you first become aware that inventory was not as stated?

A The exact time would have been during some time in late July or August of 1984 during our audit when the exact numbers were given to me. It was my feeling during the year prior to that which would have been from July of 83 to—on after the merger that when I went down there that the inventory wasn't there.

Q Okay. Would you say that you had that feeling in July of 83?

A I—it wasn't a case of "Hey, it's not here." It's a case of looking, and as I spent more and more time down there after we took the corporation over, we, meaning Norfolk Iron & Metal, I spent a lot more time there and then as I spent more time there I was better able to evaluate the inventory and it became apparent over the period that it wasn't there.

. . . .

A It was just a gut feeling, just a feeling it wasn't there and it was confirmed when we audited it.

Discovery, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer. *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985).

> " 'Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts.' "

*Id.* at 42, 374 N.W.2d at 854, quoting *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N.W. 630 (1935).

Richard Robinson felt that the inventory was short. He possessed the ability to go through the yard, observe the scrap metal inventory, and estimate what was there in order to check his impression that things were not quite right. Norfolk Iron

argues that it required another certified public accountant to do a physical inventory in order to discover the shortage. Although maybe not capable of discovering the exact extent of the shortage, Robinson was capable of ascertaining for himself that a shortage existed, especially given the size of the shortage that the appellant claims existed. "Non-'discovery' of all damages is not the equivalent of nondiscovery of a cause of action as set out in § 25-222." *Suzuki v. Holthaus,* 221 Neb. 72, 76, 375 N.W.2d 126, 129 (1985).

In *Kelly Klosure v. Johnson Grant & Co.*, 229 Neb. 369, 427 N.W.2d 44 (1988), the plaintiff sued the defendant, an accounting partnership, for alleged malpractice in the performance of accounting services provided in connection with the formation of a DISC, a corporation established for the sole purpose of obtaining exemption from income taxes. The plaintiff, unable to obtain the favorable tax benefits desired because the DISC did not qualify under the Internal Revenue Code, sought damages for the tax years ending April 30 of 1978, 1979, 1980, 1981, and 1982. The plaintiff's petition, filed on July 15, 1982, alleged that plaintiff " 'first acquired knowledge of the aforementioned negligence of the defendant. . . on or about May 13, 1982,' and that the plaintiff had not discovered and could not have reasonably discovered the negligence any sooner." *Id.* at 370, 427 N.W.2d at 45.

This court found that the plaintiff's president knew about the errors constituting malpractice on the part of the defendant long before July 15, 1981. In the summer of 1979, the IRS audited Kelly DISC. In September of 1979, an employee of the defendant was informed by the IRS that the DISC did not qualify for the tax benefits the plaintiff was seeking. The plaintiff's president was told the IRS' position and the reason for it in the summer of 1980. On June 27, 1980, the plaintiff's president wrote a letter to the defendant's employee, enclosing a copy of a letter he proposed to send to the IRS. The letter shows without any doubt that before June 27, 1980, the plaintiff was fully aware that the DISC did not qualify to shelter tax payments and that the defendant had made a mistake that was going to cost the plaintiff money. This court held that the plaintiff was "bound by its knowledge as to specific facts

occurring in specific timeframes." *Id.* at 379, 427 N.W.2d at 50.

In *Georgetowne Ltd. Part. v. Geotechnical Servs., ante* p. 22, 430 N.W.2d 34 (1988), the plaintiff sued the defendant, a civil engineering firm, for professional negligence in failing to properly perform soil testing services such that settling of the plaintiff's building resulted in structural damage. After a separate trial to the court on the issue of the statute of limitations defense, the trial court found that the plaintiff's cause of action was not and could not have been reasonably discovered within 2 years from the date the defendant performed professional services for the plaintiff. Therefore, the plaintiff had 1 year from the date of discovery or the discovery of facts which would reasonably lead to such discovery, whichever was earlier, to commence its action.

On October 4, 1978, the defendant submitted to the plaintiff a written report evaluating soils and making foundation recommendations for the proposed construction of a commercial building. The building was completed by April of 1979. By February of 1982, a crack had appeared in the floor of a restaurant located in the building. The defendant was informed of this, investigated, and advised the plaintiff that the crack was not caused by settling. In March of 1983, the crack reappeared, vertical cracks appeared on the building face, and the roof would not drain water. On April 8, 1983, the plaintiff's architect advised the plaintiff that the problems were possibly caused by settlement occurring in the lower soils. On April 27, 1983, a letter from the plaintiff informed the defendant of the problems and that the plaintiff expected the defendant to take care of any damages that occurred " 'as a result of incomplete or inaccurate soil investigations . . . .' " *Ante* p. 24, 430 N.W.2d at 36. On June 14, 1983, another soil engineering firm presented to the plaintiff a report dated June 8, 1983. The plaintiff filed suit on June 7, 1984.

The trial court ruled that by April 27, 1983, the plaintiff had discovered sufficient facts to cause the statute of limitations to start running. On appeal, the plaintiff argued that the statute did not begin running until June 8, 1983, when the second engineering firm's report was completed. This court upheld the finding of the trial court that the statute of limitations began to

run on April 27, 1983. The plaintiff's letter to the defendant made it clear that the plaintiff was aware of damage to the building, attributed the damage to settling of the building, and held the defendant responsible. Discovery occurred no later than the date of the letter, not on the date the plaintiff had a report from another engineering firm.

If the 1-year discovery limitation applies to this case, the appellant filed its petition too late. Discovery did not occur in 1984, when the yearend audit confirmed Richard Robinson's suspicion that there was a shortage in the inventory and revealed the exact extent of the shortage. Discovery occurred in the summer of 1983, when Robinson first had a feeling that the inventory was short. At that point in time he was on inquiry notice. He had the means of knowledge at hand because he had the ability to check his impression. Robinson failed to make an inquiry in the summer of 1983 but is chargeable with knowledge of a shortage, since, by proper inquiry, he could have ascertained the existence of a shortage.

CONTINUOUS RELATIONSHIP EXCEPTION

If the 2-year limitation period, not the 1-year discovery limitation, applies, then the question becomes: Is there a "continuous relationship" exception to § 25-222 such that Norfolk Iron would not be barred from raising *all* claims based on Behnke's alleged negligence, since it filed the petition within 2 years of the termination of its relationship with Behnke? Actually, there would be two issues to resolve: (1) Is there a "continuous relationship" exception, and (2) if there is such an exception, was the relationship between Behnke and Nimco the kind of relationship covered by the exception?

As recently as August of 1988, this court has acknowledged the existence of a continuous relationship doctrine. See *Kelly Klosure v. Johnson Grant & Co.*, 229 Neb. 369, 427 N.W.2d 44 (1988). Since this court does recognize a continuous relationship exception to § 25-222, does the exception apply in this case?

Norfolk Iron, in arguing that there was a continuous relationship between Nimco and Behnke, attempts to distinguish the facts of *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983), from the facts of this

case. In *Lincoln Grain*, the plaintiff sued its accountants for malpractice in the preparation of yearly audits. The trial court ruled that the 2-year statute of limitations barred some of the plaintiff's claims. On appeal, the plaintiff argued that the continuous relationship exception applied. This court stated:

> Because the inventory peculiar to a track office changed essentially from day to day without connection with any other inventory, past, present, or future, the continuity required for "continuous treatment" is nullified. The subject matter of each audit ceased to exist beyond the last day of the fiscal period being audited. The "condition" was never identical for any two audits rendered by C & L. Any audit by C & L did not refer to any prior audit, was not based on any information contained in a previous audit, did not incorporate or expand any previous audit, and was not carried forward in any form into any subsequent audit. As admitted by Lincoln's witness, each report "would stand on its own." Each audit was a separate, independent and unrelated transaction or occurrence. Consequently, in the present case the doctrine of "continuous treatment" is not available to suspend the time limit prescribed for the commencement of an action for professional negligence. . . .
>
> Under the circumstances of this case the statute of limitations commenced to run when C & L delivered the audit reports or financial statements to Lincoln.

(Citations omitted.) *Id.* at 295-96, 338 N.W.2d at 598.

In its brief, Norfolk Iron lists the following factors as critical differences between this case and *Lincoln Grain*:

(1) Behnke performed audits for Nimco for 8 years.

(2) While in *Lincoln Grain* engagement letters were indispensable for each of the audits rendered, an engagement letter between Behnke and Nimco was used only once.

(3) Unlike the auditors in *Lincoln Grain*, who performed no services other than auditing,

> Behnke (1) set up or revised the bookkeeping system of NIMCO, (2) reviewed and inspected its books and records monthly, (3) prepared and published all the monthly and other interim financial statements of the company (4)

> consulted regularly with NIMCO personnel, and (5) did tax work. Accordingly, Behnke was truly responsible for the overall supervision, maintenance, operation and auditing of the books and records of NIMCO on a continuous basis from 1976 through fiscal year-end 1983.

Brief for appellant at 34.

(4) All of the Behnke audit reports refer to the previous year's audit.

(5) Nimco's inventory was static.

Unfortunately, the record does not support those conclusions. Evidence in the record regarding the use of engagement letters between Nimco and Behnke is virtually nonexistent. It is logical to assume that there was a letter of engagement for the first year. There is, however, no direct indication that there were no other letters of engagement between the parties for the following years. On the contrary, there is some indication of a letter of engagement for the 1983 audit. In his first deposition, Richard Robinson testified that Behnke had been contracted to do the audit performed before the merger. Behnke neither set up nor revised the bookkeeping system of Nimco. While Behnke did make a few recommendations for changes, Nimco decided whether or not the bookkeeping system should be revised and did not always follow Behnke's suggestions. Norfolk Iron's attorney conveys the impression that each audited financial statement could not have been prepared without reference to the previous one. While Behnke did include information taken from the previous year's audit, he explained that this was done strictly for comparison purposes. Use of closing entries in a previous financial statement as opening entries in the next audit does not establish a continuous relationship. Perhaps the most obvious erroneous statement of fact is the claim that Nimco's inventory was static. Everyone testified that Nimco's inventory changed daily.

While the factors that Norfolk Iron listed in its brief that do accurately represent the facts of this case do indeed constitute differences between the facts of this case and *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983), they are not differences that make a difference. In *Kelly Klosure v.*

*Johnson Grant & Co.*, 229 Neb. 369, 427 N.W.2d 44 (1988), the plaintiff, relying on *Lincoln Grain* (as does Norfolk Iron in this case) argued that, due to the "continuous relationship" rule, the statute was tolled until the relationship between the plaintiff and the defendant ended. This court disagreed, stating:

> In the *Lincoln Grain* case, we determined that there was not a continuous relationship between the plaintiff and defendant. We hold that the trial court in this case clearly was correct in holding the doctrine of continuous relationship does not apply to the case before us. Defendant's services were broken up in clearly defined segments, as discussed above. It would be improper to hold otherwise and to adopt plaintiff's position that since plaintiff had hired defendant before the year 1977 and did not terminate defendant's services until August of 1981, the plaintiff had 2 years after the termination to begin an action against defendant. In the case before us, plaintiff was bound by its knowledge as to specific facts occurring in specific timeframes. In this case, we are not concerned with an uninformed patient being treated in a medical situation. The parties here were knowledgeable business people and fully informed.

229 Neb. at 378-79, 427 N.W.2d at 50. This rationale is equally applicable in this case.

## ANNUAL INVENTORY INSPECTIONS

The appellant's third assignment of error is that the trial court erred in concluding that Behnke had made annual inspections of the physical inventory of Nimco, and in concluding that separate engagement letters were used for each year Behnke performed audits. The first half of this assignment of error relates to a factual determination that goes to the merits of Norfolk Iron's claim, not to the issue of whether or not the 2-year limitation period in § 25-222 applies to this case. Furthermore, the second half of the assignment of error simply is not correct. Nowhere in the order did the trial court make a factual finding that separate engagement letters were used for each audit.

The trial court's finding that the 2-year limitation of § 25-222 applies in this case is not clearly wrong. Even if the appellant's

claims could not have been discovered within the 2-year period, the discovery exception to § 25-222 does not help Norfolk Iron, because discovery occurred in 1983, more than a year prior to May 21, 1985, when the petition was filed. Furthermore, the running of the 2-year limitation period was not tolled until the end of the relationship between Nimco and Behnke, because their relationship was not a continuous relationship.

The judgment of the district court is affirmed.

AFFIRMED.

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GENERAL ELECTRIC CREDIT CORPORATION, APPELLANT, V. GERALD B. LEWIS, APPELLEE.

432 N.W.2d 27

Filed November 23, 1988. No. 87-314.

1. **Uniform Commercial Code: Security Interests: Notice.** Compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. Failure to give notice required by the U.C.C. is an absolute bar to recovery.
2. **Uniform Commercial Code: Guaranty: Security Interests: Notice: Words and Phrases.** A guarantor, being one who owes payment or other performance of the obligation secured, is a "debtor" defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and thus entitled to notice.
3. **Uniform Commercial Code: Guaranty: Security Interests: Notice.** Because reasonable notice of sale is designed to give a guarantor an opportunity to protect the guarantor's interest, a notice which fails to inform the guarantor concerning an interest to protect, namely, potential liability for a deficiency after sale, is not reasonable.
4. _____: _____: _____: _____. To satisfy the requirement of reasonable notice, as a prerequisite concerning a guarantor's liability for a deficiency, Neb. U.C.C. § 9-504(3) (Reissue 1980) requires that the secured party-creditor inform the guarantor of a debt concerning the guarantor's potential liability for a deficiency on sale of collateral after the principal debtor's default.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Steven C. Turner and Terrence L. Michael, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

T.J. Hallinan, of Law Offices of Cobb & Hallinan, P.C., for appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and ENDACOTT and QUIST, D. JJ.

SHANAHAN, J.

General Electric Credit Corporation (GECC) appeals from a summary judgment in the district court for Lancaster County, which dismissed GECC's action for a deficiency payment from a guarantor after sale of collateral pursuant to a security agreement in favor of GECC. The district court found that the notice of sale sent by GECC (creditor) to Gerald B. Lewis (guarantor) was ambiguous as a matter of law, and, therefore, GECC could not compel Lewis to satisfy the deficiency remaining after sale of collateral.

On August 7, 1981, as an inducement to GECC's prospective loan to William Thompson III and Donna Ahrens, Lewis executed and delivered to GECC a guaranty covering the present and future debts of Thompson and Ahrens to GECC. On August 10, Thompson and Ahrens entered into a loan agreement with GECC and granted GECC a security interest in a 1981 Mack truck tractor. Lewis was not a party to this security agreement.

Two years later, after Thompson and Ahrens had defaulted on their GECC loan, GECC repossessed the Mack tractor for disposition by private sale. By certified mail on November 18, 1983, GECC sent a "NOTICE OF SALE OF COLLATERAL" to Lewis:

> TO: Gerald B. Lewis
> C/O Lewis Service Center
> 4101 West "O" Street
> Lincoln, NB 68528
>
> PLEASE TAKE NOTICE that the following described collateral of which we have taken possession pursuant to Chattel Mortgage dated August 10, 1983 in which William Thompson III and Donna Ahrens is the Debtor and we are the Secured Party, will be sold by: . . . Private Sale on or after November 30, 1983 at 2333 Waukegan Road,

> Bannockburn, Illinois 60015
> DESCRIPTION OF COLLATERAL: One (1) 1981 Mack Truck Tractor . . . .

At a private sale on February 7, 1984, GECC sold the Mack tractor. After application of sale proceeds to the Thompson-Ahrens debt to GECC, a deficiency of $25,000 remained. In a letter sent on February 10, GECC demanded that Lewis pay the deficiency within 10 days. Lewis refused.

On June 18, 1984, GECC sued Lewis to recover the deficiency on the Thompson-Ahrens debt. Relying on *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987), the district court held: "[T]he notice refers only to Thompson and Ahrens as the debtors and refers only to the chattel mortgage signed by Thompson and Ahrens and not by the defendant, the Court determines that the notice is ambiguous as a matter of law with respect to the defendant guarantor."

In this appeal, the sole issue is the sufficiency of GECC's November 18, 1983, "notice of sale" to Lewis, a guarantor, insofar as the notice relates to an action for a deficiency judgment against a guarantor after the sale of collateral under a security agreement for the principal indebtedness.

Antedating *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*, is *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983). In *Hughes*, Central Auto & Truck Supply, Inc., was indebted to First National Bank by a loan for which Vernor and Diana Hughes were guarantors of Central Auto's debt. When Central Auto defaulted on the loan, First National sent written notice to Vernor Hughes, as president of Central Auto, but addressed the notice to the Hughes residence. The notice informed Hughes about a prospective sale to liquidate the collateral involved in the Central Auto loan, but made no mention about the Hughes guaranty or possible personal liability, as the result of the guaranty, regarding a deficiency after sale of the collateral. This court, in *Hughes*, stated:

> The . . . notice in this case makes no reference to the guaranty; indeed, it makes reference only to the "Financing Statement . . . ," . . . a document which was

> signed individually by neither Mr. Hughes nor Mrs. Hughes. In that regard the notice fails to apprise either Mr. or Mrs. Hughes that a personal deficiency judgment might be sought against any one of them in his or her capacity as guarantor of the corporation's debt. Secondly, as between Mr. Hughes and Central Auto [the corporate debtor], the matter as to whom the notice was sent is ambiguous. The interest of Mr. Hughes in this context conflicts with that of the corporation. It cannot be said that the notice, as addressed, unmistakably advises Mr. Hughes personally that he . . . may be held "liable for any deficiency declared owing after disposal of this collateral." To assume that Mr. Hughes would know that a deficiency could not be obtained against the bankrupt Central Auto is to assume something not supported by the record before us. . . .
>
> It is the rule in this jurisdiction that compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. [Citations omitted.] The failure to give the requisite notice is an absolute bar to recovery. [Citations omitted.] "If the creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law he cannot secure a deficiency judgment." [Quoting from *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974).]

214 Neb. at 46-47, 332 N.W.2d at 677. Thus, First National Bank was unable to recover on the basis of the Hughes guaranty because "there was no notice to the guarantors" concerning a deficiency judgment. 214 Neb at 47, 332 N.W.2d at 677.

Similarly, in *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*, Dale Hinz, who was president of Hi-Bo, and Carol Hinz, who was secretary of Hi-Bo, signed a guaranty for Hi-Bo's debt to Deutsche Credit. When Hi-Bo defaulted, Deutsche Credit sent written notice to Hinzes that there would be a private sale of collateral, which was authorized by Hi-Bo's security agreement with Deutsche Credit. The notice did not mention the Hinz guaranty or prospective personal liability for any deficiency after sale of the collateral. After the private sale and

an established deficiency on the Hi-Bo loan, Deutsche Credit sought to enforce the Hinz guaranty and collect the deficiency from Hinzes. In denying recovery for the deficiency, this court stated:

> Neb. U.C.C. § 9-504(1) (Reissue 1980) provides that after default a secured party may sell the collateral. Section 9-504(3) provides for the disposition of the collateral by public or private sale and, with certain exceptions not relevant to the present inquiry, requires that reasonable notice of the sale be sent by the secured party to the debtor. A guarantor, being one "who owes payment or other performance of the obligation secured," has been held to be a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and thus entitled to notice. [Citation omitted.]

224 Neb. at 465-66, 398 N.W.2d at 695.

> [Hinzes] argue that the notices are, at best, ambiguous and, as such, constitute no notice at all insofar as they individually are concerned.
>
> We conclude that the notices are ambiguous as a matter of law with respect to the guarantors. They refer to but a single debtor, Hi-Bo Farms, and refer only to the security agreement executed by that debtor solely. That ambiguity is to be resolved against plaintiff as the drafter of the notices. *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983).
>
> . . . .
>
> Since the notices are ambiguous as a matter of law and since as a matter of law the ambiguity must be resolved against plaintiff and in favor of the guarantors, the situation is, as the guarantors argue, as if no notice whatsoever had been sent to them.

224 Neb. at 468-69, 398 N.W.2d at 697.

Apparently implicit in *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983), and *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987), is Neb. U.C.C. § 9-504 comment 5 (Reissue 1980), namely, one of the purposes of the Uniform Commercial Code notice provisions is assurance that "persons entitled to receive

[notice] will have sufficient time to take appropriate steps to protect their interests." Consequently, this court has concluded that, because reasonable notice of sale is designed to give a guarantor an opportunity to protect the guarantor's interest, a notice which fails to inform the guarantor concerning an interest to protect, namely, potential liability for a deficiency after sale, is not reasonable. Therefore, to satisfy the requirement of reasonable notice, as a prerequisite concerning a guarantor's liability for a deficiency, § 9-504(3) requires that the secured party-creditor inform the guarantor of a debt concerning the guarantor's potential liability for a deficiency on sale of collateral after the principal debtor's default. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*; *First Nat. Bank & Trust Co. v. Hughes, supra.*

The notice sent to Lewis, as a guarantor, is deficient in view of *Deutsche Credit* and *Hughes*, because GECC's notice failed to refer to Lewis' guaranty and did not inform Lewis that he, as a guarantor of the Thompson-Ahrens debt, would be liable for any deficiency after sale of the collateral. Instead, the notice referred only to Thompson and Ahrens as debtors, and to the "chattel mortgage" signed by those debtors. Since GECC's notice to Lewis failed to inform him that GECC would seek a personal deficiency judgment against Lewis in his capacity as a guarantor, the notice was unreasonable under § 9-504(3).

Compliance with the notice provisions of the U.C.C. is a condition precedent to recovery of a deficiency judgment against a guarantor. *First Nat. Bank & Trust Co. v. Hughes, supra.* GECC failed to satisfy the reasonable notice requirement of § 9-504(3) as a condition precedent to recovery on Lewis' guaranty. We, therefore, affirm the district court's summary judgment for Lewis.

AFFIRMED.

# IN RE INTEREST OF D.L.S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. J.S.C., APPELLANT.

432 N.W.2d 31

Filed November 23, 1988. No. 87-858.

1. **Rules of Evidence: Parental Rights: Juvenile Courts: Due Process.** While the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985), do not apply in juvenile court dispositional hearings such as one to terminate parental rights, they do provide guidance in determining the type of evidence which meets due process requirements.
2. **Parental Rights: Juvenile Courts: Due Process.** A proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process.
3. **Parental Rights: Juvenile Courts: Due Process: Evidence: Proof.** 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.
4. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
5. **Parental Rights: Juvenile Courts: Due Process: Witnesses.** A parent has the right to cross-examine an adverse witness appearing in a proceeding to terminate her or his parental rights.
6. **Parental Rights: Appeal and Error.** In a termination of parental rights case, the Nebraska Supreme Court tries the factual issues de novo on the record and reaches a conclusion independent of the trial court; provided, that when the evidence is in conflict, it considers and may give weight to the trial court's observation of the witnesses and its acceptance of one version of the facts rather than another.
7. **Parental Rights: Trial: Evidence: Appeal and Error.** In its de novo review of a termination of parental rights case, the Nebraska Supreme Court must, even absent an assignment of error, disregard impermissible or improper evidence; provided, however, that an appropriate objection was made at trial.
8. **Parental Rights.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent and child presents an independent reason justifying termination of parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1984).
9. **Parental Rights: Juvenile Courts.** Any treatment made a part of a rehabilitation plan must be specifically ordered by the court.
10. _____: _____. Any treatment ordered as part of a rehabilitation plan must be reasonably related to the plan's objective of reuniting a parent and her or his child.
11. **Expert Witnesses.** Expert evidence is not required to establish matters which are self-evident.
12. **Parental Rights: Words and Phrases.** "Mental deficiency," as used in Neb. Rev. Stat. § 43-292(5) (Reissue 1984), includes an impairment in learning capacity such that one is unable to profit from instruction and acquire parenting skills.

13. **Parental Rights.** The foremost purpose and objective of the Nebraska Juvenile Code is the promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with her or his parents where the continuation of such parental relationship is proper under the law.
14. **Trial: Expert Witnesses.** To be admissible, psychological opinions must be based on reasonable psychological certainty.
15. **Parental Rights.** A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed.

Kevin V. Schlender and Michael Powell, guardian ad litem of J.S.C., for appellant.

Charles W. Campbell, York County Attorney, for appellee.

Bruce E. Stephens, guardian ad litem.

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

PER CURIAM.

In this termination of parental rights case, the father voluntarily relinquished his rights in and to his now 3-year-old daughter, D.L.S. The county court, in the exercise of its powers as a juvenile court, then terminated the mother's parental rights in and to said child. The mother has appealed. Her guardian ad litem and her daughter's guardian ad litem have both aligned themselves with the mother. The errors assigned by and on behalf of the mother combine to challenge (1) certain evidentiary rulings, (2) the reasonableness of the plan of rehabilitation, and (3) the sufficiency of the evidence to support the judgment of termination. We affirm.

The child originally came to the attention of the Nebraska Department of Social Services when her parents brought her into a medical clinic at York, Nebraska, on July 7, 1986, because of a soft lump on the then 14-month-old's head. The physician examining the child discovered a skull fracture, but found no other bruises and no evidence of trauma or brain damage. At that time the parents told the physician they were not sure how the child's injury occurred. The physician testified that he had delivered the child and that until the head injury, she

had been receiving "very good care"; "the child was very clean, well fed. The clothes were clean. The child was usually dressed up in a very nice outfit." There had, however, been some problems with overfeeding and with ear infections.

As a consequence of the report of the head injury by the clinic, a petition was filed alleging the child was within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986) by virtue of being in a situation dangerous to life or limb or injurious to her health and morals, and thus was within the jurisdiction of the juvenile court.

Investigation revealed that the house in which the child lived with her parents was unsanitary in the extreme, and the child was placed in the temporary custody of the department. Following a series of hearings, the court below, on October 24, 1986, ordered that the mother, who is in her midtwenties, rehabilitate herself, so that she might be reunited with her daughter, by meeting a number of requirements within 90 days. The court reimposed essentially the same requirements on January 21, 1987, again to be accomplished within 90 days. These requirements, in summary, were that she (1) cooperate with the department in visiting her daughter and in taking instruction calculated to turn her into a competent parent, (2) secure psychotherapeutic services as deemed necessary by a designated clinic and as directed by the department, (3) secure and maintain steady employment so as to support herself and her child, (4) maintain an appropriate permanent residence for herself and her child, and (5) decide what to do about her relationship with her husband, the child's father.

On May 15, 1987, the State petitioned for termination of the mother's parental rights, pursuant to the provisions of Neb. Rev. Stat. § 43-292 (Reissue 1984), asserting, on the one hand, that the mother had "substantially and continuously or repeatedly" neglected the child and refused to give her necessary parental care and protection and, on the other hand, that she was incapable of proper parenting "because of mental illness or mental deficiency" which was reasonably believed would "continue for a prolonged indeterminate period." The petition also avers that reasonable efforts made under the supervision of the court below failed to remove the conditions

which endangered the child's life, limb, health, or morals, and concluded that termination of the mother's rights would be in the child's best interests.

In turning our attention to the claims of evidential error, we begin by recalling that the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985), do not apply in juvenile court dispositional hearings such as one to terminate parental rights. Neb. Rev. Stat. § 43-283 (Reissue 1984); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). See, also, *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987). However, a proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process, at which parents are entitled to cross-examine adverse witnesses. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Interest of J.S., A.C., and C.S., supra*; *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). Therefore, 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. While the Nebraska Evidence Rules do not apply, they provide guidance in determining the type of evidence which meets due process requirements.

The mother's first evidential concern focuses on the receipt into evidence of sundry reports dealing with the mental and physical condition and treatment of the child's father and one of the mother's boyfriends. The mother contends these documents were improperly received in evidence because they are not relevant and because they contain hearsay statements prejudicial to her, including the statements that the child was in foster care because of abuse and the father's claim that the mother was promiscuous. Assuming that it was error to receive these reports in evidence, the error was harmless and thus provides no basis for reversing the judgment of the court below, for error without prejudice provides no ground for appellate relief. *In re Interest of J.K.B. and C.R.B., supra.*

No prejudice resulted because there was other evidence that the child suffered a skull fracture and that the mother had not

been an adequate parent. Although at the termination hearing the father stated he did not know how his daughter was injured, he at one point prior to the hearing wrote a note saying he had caused his daughter's head injury by striking her with his ring finger. There is no evidence or claim that the mother in any way herself abused the child, but two psychologists testified that the mother suffers from a dependent personality disorder. The first psychologist testified that as a consequence, the mother allows others to assume responsibility for major areas of her life and will leave major parenting decisions to others. Both psychologists were concerned that the mother would choose a boyfriend or spouse who would take control even if such relationship were harmful to the child. The second psychologist nonetheless expressed the opinion that the mother was capable of protecting her daughter from day-to-day dangers. One of these psychologists opined that with therapy which could take as long as 2 years, the mother "could" overcome her dependent personality disorder. The other expressed the opinion that the dependent personality condition was "potentially" treatable with long-term therapy over an indeterminate period of time.

The mother's second evidential complaint is that a self-employed clinical social worker was permitted, over objection, to testify, based on reports of three psychologists, the two psychologists mentioned earlier and another with whom the social worker maintained a professional relationship, that the mother suffered from a mental deficiency, a "brain dysfunction," which would prevent her from ever acquiring adequate parenting skills. While this social worker at one point testified that both she and the psychologist with whom she maintained a "liaison" went over various psychological tests and the reports of the two other psychologists, one of whom specifically ruled out any "intellectual deficiency," it was the psychologist with whom she was professionally related who "interpret[ed] all of the psychological tests," as the social worker was not herself competent to do so. Thus, the social worker was not expressing her own opinion as to the existence of a brain dysfunction, by which statement we do not mean to suggest the record establishes she is qualified to make such a diagnosis, but in reality was merely parroting her

professionally related psychologist's thoughts. Since a parent has the right to cross-examine an adverse witness appearing in a proceeding to terminate her parental rights, the mother correctly contends that by presenting the social worker's related psychologist's thoughts in this hearsay fashion, the State impermissibly deprived her of the opportunity to cross-examine the absent psychologist. *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987); *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

This determination, however, does not end our inquiry, for in a termination of parental rights case, this court tries the factual issues de novo on the record and reaches a conclusion independent of the trial court; provided, that when the evidence is in conflict, we consider and may give weight to the trial court's observation of the witnesses and its acceptance of one version of the facts rather than another. *In re Interest of A.Z., B.Z., and R.Z., post* p. 291, 430 N.W.2d 901 (1988); *In re Interest of J.D.M., ante* p. 273, 430 N.W.2d 689 (1988); *In re Interest of Z.D.D. and N.J.D., ante* p. 236, 430 N.W.2d 552 (1988); *In re Interest of D.C.*, 229 Neb. 359, 426 N.W.2d 541 (1988). See, also, *In re Interest of L.O. and B.O.*, 229 Neb. 889, 429 N.W.2d 388 (1988). In such de novo review, we must disregard impermissible or improper evidence, *In re Interest of A.Z., B.Z., and R.Z., supra,* and *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987), even if the mother had not assigned the admission of such evidence as error, provided that, as is true in this case, an appropriate objection was made at trial. Thus, we must consider whether the evidence independent of the clinical social worker's testimony clearly and convincingly, *In re Interest of J.S., A.C., and C.S., supra* (citing *Castellano v. Bitkower,* 216 Neb. 806, 346 N.W.2d 249 (1984)), establishes grounds for terminating the mother's parental rights.

Since a parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent and child presents an independent reason justifying termination of parental rights under § 43-292(6), *In re Interest of A.Z., B.Z., and R.Z., supra*, and *In re Interest of L.O. and B.O., supra*, we begin by considering the plan and the mother's

performance with respect to it.

As to the first aspect of the plan, that the mother cooperate with the department in visiting her daughter and in taking instruction calculated to turn her into a competent parent, the evidence establishes that the mother did cooperate with the department in visiting her daughter and did take the required instruction. The evidence also establishes, however, that although the mother has shown some improvement in her parenting ability, she has not succeeded in applying much of what she has been taught. A social worker employed by the department testified that at the time she saw the mother's residence, it met "minimal standards" but nonetheless "would have had to have been much cleaner to allow unsupervised visits."

The evidence shows that the mother bought the child gifts, had her room redecorated, and greeted her warmly during visits. While initially the child was excited to visit with her mother, as time went on the child became less affectionate toward her mother. On at least one occasion, discipline was observed to break down to the point that the mother and daughter "verbally attack[ed] each other," and many of the mother's comments to the child were negative or neutral. The same social worker who found the mother's residence to meet no more than minimal standards was also of the opinion that the mother had difficulty meeting her daughter's physical, emotional, and intellectual needs and would never be able to provide the child with a stable environment. Following the recent visits with her mother, the child became hyperactive, buried herself in play, cried herself to sleep, lost her appetite, had nightmares, and took a couple of days to return to normal. What is not clear from the record is whether this reaction was the result of the child's interaction with her mother or, rather, was the result of sorrow at being separated from her mother.

The mother attacks the reasonableness of the second aspect of the plan, that she secure psychotherapeutic services as deemed necessary by a designated clinic and as directed by the department, by arguing that the court below impermissibly abdicated its judicial responsibility by leaving the nature and frequency of the therapy to be administered to the discretion of

the clinic and department. The attack is well founded. Although a juvenile court judge certainly cannot be expected to diagnose a parent's condition, determine whether treatment is indicated, and then design a course of treatment, any treatment made a part of a rehabilitation plan must be specifically ordered by the court. *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985); *In re Interest of L.J, J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). In this way, the juvenile court can assure itself that the treatment recommended is reasonably related to the rehabilitative objective of its plan. *In re Interest of L.O. and B.O.*, 229 Neb. 889, 429 N.W.2d 388 (1988); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

Notwithstanding the legal infirmity of the subject aspect of the plan, the fact remains that the mother did undergo the psychotherapy as required by the designated clinic and the department. Contrary to the mother's claim that such therapy had nothing to do with her dependent personality disorder, the evidence is that part of the therapy was directly aimed at helping her make decisions on her own. The lack of that ability is the essential feature of the disorder in question.

The plan next required that the mother secure and maintain steady employment so as to support herself and her child. The record shows that by the time of the termination hearing, the mother had obtained part-time employment as a waitress, earning minimum wages and gratuities.

The plan also required that the mother maintain an appropriate residence for herself and her child. The evidence establishes that the mother was more peripatetic than most, having moved four times in a 10-month period. However, each residence provided space, bedding, and furnishings for her daughter. At the time of the termination hearing, the mother was maintaining a household in an apartment she was sharing with her sister.

Finally, the plan required that the mother decide what to do about her relationship with her husband, who was abusive toward both her and the child. The evidence is that she decided to dissolve the marriage, and did so.

This brings us, then, to the question of whether the evidence

establishes the grounds for termination of the mother's parental rights as alleged in the State's petition; that is, does the evidence establish that the mother (1) continuously or repeatedly neglected or refused to give her daughter necessary care and protection, and, if so, (2) failed to substantially comply with the juvenile court's plan to rehabilitate her to a condition whereby she and her daughter, consistent with the latter's well-being, could be reunited, or, if not, (3) suffers from a "mental illness or mental deficiency" which is reasonably believed will "continue for a prolonged indeterminate period"?

The evidence convinces us the mother gave her child such care and protection as her abilities enabled her to provide. Thus, we must conclude the evidence fails to establish the State's first ground for termination.

Neither does the evidence establish that the mother failed to comply with the juvenile court's plan of rehabilitation. She did substantially all that was required of her, albeit she failed to obtain employment as quickly as directed. She took all the training and therapy she was directed to take. While the housing she maintained met no more than minimum standards, it cannot be said that housing which meets minimum standards provides a basis for terminating parental rights. She dealt with her relationship with her husband by divorcing him. Thus, the evidence fails as well to establish the State's second ground for termination.

The third and last ground for termination, however, is another matter. The evidence establishes that although the mother did what the plan of rehabilitation required of her, she remained substantially incapable of applying what she was taught. She was not unwilling to do what was asked in an effort to learn to become a competent parent, but she found herself unable to acquire the requisite skills. While the record ascribes no specific reason for the existence of this lack of learning ability, there is no question but that it is present. Expert evidence is not required to establish matters which are self-evident. See *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987). Thus, notwithstanding the lack of expert opinion that the mother suffers from a "mental deficiency," the evidence compels the conclusion that

such a deficiency nonetheless exists. See, also, *In re Interest of J.D.M., ante* p. 273, 430 N.W.2d 689 (1988); *In re Interest of R.L.T.*, 221 Neb. 251, 376 N.W.2d 310 (1985).

In the context of a statute which permitted the sterilization of "mentally deficient" patients seeking release from a certain state institution, we said the statute referred to those who were "feeble-minded" or "mentally retarded." *State v. Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968), *reh'g denied* 183 Neb. 243, 159 N.W.2d 566, *appeal dismissed* 396 U.S. 996, 90 S. Ct. 543, 24 L. Ed. 2d 490 (1970). Whatever "feeble-minded" or "mentally retarded" may mean in its various contexts, we hold that as used in § 43-292(5), "mental deficiency," as distinguished from "mental illness," includes an impairment in learning capacity such that one is unable to profit from instruction and acquire parenting skills. See *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977), *modified* 612 F.2d 84 (3d Cir. 1979).

Having made that determination, it is necessary to remind ourselves that the foremost purpose and objective of the Nebraska Juvenile Code is the promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with her or his parents where the continuation of such parental relationship is proper under the law. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). Thus, the crucial question becomes whether the determination that the mother suffers from a mental deficiency in the previously reviewed context clearly and convincingly establishes that it is in the daughter's best interests that her mother's parental rights be terminated. We must conclude that the record does so establish.

There is no evidence whatsoever regarding the curability of the mother's mental deficiency as such. To the extent it can be inferred the mother's inability to learn is but a component of her dependent personality disorder, the evidence is only that the disorder is potentially treatable and only that the disorder "could" be overcome. No psychologist expressed an opinion based on reasonable psychological certainty that the mother's disorder would be cured.

Psychological evidence based on possibility is no less

speculative and conjectural than like testimony by other experts. Just as we require medical opinions to be based on reasonable medical certainty, *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983), so do we require that psychological opinions be based on reasonable psychological certainty.

Moreover, even to the extent the disorder is theoretically treatable, assuming that to mean it is curable, the record tells us that the treatment would extend over an indeterminate period. The only concrete suggestion is that treatment would take another 2 years. We cannot gamble away an additional 2 years of this child's life on the speculative hope that the mother can overcome the deficiency which she, albeit through no fault of her own, brought to motherhood. As we have noted in the past, a child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of Z.D.D. and N.J.D., ante* p. 236, 430 N.W.2d 552 (1988); *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987). See, also, *In re Interest of J.D.M., supra.*

AFFIRMED.

FAHRNBRUCH, J., concurs in the result.

GRANT, J., concurring.

I concur with the result reached by the majority, but I base my judgment that the parental rights of J.S.C., the mother of D.L.S., should be terminated on somewhat different and broader grounds than does the majority opinion.

The first of the mother's "evidentiary errors" concerns the receipt into evidence of various reports concerning the mental health commitments of the mother's husband and her boyfriend. J.S.C. had divorced her husband at some time between the time the child in question was removed from her mother and father and the time of the termination hearing. The mother's boyfriend had been the companion with whom she lived for some months during the same period of time. The majority opinion dismisses this evidentiary problem, stating that the error, if any, in receiving such evidence was harmless, in that there was other evidence about the injury to the child.

In my opinion, the evidence was admissible and important in

the trial court's decision. It was established, beyond question, that the mother suffered from a dependent personality disorder. There was credible testimony that as a result of this condition the mother allows others to assume responsibility for major areas of her life and will leave major parenting decisions to others. Since this is the case, it would seem to be important to determine with whom the mother was living during the 13-month time in question (between the removal of the child and the termination hearing), since those persons may well be responsible in the major areas of the mother's life and could well be making parental decisions if the child were placed with the mother.

The foundation as to these exhibits was waived. The exhibits were objected to at the trial on the basis of relevance and because the exhibits contained hearsay about the mother's relationship with her husband and her boyfriend. At this point, considering only the relevancy of the exhibits, I have no difficulty in determining they were relevant. The four exhibits complained of showed, in part, that the husband was placed in the Hastings Regional Center on October 28, 1986, for treatment of severe alcohol problems culminating in a suicide attempt (by wrist-slashing, requiring eight stitches). The husband was determined to be dangerous to himself at that time. He was released from the regional center on November 21, 1986, returned to the residence of J.S.C., and was admitted to the Lincoln Regional Center on November 28 because of another suicide attempt resulting from an overdose of drugs. This attempt required the pumping of the husband's stomach. At this point, the husband told the treating authorities that he felt he was a danger to others because when he loses his temper, he becomes violent. This fact was corroborated in the testimony of J.S.C. The husband was found to be dangerous to himself and to others at this time. He was discharged on January 21, 1987. It seems to me those facts are relevant when the trier of fact is in the process of determining if this child should be returned to the mother.

Similarly, in connection with the exhibit concerning J.S.C.'s boyfriend, with whom she took up residence at some time before the husband's admission to the Lincoln Regional Center

in November of 1986, the report shows that on June 8, 1987, this man was admitted to the Hastings Regional Center after commitment from the York County Mental Health Board. One week before that commitment, the boyfriend had been taken to the Lincoln Regional Center because of suicide threats. At that time, it was determined that this man's problem was based on alcohol and drug abuse. He had been in the Hastings Regional Center in September of 1986 for the same problems. The man was apparently discharged from the second treatment on June 30, 1987. Testimony from the mother during the trial established that this person also was physically violent with her and others while they were together. Again, I think it was relevant to consider the characteristics of this person who was apparently in charge of the mother's life for many months prior to the termination hearing.

It might also be noted that the trial court received similar evidence to show that a man who resided with the mother and her boyfriend (along with the visitor's girlfriend, the girlfriend's infant child, and occasionally the girlfriend's two brothers) in the summer of 1987 was on probation from a felony conviction. This evidence was objected to on the ground of relevance but was not made the subject of an assignment of error. I think this evidence was also relevant for the reasons set out above.

I agree generally with the majority's treatment of the evidence adduced from a social worker who submitted opinions based on reports of three psychologists, but I believe that only the testimony based on the opinion of the one psychologist who was not called as a witness in the hearing should be ignored. The social worker herself made valid factual observations which were properly admitted, and the other two psychologists testified. The testimony of the witness in question was proper, except as to all testimony concerning opinions of the missing psychologist.

Insofar as the majority opinion sets forth the factual issues to be tried de novo in this court, I believe the record contains many facts which must be considered. First of all, the physician who treated the child's skull fracture did testify that the child had received "very good care," but he testified on cross-examination that he was not aware of the poor and

extremely unclean condition of the child's home when picked up, nor was he aware of the father's mental illness nor the mother's personality disorder. The doctor's opinion as to "good care" is certainly not controlling on the disposition of this case.

With regard to the trial court's finding that termination of parental rights was in the child's best interests, the trial court also had before it, as do we, testimony that when the husband was discharged from the Hastings Regional Center on November 21, 1986, he stayed with the mother and boyfriend. This situation "caused problems," and the father again attempted suicide, resulting in the father's admission into the Lincoln Regional Center on November 28, 1986.

At a later time, the mother described her living conditions in May of 1987, when she was living in a trailer court with her boyfriend Bill, and testified:

> Well, at the end of May my ex-husband [the father of the child] came up with his girlfriend and my ex-husband started to drink and he was doing something to his girlfriend — trying to strangle her because she would not give him the keys so he could go back to Lincoln. And Bill seen him strangle her and Bill pulled [the husband] off of there — off of her. And [the husband] hit Bill and Bill hit [the husband] and [the husband] fell to the ground. We got kicked out of the trailer park.

The mother admitted to a social worker therapist, who was counseling with the mother, that she did not know why she is attracted to people who engage in drinking, get into trouble with the law, and maintain adversary relationships with other authority figures. This witness testified, on cross-examination, that the mother has a "sense of excitement" in being involved with such people. This therapist further testified that sort of attraction is not likely to change in the future, because the mother relies heavily on impulse, wants to have a close relationship with a man, and wants to have attention.

This witness' observations are reflected in the facts of this case. The mother divorced the father of her child because he was violent, abusive, physically assaulted her, attempted suicide twice, and had a severe alcohol problem.

While the mother of this child was apparently legally married

to one man throughout these proceedings, she was also intimately involved with another—also throughout the proceedings—up to a month or two before the hearing. As the mother began to rid herself of one abusive, violent, alcoholic partner (her husband), she immediately, if not sooner, moved in with another violent, abusive, alcoholic, drug-taking partner, who also beat her and attempted to commit suicide. I cannot see that this progression of events shows the mother is improving in her ability to parent this child.

The facts on J.S.C.'s dissolution of marriage are not in the record, but it can be approximately calculated that the divorce apparently was to become final in approximately October of 1987. If that is so, the dissolution decree would have been signed in approximately April of 1987, and the action begun at least 60 days before that. It is difficult to have to make such approximations, but no facts were presented on this easily provable fact.

In connection with the mother's inviting her ex-husband and his then girlfriend to stay with the mother and her then boyfriend, one psychologist testified that the concern she had about the mother's activities was that the mother did not perceive this situation as a potential problem. Whether one is concerned about the mother's amoral approach to life or not, one would have to be concerned if the mother did not have enough insight to perceive the real possibility of violence arising out of the situation the mother had created. Such violence did, of course, erupt, with the result of eviction from the trailer park residence above referred to.

With regard to the subject of the mother's employment, the record shows that after her graduation from high school, the mother worked for the same employer for 3 1/2 years. She quit her employment only when she became pregnant with D.L.S. She is obviously employable, but she did not work during the 13 months in question when D.L.S. was being cared for by others. The record does not show how J.S.C. provided for her own existence during this time. She did obtain a job 1 week before the termination hearing. I believe the mother's activities with regard to employment, which was ordered by the court in an attempt to let the mother prove that she could become an

independent parent, show that the mother does not intend to exert herself to provide her child a safe home.

With regard to the trial court's requirement that the mother maintain an appropriate residence for herself and the child, the residences which the mother provided, up to the time she moved in with her sister, have been generally referred to and described above. I do not believe that any of these residences provided appropriate space, bedding, or furnishing for her child, with the exception of the apartment referred to in the next paragraph.

The mother's ability to maintain a clean residence was explained by the mother to a protective services worker with the Department of Social Services in York. In one of J.S.C.'s residences after leaving her husband, she resided in an apartment. When the protective services worker was unable for some period of time to talk to the mother at the apartment, she indicated to him that she had not been living in the apartment because she wanted to keep it clean; she felt if she did not live there it would not get dirty; and then when the protective services worker came to see the apartment, he would find it clean. The mother informed him that she spent the nights and some daytime hours at the apartment of a friend in the same apartment building.

With regard to the mother's visitation, I find no indication in the record that the mother initiated any visitation. The social worker who supervised the foster parent placement for the child arranged for much of the visitation. It appears that the child was brought to the mother's various residences, but none of them were clean enough to enable the child to be left with the mother all day unless there was supervision. Neither could the child be left overnight with the mother.

I believe that the evidence clearly and convincingly establishes grounds for the termination of the mother's parental rights and that the trial court and this court have reached a legally correct result. In fact, I cannot think it remotely proper to subject this helpless baby, growing into a vulnerable little girl, to an environment where violence, abuse, alcohol, and drugs reign supreme, and where no one appears to be able or willing to defend this helpless little human being from the hazards that

inevitably flow from such conditions.

HASTINGS, C.J., and BOSLAUGH, J., join in this concurrence.

CAPORALE, J., dissenting.

I must dissent, for while I do not suggest the mother should be given immediate possession and custody of her daughter, the record, in my mind, demonstrates she has made sufficient progress to warrant granting her additional time within which to attempt further improvement.

When all is said and done, the majority forever severs the natural and constitutionally protected relationship between a young mother and her infant daughter because discipline broke down on at least one occasion; because the child reacts with some agitation after visiting with her mother; and because, in the opinion of a social worker, the mother has experienced difficulty meeting the daughter's physical, emotional, and intellectual needs and will never be able to provide the child with a stable environment. Notwithstanding the fact that the record provides us with no information as to why the child reacts as she does after leaving her mother, the majority characterizes the evidence as "clearly and convincingly" establishing that the best interests of the child will be served by immediately turning her into an orphan.

The fact the mother divorced the child's abusive father apparently does not impress the majority; the fact the mother found employment, although later than directed, apparently does not impress the majority; the fact the mother took the myriad other steps she was ordered to take in an effort to improve her abilities as a parent apparently does not impress the majority.

I do not overlook that the mother has thus far not been able to apply all she has been taught about becoming a model parent or that there is no competent evidence that she will be able to do so. The burden, however, is not on the mother to prove she can learn, but on the State to prove that she cannot. It is the State which has the burden of proving by clear and convincing evidence that grounds exist for terminating parental rights; it is not the parent's burden to prove by any evidential standard that no such grounds exist. As this very court has observed:

> "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. . . ."

*In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 264, 417 N.W.2d 147, 156 (1987). See, also, *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

I recognize, too, that a child cannot and will not be made to await uncertain parental maturity. *In re Interest of Z.D.D. and N.J.D., ante* p. 236, 430 N.W.2d 552 (1988); *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987). See, also, *In re Interest of J.D.M., ante* p. 273, 430 N.W.2d 689 (1988). This court has observed, however, that the foregoing principle should not be used to tread upon the rights of either a parent or a child. *In re Interest of L.J., J.J., and J.N.J., supra.* Although the juvenile justice system far too frequently takes much too long to do what obviously must be done, in my view the system has acted far too hastily in this instance, and in so doing has trampled upon the mother's constitutionally protected parental rights.

Clear and convincing evidence has been defined to be 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. *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985); *In re Guardianship of Sain*, 217 Neb. 96, 348 N.W.2d 435 (1984); *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). The evidence in this case simply does not

rise to that level at this point. As the guardian ad litem for the child suggests, on the record presented the mother is entitled to additional time to learn to be an adequate, if not a model, parent; if more time continues to demonstrate she cannot apply what she is taught, the State will then have the requisite evidence.

In saying that the evidence clearly and convincingly establishes grounds for termination of the parental rights of the mother at this point, the majority, in my view, has used legally correct words to reach a legally incorrect result. As a consequence, the relationship between every parent and child in this sovereign state has been impoverished.

WHITE and SHANAHAN, JJ., join in this dissent.

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STEVEN JAMES KNIEVEL, APPELLEE, V. TAMARA JEAN KNIEVEL, APPELLANT.
431 N.W.2d 648

Filed November 23, 1988. No. 87-1126.

1. **Divorce: Appeal and Error.** In an appeal involving actions for dissolution of marriage, 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.
2. **Child Custody.** A court may place custody of minor children in the court when it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Michael L. Munch, of Hascall, Jungers & Garvey, for appellant.

Michael N. Schirber, of Arps & Schirber, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage in which the only issue on the appeal is the custody of the child of the parties, Kelly, who was born January 16, 1983. The trial court retained custody of the child, with possession awarded to the petitioner husband, subject to liberal and reasonable visitation by the respondent wife.

The respondent has appealed and contends that custody of the child should have been awarded to her.

Neb. Rev. Stat. § 42-364 (Cum. Supp. 1986) authorizes the trial court to retain custody of minor children and award possession to one of the child's parents if appropriate. In *Bartlett v. Bartlett*, 193 Neb. 76, 78-79, 225 N.W.2d 413, 415-16 (1975), we stated that § 42-364

> authorizes the court to place the custody of minor children in the court, to determine custody on the basis of the best interests of the children, and to make subsequent changes when required. When the best interests of the children, in regard to custody, [are] not clear, the court may, and should, place custody in the court. In regard to such disposition we have stated that: "Its purpose is to 'facilitate judicial supervision and summary power to act swiftly in their (the childrens' [sic]) best interests.' . . . The parent having possession where the court has retained custody is in effect an agent of the court." Benson v. Benson, 190 Neb. 87, 206 N.W.2d 51.
>
> It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties.

There is substantial evidence in this case that the child was subjected to sexual abuse by the respondent's brother while the child was being cared for in the home of the maternal grandmother, where the uncle resided. The respondent's attitude has been to deny that the abuse occurred.

The petitioner suffers from alcoholism, for which he has been receiving treatment.

A child therapist and counselor, who conducted 11 counseling sessions with the child in 1987, testified that therapy should continue for 1 1/2 to 2 years and that it was important for the child to receive support from the parents in regard to the therapy. This witness described the petitioner as being supportive of therapy for the child, but stated that the respondent tended to minimize the possibility that the child had been sexually abused. Apparently, the respondent did not feel that therapy was necessary. In a letter to the guardian ad litem, dated November 4, 1987, the therapist stated that the respondent

> has also made it very clear that she believes therapy is unnecessary for Kelly. At one point in therapy, when I switched Kelly from every two weeks to weekly appointments due to the significance of issues Kelly was dealing with at the time, Tammy was quite resistive.
>
> . . . .
>
> I have serious questions regarding Tammy's intentions to follow through on necessary outpatient psychiatric treatment for Kelly should she receive custody.

The guardian ad litem for the child reported that the child's best interests would be served by residing with the parent who would promote continued counseling. The guardian concluded that both parties were capable parents and that placement with the respondent would be reasonable so long as counseling would be continued. The guardian expressed concern, however, that the respondent might be unwilling to comply with counseling recommendations. Finally, the guardian stated that should respondent not cooperate with treatment for the minor child, custody should be with the petitioner.

In announcing his decision, the trial judge made the following statement in regard to the matter of custody:

> I have some doubts as to whether or not I've gotten all the evidence in or whether the final determination is ready to be made as to the [sic] what the best interests of Kelly is. And I say that because of the alleged sexual abuse by the uncle and I say it also because the status of Mr. Knievel as

> an acknowledged alcoholic with an admitted problem to deal with the disease during the last six months or a year.
>
> However, because of Mr. Knievel's forthright acknowledgement and admissions of the problem, and his failings, it gives weight to or support to his position as a primary posssessive [sic] party as opposed to Mrs. Knievel, and the family's response to the other problem.

In an appeal involving actions for dissolution of marriage, 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. *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

As we stated in the *Christen* case at 270-71, 422 N.W.2d at 95,

> "It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. There has not been a final determination of fitness in regard to either party. That question remains open and subject to determination after further notice and hearing."

Our review of the record discloses no abuse of discretion by the trial court. The judgment is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. ROY K. LYMAN, APPELLANT.

432 N.W.2d 43

Filed November 23, 1988. No. 88-033.

1. **Criminal Law: Sentences.** It is sufficient for the trial court to explain the possible range of penalties for each crime. It is not necessary to explain that the sentence on each count might run concurrently or consecutively to any other sentence imposed.
2. **Criminal Law: Weapons: Sentences.** A defendant charged under Neb. Rev. Stat. § 28-1205 (Reissue 1985) must be advised that it is mandatory that any sentence imposed on that count be consecutive to any other sentence imposed.
3. **Criminal Law: Sentences: Pleas.** The purpose of the rule requiring that the defendant be advised of mandatory consecutive sentencing is to apprise the defendant of the minimum time he will serve in prison so that his plea of guilty is given with full knowledge of the consequences.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

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

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

PER CURIAM.

The defendant, Roy K. Lyman, was originally charged with two counts of attempted first degree murder, first degree assault, second degree assault, and four counts of use of a knife in the commission of a felony. Pursuant to a plea bargain, the defendant pleaded guilty to an amended information charging two counts of first degree assault and one count of use of a knife in the commission of a felony. He was sentenced to imprisonment for 5 to 10 years on each count, the sentences to run consecutively, with credit for 206 days' jail time on the sentence on count I.

The defendant has appealed and contends his pleas were not voluntary because at his arraignment the trial court did not advise him that, under Neb. Rev. Stat. § 28-1205(3) (Reissue 1985), it was mandatory that the sentence on count II, use of a

knife in the commission of a felony, be consecutive to any other sentence imposed.

All three counts of the amended information alleged Class III felonies punishable by imprisonment for 1 to 20 years, or a fine of up to $25,000, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). At the arraignment the trial court advised the defendant as to the range of penalties as follows:

> Q. Do you understand that the possible punishment under each of these charges is imprisonment for not less than one nor more than 20 years?
>
> A. Yes.
>
> Q. And a fine of up to $25,000?
>
> A. Yea.
>
> Q. Either and/or on each one of them. Do you understand that further they could be stacked, if you will, in other words, they could be made to run one after the other and the fines could be tripled, in other words, $25,000, up to 25,000 on each one of them? Do you understand that?
>
> A. Yes.
>
> Q. So you're talking about a possibility of up to as high as three to 60 years on the imprisonment. Do you understand that?
>
> A. Yes, sir.

In *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), the defendant was sentenced to imprisonment for 1 year for second degree forgery, the sentence to run consecutively to a 5- to 10-year sentence for manslaughter the defendant was then serving. On appeal, the defendant claimed his plea of nolo contendere was not made intelligently and voluntarily because the trial court failed to inform him that the forgery sentence might run consecutively to the manslaughter sentence. We held that it was sufficient for the trial court to explain the possible range of penalties for each crime and that it was not necessary to explain that each sentence might run concurrently or consecutively to any other sentence imposed.

The defendant relies on *State v. Golden*, 226 Neb. 863, 415 N.W.2d 469 (1987), in which the defendant was charged with third degree assault on an officer and use of a firearm in the

commission of a felony. Upon pleas of guilty to both charges, the defendant was sentenced to 3 years' probation, including 90 days in jail. We held that the failure to inform the defendant that any sentence on the use of a firearm count must be made consecutive to any other sentence made the pleas involuntary.

The distinction in this case is that the trial court informed the defendant that the sentences could be "up to as high as three to 60 years." In fact, the minimum sentence, if the defendant was not placed on probation, could have been 2 years, since the sentences on counts I and III could have been made to run concurrently.

The purpose of the rule requiring that the defendant be advised of mandatory consecutive sentencing is "to apprise the defendant of the minimum time he will serve in prison so that his plea of guilty is given with full knowledge of the consequences." *People v Mitchell*, 102 Mich. App. 554, 557, 302 N.W.2d 230, 231 (1981). In this case the defendant was advised that the minimum sentence would be 3 years.

While it was error to fail to inform the defendant that it was mandatory that the sentence on count II run consecutively to any other sentence imposed, it was not prejudicial because the defendant was informed that his combined minimum sentence would be at least 3 years. Under these circumstances, the error was not prejudicial and does not require that the judgment be reversed.

The judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I agree with the majority that it was error to fail to inform the defendant that it was mandatory that the sentence on count II run consecutively to any other sentence imposed. However, based on *State v. Golden*, 226 Neb. 863, 415 N.W.2d 469 (1987), I feel the majority is incorrect in holding that this error is not prejudicial just because the defendant knew the sentences "could be stacked" and that he could serve "a possibility of up to as high as three to 60 years on the imprisonment."

In addition to the requirements set out in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and as we held in *Golden, supra*, it is prejudicial error if the defendant is not informed of

the minimum sentence or that the applicable sentencing statute mandates each sentence to run consecutively to any other sentence imposed.

SHANAHAN, J., joins in this dissent.

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CINDY MCLAUGHLIN, APPELLANT AND CROSS-APPELLEE, V. DANIEL MCLAUGHLIN, APPELLEE, AND GREAT WEST CASUALTY COMPANY, APPELLEE AND CROSS-APPELLANT.

432 N.W.2d 45

Filed November 23, 1988. No. 88-037.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Joy Shiffermiller, of Atkins Ferguson Zimmerman Carney P.C., for appellant.

James J. DeMars, of Barlow, Johnson, DeMars & Flodman, for appellee Great West Casualty.

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

PER CURIAM.

On rehearing in the Nebraska Workers' Compensation Court, Cindy McLaughlin was awarded benefits for injuries sustained when she fell while loading trucks for her husband's business, McLaughlin Trucking, for which Great West Casualty Company provided workers' compensation insurance coverage.

The Workers' Compensation Court awarded Cindy McLaughlin benefits for both temporary total disability and permanent partial disability to the body as a whole. See Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986).

Plaintiff appeals, and defendant Great West cross-appeals. Plaintiff claims that the amount awarded was incorrect. The defendant Great West claims that plaintiff was not an employee entitled to benefits under the Workers' Compensation Act.

We affirm the decision of the Workers' Compensation Court.

> Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. [Citations omitted.] In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. [Citations omitted.] Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. [Citations omitted.] As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.

*Fees v. Rivett Lumber Co.*, 228 Neb. 617, 620, 423 N.W.2d 483, 486 (1988). See, also, Neb. Rev. Stat. § 48-185 (Reissue 1984); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987); *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

The record shows conflicting evidence concerning the errors alleged by the parties. Conflicts in the evidence were resolved by the Workers' Compensation Court. It is not the province of this court to disturb findings by the Workers' Compensation Court unless those findings are clearly erroneous. The record substantiates the fact findings made by the Workers' Compensation Court. Finding no clear error regarding the award, we affirm the judgment of the Workers' Compensation Court.

AFFIRMED.

# IN RE INTEREST OF RODERICK JONES, A CHILD UNDER 18 YEARS OF AGE.
# STATE OF NEBRASKA, APPELLEE, V. RODERICK JONES, APPELLANT.

432 N.W.2d 46

Filed November 23, 1988. No. 88-345.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile proceeding to this court is heard de novo upon the record, and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. Also, the trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **Juvenile Courts: Statutes.** A juvenile court has broad discretion as to the disposition of a child found to be delinquent. The juvenile court judge has broad discretion under Neb. Rev. Stat. § 43-286 (Supp. 1987), the disposition statute. Section 43-286(1)(c) provides that a juvenile adjudicated to be a juvenile described in Neb. Rev. Stat. § 43-247(2) (Cum. Supp. 1986) may be placed in an institution.

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

Dennis R. Keefe, Lancaster County Public Defender, and Craig L. Nelson for appellant.

Robert M. Spire, Attorney General, Royce N. Harper, and Melanie Whittamore for appellee.

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

WHITE, J.

This is an appeal from a disposition of the separate juvenile court of Lancaster County of Roderick Jones, a child under 18 years of age, on a petition alleging sexual penetration of another in violation of Neb. Rev. Stat. § 28-319(1)(a) and (b) (Reissue 1985).

On March 2, 1988, a petition was filed in the juvenile court of Lancaster County charging that Jones

> on or between the 1st day of July, 1987, and the 7th day of September, 1987 . . . did subject [T.G.] to sexual penetration and overcame [T.G.] by force, threat of force,

> expressed or implied, coercion or deception or did subject [T.G.] to sexual penetration and knew or should have known that [T.G.] was mentally or physically incapable of resisting or appraising the nature of her conduct, in violation of the provisions of Neb. Rev. Stat. Section 28-319 (1) (a) (b) . . . .

Jones entered a plea of no contest to the charge made in the petition at an adjudication hearing on March 23, 1988. Evidence was introduced showing that Jones did sexually penetrate T.G. and that Jones was approximately 16 years of age and T.G. was approximately 10 years of age when the incident set forth in the petition occurred.

The juvenile court accepted Jones' no contest plea, adjudicated him to be a child as defined by Neb. Rev. Stat. § 43-247(2) (Cum. Supp. 1986), and ordered that a predisposition investigation be completed, as well as ordering the juvenile probation officer to attempt to obtain an evaluation of Jones at the Child Guidance Center for inclusion in the predisposition report.

The evaluation recommended that Jones be placed on probation and be allowed to remain in the home of his mother and stepfather. Jones would be required to participate in the adolescent offenders group counseling program at the Child Guidance Center.

On April 15, 1988, the juvenile court found that Jones had attained the age of 12 years or more and should be committed to the custody of the Department of Correctional Services, State of Nebraska, for placement at the Youth Development Center in Kearney, Nebraska, there to remain until duly paroled or discharged. The court, in determining Jones' sentence, took into consideration the tender years of the victim, her resulting pregnancy, Jones' average intelligence and lack of any mental disability, Jones' knowledge of sex, the seriousness of the offense under the law, and that any lesser sentence would tend to depreciate the seriousness of the crime.

Jones filed a notice of appeal and motion to suspend execution of disposition on April 19, 1988. The motion to suspend execution was overruled on April 21, 1988.

Jones assigns three errors, which can be consolidated as

follows: The juvenile court erred by imposing a disposition which was excessive, and as such an abuse of discretion, and by abusing its discretion in overruling Jones' motion to suspend execution of the disposition pending appeal.

Treating both assignments together, we note the applicable standard of review is as follows:

> "An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. Also, the trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion."

*In re Interest of Biesecker*, 214 Neb. 425, 429, 333 N.W.2d 923, 925-26 (1983).

> "[A] juvenile court has broad discretion as to the disposition of a child found to be delinquent." The juvenile judge has broad discretion under Neb. Rev. Stat. § 43-286 (Reissue 1984), the disposition statute. Section 43-286(1)(c) provides that a juvenile adjudicated to be a juvenile described in § 43-247 . . . (2) . . . may be placed in an institution.

*In re Interest of J.M.*, 223 Neb. 609, 613-14, 391 N.W.2d 146, 150 (1986).

We cannot find that the disposition or overruling of Jones' motion to suspend execution of disposition pending appeal was erroneous. The juvenile court adjudicated Jones as a child within the meaning of § 43-247(2). Jones' commitment to the Youth Development Center in Kearney is a disposition specifically authorized by statute. See Neb. Rev. Stat. § 43-286(2) (Supp. 1987). The record reveals no abuse of discretion on the part of the juvenile court in overruling Jones' motion to suspend execution of disposition pending appeal.

Accordingly, the judgment of the juvenile court is affirmed.

AFFIRMED.

# FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, A UNITED STATES CORPORATION, APPELLEE, V. KENNETH L. AND ELAINE R. THOMAS, APPELLANTS, GORDON SCHROLL, DOING BUSINESS AS GORDON'S SERVICE CENTER, ET AL., APPELLEES.

432 N.W.2d 222

Filed December 2, 1988. No. 86-727.

1. **Foreclosure: Reformation: Equity.** Proceedings to foreclose a real estate mortgage and to reform a written instrument are equity actions.
2. _____: _____: _____. The reformation of a mortgage to correct a mutual mistake is incidental to the foreclosure of a mortgage and any and all equitable rights the mortgagee can show he has in it.
3. **Reformation: Evidence: Proof.** A party seeking reformation on a claim of mutual mistake must, by clear and convincing evidence, prove the existence of the mistake in reference to the instrument.

Appeal from the District Court for Howard County: WILLIAM H. RILEY, Judge. Reversed and dismissed.

John S. Mingus, of Mingus & Mingus, for appellants.

R. Kent Radke, of Badami & Radke, for appellee First Federal Savings and Loan.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and MORAN and BROWER, D. JJ.

GRANT, J.

This is an appeal from a judgment of the district court for Howard County foreclosing a real estate mortgage.

In December of 1979, the defendants-appellants, Kenneth L. and Elaine R. Thomas, mortgagors, delivered to First Federal Savings and Loan Association of Lincoln, plaintiff-appellee, mortgagee, a real estate mortgage on property located in Howard County. The land was described by metes and bounds. The Thomases made payments on the $40,000 promissory note secured by this mortgage until their default in April of 1983.

On December 24, 1985, First Federal filed a petition to foreclose the mortgage. A copy of the mortgage, as filed in the office of the register of deeds of Howard County, was attached to the petition. First Federal alleged that "through inadvertence and omission" the description in the mortgage, as filed, was in error in that one line was omitted. The description in the

original mortgage was:

> A tract of land in the Northeast Quarter (NE1/4) of Section 20, Township 13 North, Range 12, West of the 6th P.M., more accurately described as follows: Commencing at the Northeast corner of said section 20, thence in a Southerly direction on the East line of said Section 20 on a bearing of S 00 17' E a distance of Three Hundred Ninety feet (390') thence in a Westerly direction on a bearing of S 89°41' W a distance of 41.77 feet to a point on the West Right-of-Way line of a County Road, the point of beginning, thence in a Southerly direction along said County Road Right-of-Way line on a bearing of S 09°20' 09" W a distance of 29.1 feet, thence in a Southwesterly direction along said County Road Right-of-Way line on a bearing of S 27°52'29" a distance of 432.71 feet, thence in a Westerly direction parallel to the North line of said Section on a bearing of S 89° 41' W a distance of Four Hundred Ten Feet (410') thence in an Easterly direction on a bearing of N 89°41' E a distance of 1075.23 feet to the point of beginning and containing 9/18 acres more or less, Howard County, Nebraska.

Plaintiff's petition alleged that the above description was in error in that in the fourth line from the end of the description, immediately after the phrase "89° 41' W a distance of" the phrase, "Eight Hundred Sixty-six and Forty-two Hundredths (866.42) feet; thence in a Northerly direction on a bearing of N 0°17" W, a distance of," was inadvertently omitted by the scrivener. As filed, the mortgage sets out that the south line of the property is determined by going 410 feet west, then 1,075.23 feet east "to the point of beginning." This obviously means that never the twain shall meet.

It is clear that the description in the filed mortgage does not describe a closed parcel of land. It is also clear what plaintiff alleged was omitted. What is not clear is what, if any, facts indicate the precise direction and distance omitted.

The mortgage is on a preprinted form, and, because the description is lengthy, the portion not fitting in the appropriate space on the first page was added as "Exhibit 'A' " typed on a separate piece of paper attached to the signature page. It is the

portion of the description found on the separate piece of paper attached to the signature page where First Federal alleges a line of the description was left out due to a scrivener's error.

In its petition, First Federal set out the erroneous description, in the mortgage as filed, and the alleged correct description, and alleged that "these facts were known to the parties at the time the mortgage was signed," and stated that "the Plaintiff shall correct instantor [sic] the legal description . . . ." The prayer of the petition did not seek reformation of the instrument, but merely announced that the plaintiff was going to, apparently unilaterally, correct the problem.

The Thomases filed a general demurrer, which was overruled by the trial court. The Thomases were given 14 days thereafter to answer. No answer was ever filed.

First Federal filed a motion for summary judgment, with attached exhibits, on April 9, 1986. On May 28, 1986, the district court rendered its order denying First Federal's motion for summary judgment and setting the matter for trial on July 31.

On July 31, 1986, a trial was held before the district court. The district court noted the appearance of plaintiff and its attorney and the defendants Thomases' attorney. The court orally found that the Thomases "have neither pled further; nor answered the petition of the plaintiff, and Mr. Shaughnessy [plaintiff's counsel], is it the desire that the Court find the Thomases in default at this time?" Counsel responded, "Yes." Thomases' counsel then stated, "I thought an answer had been filed. Evidently no answer has been filed here. Response of trial setting, there'd be a general denial, if allowed to file one and a reiteration of the demurrer."

Although the court then orally stated, "For the record, default judgment is entered against defendants, Kenneth L. and Elaine R. Thomas; said parties having failed to answer," the court's subsequent conduct shows that the court did not dispose of Thomases' interests by default judgment. The case, in effect, just proceeded to trial.

The trial began over Thomases' counsel's objections. At this time, neither defendant Howard County nor the holder of a small second lien had been advised of the trial. Each had filed

an answer. The interests of Howard County were not mentioned in the decree later entered. When the hearing began with plaintiff's first witness, Thomases' counsel inquired if he would be able to make objections, and the trial court allowed Thomases' counsel to participate.

Plaintiff's counsel offered the testimony of one witness, a vice president of plaintiff, and four exhibits. Thomases' counsel had no objection to the testimony or any of the exhibits. The testimony established the note, Thomases' failure to pay, and an amount due. The four exhibits were (1) the mortgage note; (2) the filed mortgage, with the erroneous description, which described a geometrically open area; (3) Thomases' answers to plaintiff's request for admissions, which admitted the execution of the note and their failure to pay, but denied that Thomases had executed a mortgage with the alleged proper description; and (4) Thomases' answers to plaintiff's interrogatories, in which Thomases set out generally in denying that they had executed a mortgage on the alleged properly described property, they found it "difficult to preceive [sic] in light of the foregoing exactly to which description the plaintiff has referenced was clear and known by it which would seem to be pertinent in the premises."

The witness was excused. Plaintiff's attorney then requested that, as part of the decree, "the legal description be conformed correctly and that the decree set out the correct legal description." Plaintiff then rested. The court then said, "Mr. Mingus [Thomases' counsel]?" Thomases' counsel then stated, "It's the same situation. In the pleadings, they never came in and asked for reformation of the instrument. . . . They offer no proof. They are just simply saying, 'Your Honor, we want it from this description to this description' . . . ."

The court then stated, "The Court's going to enter judgment in foreclosure in favor of the plaintiff . . . ." In its decree, the court stated that the judgment was a first lien upon property described in the fashion said to be correct in plaintiff's petition. No findings were made as to any reformation.

The Thomases assign five errors, which, as argued in their brief, may be summarized as errors in the trial court's actions (1) in not sustaining the Thomases' demurrer, since First

Federal had neither asked for nor pled sufficient facts for reformation, and (2) in entering a default judgment against the Thomases when the Thomases had filed a demurrer and had resisted First Federal's motion for summary judgment.

Proceedings to foreclose a real estate mortgage and to reform a written instrument are equity actions. *First Fed. Sav. & Loan Assn. v. Cal-Neb Land Co.*, 219 Neb. 887, 367 N.W.2d 136 (1985); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986). On appeal to the Supreme Court, an equity action is reviewed de novo on the record, requiring this court to reach a conclusion independent of the findings of the trial court but subject to the rule that, where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Newton v. Brown, supra.*

This case has come to this court on the petition of First Federal. This petition was generally demurred to by the Thomases, and this demurrer was overruled. No answer was filed, but at the trial, handled on a default basis, evidence was adduced by plaintiff that Thomases had not signed any mortgage except one with, in effect, no description of land.

We recognize that the reformation of a mortgage to correct a mutual mistake is incidental to the foreclosure of a mortgage and any and all equitable rights the mortgagee can show he has in it. *Gurske v. Strate*, 165 Neb. 882, 87 N.W.2d 703 (1958). We also recognize that a court may, although not requested by either party, reform an instrument to the ascertained intentions of the parties. See, *Plummer v. Fie*, 167 Neb. 367, 93 N.W.2d 26 (1958); *Clark v. Hall*, 54 Neb. 479, 74 N.W. 856 (1898); *Martin v. Reavis*, 117 Neb. 219, 220 N.W. 238 (1928).

The difficulty in this case is that we cannot ascertain the intention of the parties. The petition seems to allege there has been a mutual mistake. While plaintiff did not specifically pray for reformation, its petition did pray "for such other and further relief as equity may require." Such a prayer seeks any relief that an equity court may grant, which relief would included reformation. *Rodgers v. Jorgensen*, 159 Neb. 485, 67 N.W.2d 770 (1954).

We have held that a party seeking reformation on a claim of

mutual mistake must, by clear and convincing evidence, prove the existence of the mistake with reference to the instrument. *Newton v. Brown, supra.* There is no evidence on the question of mistake, beyond the fact that the mortgage description is meaningless. The mortgage with the improper, open-ended description is in evidence, as are Thomases' denials that they signed any other mortgage, but there was no evidence before the court to support reformation in the manner in which plaintiff submitted the description to the court.

Adding to the confusion is the concluding language of the mortgage itself. That language sets out, after reciting the erroneous description, the phrase, "containing 9/18 acres more or less." That language is not in the petitioner's proposed description at any point, but is before us in the language of the mortgage itself. Aside from wondering why "9/18" is not reduced to "1/2," rough calculations of an area which measures approximately 1,075 feet on its northern boundary, 866 feet on its southern boundary, 410 feet on its western boundary, and 462 feet on its eastern boundary (which is the general area described in the description which plaintiff alleges is correct) show that the tract allegedly mortgaged contains approximately 398,000 square feet. Since there are 43,560 square feet in an acre, it is clear that the area described in plaintiff's alleged proper description contains slightly more than 9 acres. That amount, while certainly more than the "9/18 acres more or less," is not sufficiently close in size to enable a finder of fact to determine any description of the property involved from the language itself.

The evidence before the trial court, and this court, is not sufficient to establish any reformation of the instrument before us. The judgment in favor of plaintiff is reversed and the cause dismissed.

REVERSED AND DISMISSED.