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REPORTS OF CASES

DECIDED BETWEEN

JANUARY 27, 1989 and MAY 4, 1989

IN THE

Supreme Court of Nebraska

VOLUME CCXXXI

TRINA SOLLARS

OFFICIAL REPORTER

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By Trina Sollars, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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[1]Until March 31, 1989
[2]Appointed April 1, 1989

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 87-034: **Norwest Bank Omaha So. v. Anderson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-179: **First Security Bank & Trust v. New Hampshire Ins. Co.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-226: **In re Application of MCI Telecommunications v. LT&T.** Stipulation allowed; appeal dismissed.

No. 87-284: **Bank of Valley v. Arlington State Bank.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-374: **Logan, Ltd. v. Tommy Kendrick Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-414: **Douglas County Health Dept. Employees Assn. v. County of Douglas.** Stipulation allowed; appeal dismissed.

No. 87-474: **Kangior v. Ross.** Stipulation allowed; appeal dismissed, each party to pay own costs.

No. 87-491: **MOR America Financial Corp. v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-534: **Burbach v. Steinbach.** Stipulations to dismiss appeal noted; by order of the court, appeal dismissed.

No. 87-753: **In re Estate of Borron.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-1031: **Flock v. Martensen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-059: **Kunce v. National Home Medical, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 88-187: **Nebraska State Bank v. Scollard.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-227: **Douglas County Health Dept. v. County of Douglas.** Stipulation allowed; appeal dismissed.

No. 88-286: **Air Power of Nebraska v. Columbia Casualty Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-307: **Doak v. Doak.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-350: **Ress v. Lawrence.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-371: **Lockhart v. Village of Cairo.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-396: **State Code Agencies Ed. Assn. v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-397: **Dewispelare v. Department of Motor Vehicles.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-452: **Prince v. Prince.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-465: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-512: **In re Interest of Bullock.** By order of the court, no cause having been shown, motion of appellant to dismiss appeal as moot sustained.

No. 88-541: **State v. Perry.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-544: **In re Interest of Pitts.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-606: **State v. Stiver.** Affirmed. See Rule 7A(1).

No. 88-609: **State v. Thompson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-663: **Allen v. Allen.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-665: **State v. Manchester.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-672: **State v. Harris.** Motion of appellee for summary

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

No. 88-675: **State v. Canaday.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-683: **Inman Education Assn. v. School Dist. No. 30.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-710: **Peterson v. First National Bank of Elm Creek.** Stipulation allowed; appeal dismissed.

No. 88-711: **Demerath v. Demerath.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-725: **Brehm Enterprises v. The Pizza Inn, Inc.** Stipulation allowed; appeal dismissed.

No. 88-731: **State v. Thomas.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-747: **State v. Flatt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-753: **Garden v. Nash Finch Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-764: **State v. Bronson.** Affirmed. See Rule 7A(1).

No. 88-766: **Price v. State Claims Board.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-769: **State v. Graskowiak.** Affirmed. See Rule 7A(1).

No. 88-770: **In re Application of Dorsey Dean Adams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-787: **State v. Greer.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-795: **State v. Fountain.** Affirmed. See Rule 7A(1).

No. 88-806: **State v. Pence.** Affirmed. See Rule 7A(1).

No. 88-810: **State v. McCartney.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-813: **State v. Welch.** Affirmed. See Rule 7A(1).

No. 88-814: **State v. Jarmon.** Affirmed. See Rule 7A(1).

No. 88-826: **State v. Vollbrecht.** Motion of court- appointed counsel for leave to withdraw appearance overruled. By order of the court, judgment of Madison County District Court reflected in journal entry filed September 14, 1988, which

sentences defendant to the Department of Correctional Services for not less than 20 months nor more than 5 years at hard labor and gives defendant credit for 100 days previously served, affirmed.

No. 88-828: **State v. Rhodd.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-833: **State v. Alexander.** Affirmed. See Rule 7A(1).

No. 88-839: **State v. Markise.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-844: **State v. Jenkins.** Affirmed. See Rule 7A(1).

No. 88-854: **State v. Rodriquez.** Affirmed. See Rule 7A(1).

No. 88-860: **Torres v. Armijo.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-864: **State v. Kallos.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-870: **Abdullah v. Gunter.** Appeal dismissed for lack of jurisdiction. See Rule 7A(2).

No. 88-871: **Lafler v. Cheyenne County.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-872: **State v. Newman.** Affirmed. See Rule 7A(1).

No. 88-873: **State v. Manchester.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-888: **Plock v. Crossroads Joint Venture.** Stipulation allowed; appeal dismissed.

No. 88-890: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-894: **In re Interest of Erks.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-897: **Creighton Omaha Regional Healthcare Corp. v. Leuenberger.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

Nos. 88-899, 88-920: **State v. Parker.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 88-900, 88-901: **State v. Goodwin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see

Rule 7B(2).

No. 88-905: **Mandery v. Chronicle Broadcasting.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-919: **State v. Tyndell.** Affirmed. See Rule 7A(1).

No. 88-922: **State v. Stubbs.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-926: **Commercial Federal Savings v. Hackwith.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 88-929: **In re Estate of Dobrovolny.** Stipulation allowed; appeal dismissed.

No. 88-931: **State v. Bainbridge.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-935: **Gillogly v. Principal Casualty Ins. Co.** Stipulation allowed; appeal dismissed.

No. 88-938: **State v. Sutton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-939: **State v. Haynes.** Affirmed. See Rule 7A(1).

No. 88-940: **State v. Graham.** Affirmed. See Rule 7A(1).

No. 88-942: **In re Estate of Dopheide.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-944: **Morrow, Davies, Nissen v. Nissen.** Stipulation allowed; appeal dismissed without prejudice.

No. 88-950: **Benson v. Metro Area Transit.** Affirmed. See Rule 7A(1).

No. 88-953: **Wickes Companies v. Lakeview Heights Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 88-961: **State v. Hurley.** Affirmed. See Rule 7A(1).

No. 88-962: **State v. Kramer.** Affirmed. See Rule 7A(1).

No. 88-964: **State v. Kitt.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

Nos. 88-966, 88-967: **State v. Lewis.** Affirmed. See Rule 7A(1).

No. 88-968: **State v. Hindman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-970: **State v. Oellerich.** Affirmed. See Rule 7A(1).

No. 88-976: **Anderson v. Anderson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-977: **State v. Schleiger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-981: **State v. Thompson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-983: **State ex rel. Tyler v. Shortridge.** Affirmed. See Rule 7A(1).

No. 88-984: **Cavanaugh v. Cavanaugh.** Stipulation allowed; appeal dismissed.

No. 88-987: **FBG Service Corp. v. Dale Beggs Development.** Stipulation allowed; appeal dismissed.

No. 88-993: **State v. Walter.** Affirmed. See Rule 7A(1).

No. 88-999: **State v. Evans.** Affirmed. See Rule 7A(1).

No. 88-1000: **State v. Watson.** Affirmed. See Rule 7A(1).

No. 88-1005: **Tyler v. Board of Parole.** Appeal dismissed as moot.

No. 88-1006: **Rayes v. State.** Appeal dismissed. See Rule 7A(2).

No. 88-1017: **State v. Weaver.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-1018: **State v. Flournoy.** Affirmed. See Rule 7A(1).

No. 88-1020: **Steadman v. George McGinley Ranch.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-1025: **Sturdevant v. Sturdevant.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-1029: **State v. Sellers.** Motion of appellee for summary affirmance sustained;judgment affirmed; see Rule 7B(2).

No. 88-1031: **Tyler v. Shortridge.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1035: **State v. Standley.** Stipulation allowed; appeal dismissed.

No. 88-1036: **State v. Pierce.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1039: **State v. Garton.** Stipulation allowed; appeal dismissed.

No. 88-1040: **Everitt v. Mainliner Motor Express.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 88-1041: **State v. King.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-1043: **State v. Rodenbaugh.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1046: **State v. Thiel.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 88-1048: **Beavers v. The CECO Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 88-1049: **State v. Wolf.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1050: **Cole's Custom Awards v. Jones.** By order of the court, no cause shown, appeal dismissed.

No. 88-1051: **State v. Sherbutte.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-1054: **Thompson v. Higgins.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-1056: **State v. Paulsen.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-1059: **Vay Wey Truckin v. Yueill.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1061: **County of York v. Battreall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1064: **Tyler v. Hart.** Affirmed. See Rule 7A(1).

No. 88-1065: **State ex rel. Tyler v. Buckley.** Affirmed. See Rule 7A(1).

No. 88-1070: **State v. Lopez.** Affirmed. See Rule 7A(1).

No. 88-1075: **Chace v. Chace.** Stipulation allowed; appeal dismissed.

No. 88-1080: **Tylski v. Peter Kiewit Constr. Co.** Stipulation allowed; appeal dismissed.

No. 88-1084: **State v. Culkins.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 88-1086: **Steenbarger v. Steenbarger.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-1087: **Nash v. Tussing.** Stipulation allowed; appeal dismissed.

No. 88-1088: **In re Application of Adams.** Affirmed. See Rule 7A(1).

No. 89-004: **Jensen v. City of Omaha.** Appeal dismissed for lack of a final order. See Rule 7A(2).

No. 89-007: **Jones v. City Clerk of Omaha.** Appeal dismissed. See Rule 7A(2).

No. 89-009: **State v. Beyersdorf.** Affirmed. See Rule 7A(1).

No. 89-012: **Tyler v. Asmussen.** Appeal dismissed. See Rule 7A(2).

No. 89-018: **Madison v. Madison.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 89-020: **State v. Lange.** Affirmed. See Rule 7A(1).

No. 89-021: **Crow v. Campbell.** Appeal dismissed. See Rule 7A(2).

No. 89-027: **Westling v. Cameron.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-028: **Kobza v. Kobza.** Stipulation allowed; appeal dismissed.

No. 89-034: **In re Interest of Tyler.** Appeal dismissed. See Rule 7A(2).

No. 89-037: **State v. Porter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-040: **State v. Starks.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-041: **Tyler v. Mrs. B.** Affirmed. See Rule 7A(1).

No. 89-059: **State v. Negley.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-062: **OPP v. Floors, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-075: **State ex rel. Tyler v. Gunter.** Affirmed. See Rule 7A(1).

No. 89-076: **Tyler v. Scarborough.** Affirmed. See Rule 7A(1).

No. 89-087: **Nykiel v. Nebraska Board of Parole.** Affirmed.

See Rule 7A(1).

No. 89-088: **Tyler v. Longwell.** Affirmed. See Rule 7A(1).

No. 89-097: **Twyman v. Omaha Public School Dist. No. 1.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own fees and costs.

No. 89-104: **Javorsky v. Javorsky.** Stipulation allowed; appeal dismissed.

No. 89-111: **In re Estate of Heitman.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 89-132: **State v. Brown.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-134: **State v. McCoy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-139: **Carritt v. City of Omaha.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-148: **Roach v. Roach.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-178: **Kullbom v. Kullbom.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-191: **Neneman v. Continental Baking Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-237: **Kudlacek v. CAC XXII, Inc.** Stipulation allowed; appeal dismissed.

MARVIN E. JEWELL & COMPANY, A PARTNERSHIP, APPELLANT, V. DALE A. THOMAS, APPELLEE.

434 N.W.2d 532

Filed January 27, 1989. No. 87-028.

1. **Appeal and Error.** The factual findings of a trial court in a law action tried without a jury have the effect of findings of a jury and will not be set aside unless they are clearly wrong.
2. _____. In reviewing questions of law, the Supreme Court has an obligation to reach its conclusions independent from conclusions reached by the trial court.
3. **Contracts: Intent.** The intent of the parties is determinative of whether a party is an accommodation maker or the principal obligor of an instrument.
4. _____: _____. The best, if not controlling, evidence of the intent of the parties to an agreement is the parties' interpretation of the agreement as evidenced by their actions in performance of the agreement.

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

Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

James M. Bausch and David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Plaintiff-appellant, Marvin E. Jewell & Company (Jewell), a partnership, filed this action against defendant-appellee, Dale A. Thomas, seeking damages of $141,000 plus interest, representing payments made by Jewell to the Union Bank and Trust Company (Union Bank) in paying off a promissory note. Jewell alleged that it paid the note only after Thomas did not pay it when due and that Thomas, as a party accommodated, owed the amount of the note to Jewell.

Thomas, in his amended answer, denied he was a "party accommodated" and alleged that any amount paid by Jewell to Union Bank was in payment of an amount owing to Union Bank by Jewell. Thomas counterclaimed against Jewell, seeking an accounting. Trial on the petition seeking damages in a law action was held separate from the counterclaim action, which sought the equitable remedy of accounting.

After trial on the petition, the district court entered its order setting out detailed findings of fact and conclusions of law and dismissing Jewell's petition. After a motion for new trial was denied, Jewell timely appealed. In this court, appellant sets out five assignments of error, alleging that the trial court erred in (1) holding that Jewell had not signed the note for the purpose of lending its name to Thomas; (2) holding that Jewell was not an accommodation party because Jewell was identified as the maker on the face of the note; (3) requiring Jewell to prove that Union Bank would not have renewed Thomas' indebtedness unless Jewell was a party to the note; (4) holding that Jewell was not an accommodation party because Union Bank considered Jewell to be the debtor; and (5) holding that Jewell was not an accommodation party because it paid the note without first requiring that Thomas default on the note and that the bank proceed against Thomas. We affirm.

The record shows the following. In 1963, Marvin E. Jewell formed a business known as Marvin E. Jewell & Company. In 1965, the business became a partnership with two other certified public accountants. In 1969, Thomas joined the firm as an employee and became a partner holding 10 percent of the partnership's equity capital, effective January 1, 1977. Because Marvin Jewell was negotiating a settlement with an ex-partner, Thomas did not actually purchase his interest until sometime in the spring of 1978.

In order to purchase his 10-percent interest in Jewell, Thomas borrowed $90,000 from Union Bank in May of 1978. At that time, Thomas had an outstanding home improvement loan with Union Bank for $25,000. Thomas borrowed $115,000 from Union Bank: $90,000 went to the purchase of his Jewell partnership interest, and the balance renewed his personal home improvement loan.

Marvin Jewell and Dennis Baumert shared $81,344 of the $90,000 Thomas borrowed from Union Bank, and the remaining $8,656 was used to fund Thomas' partnership capital account. After Thomas' purchase into the partnership, Marvin Jewell held 51 percent, Baumert held 39 percent, and Thomas held 10 percent.

Between May 12, 1978, and August 17, 1981, Thomas executed a number of new and renewal notes with Union Bank in connection with the $115,000 loan. During this period, Thomas paid approximately $50,000 toward the principal on these notes and over $60,000 in interest payments. By August 17, 1981, Thomas was paying Union Bank 19.5 percent interest on his note to Union Bank.

In November of 1981, Union Bank wrote Thomas and indicated a desire to discuss Thomas' obligations to the bank. The executive vice president of Union Bank testified that he suggested to Thomas that he might "have the partnership assume a . . . large portion of his indebtedness and that the repayment source for that would come from amounts due him from the partnership in the profit sharing arrangement they had as partners."

Thomas testified that he approached Marvin Jewell and requested that the partnership capital accounts be equalized. Thomas testified that this would have required Marvin Jewell to have paid approximately $40,000 into the partnership capital account. Marvin Jewell testified that Thomas told him that he (Thomas) was having trouble "with a number of his obligations" with Union Bank. Marvin Jewell testified that he agreed to look into whether the partners would be willing to "guarantee" Thomas' obligation with Union Bank.

Sometime later, Thomas brought a promissory note in the amount of $145,000 to Marvin Jewell. This note designated Union Bank as the payee and Jewell as the debtor. The note had a signature line for Thomas, on which Thomas had already signed, and three signature lines for the remaining partners. Beside these lines was the phrase, "Partner/Personally." Each of the remaining partners executed the note, and the note was delivered to Union Bank. The proceeds were used by Thomas to pay off his personal obligations with Union Bank.

The other Jewell partners, Marvin Jewell, Baumert, and Ronald Culwell, testified that it was their understanding that Thomas would still be required to make payments on the note. Thomas testified that it was his understanding that payments on the note would be taken from his portion of partnership profits. A representative of Union Bank testified that it was his understanding that the note was an obligation of Jewell, and not of Thomas.

On December 1, 1982, the $145,000 note with Union Bank was renewed. In view of the result reached in this case, we need not determine the question, raised by Thomas, as to whether the renewal of the note constituted such payment of the note as to enable Jewell to seek recourse against Thomas under Neb. U.C.C. § 3-415(5) (Reissue 1980). The new note also listed the debtor as Jewell, and Marvin Jewell was the sole signatory. On December 21, 1982, Thomas resigned from the partnership without prior notice.

In May of 1983, Marvin Jewell sent a letter to Thomas advising Thomas that he was "liable for a note" at Union Bank. On June 2, 1983, Jewell made another interest payment to Union Bank. This time the check bore a notation "Int DT Note." This notation had not appeared on any of the payments Jewell had made on the obligation before Thomas left the partnership.

Our law setting out the review of a law action tried to the court is settled. The factual findings of a trial court in a law action tried without a jury have the effect of findings of a jury and will not be set aside unless they are clearly wrong. *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987). However, in reviewing questions of law, the Supreme Court has an obligation to reach its conclusions independent from conclusions reached by the trial court. *Pallas v. Black*, 226 Neb. 728, 414 N.W.2d 805 (1987); *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987).

Jewell's claim against Thomas is based entirely on § 3-415, which provides in relevant part as follows:

> (1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

(2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

. . . .

(5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

An accommodation party is a surety, and by lending its name to the maker of the note, in a sense, guarantees that in the event of default by the principal obligor, the accommodation party will be liable. We recognize that the obligation of an accommodation party to the payee is determined by the capacity in which the accommodation party signs the instrument.

We are concerned in this case with the relationship between Jewell and Thomas, and that relationship is not determined by the capacity in which Jewell signed the note. The intent of the parties is determinative of whether a party is an accommodation maker or the principal obligor of an instrument. *Holcomb State Bank v. Adamson*, 107 Ill. App. 3d 908, 438 N.E.2d 635 (1982); *Kerney v. Kerney*, 120 R.I. 209, 386 A.2d 1100 (1978). In this case, the promissory note shows on its face that each partner signed as a comaker, both personally and on behalf of the partnership. Both Thomas and a representative of Union Bank testified that it was their understanding that the note was an obligation of Jewell, and not that of Thomas. Additionally, all correspondence concerning the note was sent by Union Bank to the partnership. The trial court was not clearly wrong in holding that Jewell was not an accommodation party.

Jewell had the burden of establishing that an understanding existed between Jewell and Thomas that the partnership would execute the note as an accommodation party. *Mary Riegler v. N. W. Riegler Jr.*, 244 Ark. 483, 426 S.W.2d 789 (1968); *MacArthur v. Cannon*, 4 Conn. Cir. 208, 229 A.2d 372 (1967). Jewell did not sustain its burden. While both Marvin Jewell and Baumert testified that the note was signed to reduce the day-to-day "pressures" on Thomas, Thomas testified the

note was comade by the partners in an effort to appease his desire to have the partnership capital accounts equalized. In determining the sufficiency of the evidence to support the judgment of the trial court, 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 the evidence. *InterSystems, Inc. v. Farmers Co-op Exch.*, 225 Neb. 497, 406 N.W.2d 344 (1987); *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 382 N.W.2d 303 (1986).

We are not convinced from the record that the trial court was clearly wrong in accepting Thomas' explanation of the intent of the parties over that of the remaining partners, nor can we say as a matter of law that the trial court erred in not holding that an intent to relieve the "pressure" from Thomas gave Jewell accommodation party status as to Thomas.

An express condition of accommodation party status is the signature of one "for the purpose of lending his name" to another. § 3-415(1). The critical question in determining whether someone intended to lend his name to another is whether the alleged accommodation party was required to sign the instrument to enable the alleged principal obligor to obtain credit. Several courts have stated that a major consideration in determining accommodation party status is the fact that the lender refused to make the loan unless the accommodation party was a party to the instrument. See *Farmers State Bank v. Cooper*, 227 Kan. 547, 608 P.2d 929 (1980). In this case, Union Bank and Thomas had an ongoing relationship. There was no demand by Union Bank that Jewell sign a note as a comaker as a condition of extending the loan to Thomas, and there is no evidence in the record that Jewell was required to lend its name to Thomas so that Thomas could maintain his credit with Union Bank.

Evidence of the effect of the transaction in question is also relevant to the issue of intent. The best, if not controlling, evidence of the intent of the parties to an agreement is the parties' interpretation of the agreement as evidenced by their actions in performance of the agreement. *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983); *DeFilipps v. Skinner*, 211

Neb. 801, 320 N.W.2d 737 (1982). Jewell did not exhibit the behavior of a surety. Instead of waiting for a default on the note by the person it claims to have accommodated, Jewell treated the note as its own obligation. After executing the note to Union Bank on December 1, 1981, Jewell took over complete responsibility for servicing the debt. Thomas never dealt with Union Bank again on the note. Thomas made no further payments on the note. The note was also reflected on the books of Jewell as an obligation of Jewell.

Appellant contends that the trial court erred in holding that "an accommodation party is not liable on the instrument until after its principal defaults." Brief for appellant at 29. We have reviewed the trial court's order and cannot find where it made such a specific holding. The trial court correctly stated the status of a party who signs a note is determined by the capacity in which he signs the instrument. The holding of the trial court on this issue is not determinative of the result herein reached.

We are unwilling to hold that Jewell was an accommodation party based on the evidence presented here for our review. We recognize that accommodation party status may be shown through parol evidence. § 3-415, comment 2; *Dalton v. George B. Hatley Co., Inc.*, 634 S.W.2d 374 (Tex. App. 1982). A party claiming accommodation party status, however, bears the burden of proving its right to such status. We have reviewed the record and are unable to say that the trial court was clearly wrong in holding that the facts did not support a finding that Jewell was an accommodation party on the note. Jewell executed the instrument as the maker, with each of its partners signing as individual guarantors for the partnership. Jewell did not establish that it was an accommodation party as to Thomas.

The judgment of the trial court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

MARK A. RENNER, APPELLANT, V. ROBERT H. WURDEMAN AND WURDEMAN OF OMAHA, INC., A NEBRASKA CORPORATION, APPELLEES.

434 N.W.2d 536

Filed January 27, 1989. No. 87-132.

1. **Summary Judgment: Appeal and Error.** In an appellate review of a summary judgment, the reviewing 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 appropriate 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 material facts and that the moving party is entitled to judgment as a matter of law.
3. **Corporations: Stock: Words and Phrases.** There is a distinction between the certificate issued to a shareholder and the "share" issued to him. A share of stock is the actual property of the shareholder, while the stock certificate is merely the authentic evidence of the stockholder's ownership of shares.
4. _____: _____: _____. Corporate stock, when paid for, is "issued" regardless of the execution and delivery of the certificate, which is merely evidence of the stockholder's interest.
5. **Gifts.** The essential elements of a gift inter vivos are donative intent, delivery, and acceptance.
6. **Employer and Employee: Employment Contracts: Termination of Employment.** As a general rule, when the 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 it chooses without incurring liability.
7. _____: _____: _____. Except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination.
8. _____: _____: _____. An employee's at-will status can be modified by contractual terms that may be created by employee handbooks and oral representations.
9. _____: _____: _____. Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee.
10. **Torts: Words and Phrases.** One of the basic elements of tortious interference with a business relationship requires an intentional act inducing or causing a breach or termination of the relationship or expectancy.
11. **Corporations: Principal and Agent: Conspiracy.** A corporation cannot conspire with an agent when that agent is acting within the scope of his authority. A

corporation acts through its agent and the acts of the agent are the acts of the corporation.

12. **Corporations: Employer and Employee: Conspiracy: Pleadings.** A corporate official can conspire with the corporation only if he is acting in his individual capacity. However, in order to set forth a claim of conspiracy between a corporation and its corporate employees, the petition must allege that the employees are acting outside the scope of their authority or other than in the normal course of their corporate duties.
13. **Pleadings: Actions.** Although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

Warren S. Zweiback, Susan Wiesner, and Mary Lou Perry, of Zweiback, Flaherty & Lamberty, P.C., for appellant.

H. Daniel Smith, of Smith, Trustin & Schweer, for appellees.

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

HASTINGS, C.J.

Plaintiff has appealed from the order of the district court which dismissed his second amended petition filed against Robert H. Wurdeman and Wurdeman of Omaha, Inc. The dismissal was based on the court's sustaining the defendants' motion for summary judgment. Although plaintiff specifies five errors, in actuality they may be distilled down to the claim that the court erred in finding that there were no genuine issues of material fact.

Mark Renner, the plaintiff, was employed in 1972 as a salesman by Wurdeman of Omaha, Inc. (the company), a real estate company. In 1978, Robert Wurdeman, then the sole shareholder of the company, had surgery on his hip. According to the testimony of Wurdeman, Renner helped out during Wurdeman's period of convalescence. Upon Wurdeman's return, he told Renner, "I will give you one share" (of the stock of the company) for the work Renner did in helping out during Wurdeman's disability. However, the paperwork, the issuance of the share of stock, was never accomplished. This took place

in about November of 1978.

Renner's testimony, although differing slightly from that of Wurdeman, would seem to result in the same conclusion. He testified that Wurdeman told him that he, Wurdeman, was so excited about the good job that Renner had done while he (Wurdeman) was temporarily incapacitated due to the surgery, "he [Wurdeman] was going to begin our relationship by — by reimbursing, instead of money, two percent stock in the company." However, Renner admitted that he had never received any stock certificate.

On June 11, 1979, Renner and Wurdeman signed a stock option agreement recognizing that "Renner has purchased _____ shares of the stock of Wurdeman Real Estate Company (which is approximately two percent (2%) of the outstanding shares) . . . ." In addition, Renner was given the option to purchase an additional 2 percent of the company's stock for each calendar year, commencing with 1979, for so long as he remained employed by the company. As a condition precedent to exercising the option, Renner had to be employed on the annual stock option date, March 31. On the same day, Renner, Wurdeman, and the company entered into a stock restriction agreement. Under the agreement, neither Renner nor Wurdeman could transfer the stock of the company that he owned to outsiders without having first offered to sell the stock to the other. The agreement provided that it could be terminated by the written agreement of all shareholders and the company.

In 1983, Renner and the company entered into an employment contract which established that Renner was an independent contractor whose employment was terminable at will.

On January 29, 1985, Renner attempted to exercise the option for the first time to purchase 12 percent of the stock of the company. On January 31, 1985, Wurdeman notified Renner that his request was being denied. Furthermore, the company gave Renner notice that his employment contract was terminated. Wurdeman and the company, by written agreement, terminated the stock restriction agreement. Subsequently, Wurdeman entered into an agreement to sell 75

shares of the stock of the company to third persons without having first offered the stock to Renner.

Renner brought this action for damages, alleging three causes of action: (1) breach of contract involving the stock option agreement and the stock restriction agreement; (2) tortious interference with the business relationship because of the breach of the previous listed written contracts; and (3) breach of an oral contract employing Renner as a manager of the company. Additionally, there was a fourth cause of action involving a small item of unreimbursed expenses which is not argued, nor will it be considered on appeal.

The defendants, in their amended answer to the operative petition of the plaintiff, admitted the execution of the stock option agreement and the stock restriction agreement, alleged the existence of the written employment contract, alleged the failure of the plaintiff to exercise his rights under the stock option agreement in a timely manner, and denied that plaintiff was ever a stockholder of the company.

By order dated January 22, 1987, the trial court sustained the defendants' motion for summary judgment. In doing so, the court found that plaintiff's second and third causes of action were redundant to the first cause of action for breach of contract. The conclusion that the second cause of action was redundant would seem to rest, in part, on the fact that if plaintiff was not a shareholder and therefore acquired no rights under the stock option agreement or the stock restriction agreement (which could be terminated by agreement of the company and all the shareholders), and the plaintiff was bound by the written employment agreement and therefore could be terminated without cause, then Wurdeman and the company, the parties with whom Renner had the contractual relationship, acted properly under the terms of the contracts, and there could be no tortious interference with a business relationship. The conclusion that the third cause of action was redundant would seem to rest on the fact that plaintiff's claim that the company breached an oral agreement whereby he would perform managerial services for the company in return for eventual ownership of the company rather than contemporaneous compensation is essentially the same as his claim that

defendants breached the stock option and stock restriction agreements by wrongfully discharging him because the oral agreement changed his at-will employment to employment that could be terminated only for cause.

We then turn to the question of whether the district court correctly ruled that defendants were entitled to summary judgment on the first cause of action.

In an appellate review of a summary judgment, the reviewing 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. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988).

Summary judgment is appropriate 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 material facts and that the moving party is entitled to judgment as a matter of law. *Id.*

The essential facts are not in dispute. There are, however, two troublesome questions this court needs to answer in order to determine whether summary judgment on plaintiff's first cause of action was proper: first, whether it can be concluded that Renner was ever a shareholder of the company, and second, whether Renner has a colorable claim for wrongful termination of employment. The facts are clear that Renner never exercised his option to purchase stock under the stock option agreement on the designated dates and while he was still employed by the company. If Renner never became a shareholder before the stock option agreement was entered into, the stock restriction agreement was legally terminated by the agreement of the company and Wurdeman (who would have been the only shareholder of the company). If Renner was legally terminated from his employment contract, he had no right of continued employment until the next annual stock option date, March 31, 1985, in order that he could exercise his option.

WAS RENNER EVER A SHAREHOLDER?

Renner, in arguing that the receipt of a certificate is irrelevant

to ownership of stock, cites us to *Pacific National Bank v. Eaton*, 141 U.S. 227, 11 S. Ct. 984, 35 L. Ed. 702 (1891), and *Federal Deposit Ins. Corporation v. Gunderson*, 106 F.2d 633 (8th Cir. 1939).

In *Gunderson*, the court stated:

> [T]here is a distinction between the certificate issued to a shareholder and the "share" issued to him. The distinction is recognized by the authorities. A share of stock is the actual property of the shareholder, while the stock certificate is merely the authentic evidence of the stockholder's ownership of shares. [citations omitted.] . . . [C]orporate stock, when paid for, is "issued" regardless of the execution and delivery of the certificate, which is merely evidence of the stockholder's interest.

Id. at 634-35.

Renner further contends that, pursuant to Neb. Rev. Stat. § 21-2018 (Reissue 1987), he "paid for" the stock by providing services to the company while Wurdeman was hospitalized. Section 21-2018 provides in pertinent part:

> No corporation shall be permitted to issue stock except for an equivalent in money paid or labor done, or property actually received and applied to the purpose for which such corporation was created. Neither promissory notes nor future services shall constitute payment or part payment for issuance of shares of a corporation. When payment of the consideration for which shares are to be issued shall have been received by the corporation, such shares shall be deemed to be fully paid and nonassessable.

It is clear from *Eaton, supra*, *Gunderson, supra*, and § 21-2018 that possession of a stock certificate is irrelevant to ownership of the stock if the stock in dispute was purchased from the issuing company. In the case at bar the question then becomes, Did Wurdeman intend to give Renner a share of the company that he, Wurdeman, himself owned, or did he intend to have the company give Renner a share of stock for the services Renner had provided? If Wurdeman intended to give Renner a share he personally owned, the fact that Wurdeman did nothing may mean that Renner did not become a shareholder. The essential elements of a gift inter vivos are

donative intent, delivery, and acceptance. See *Guardian State Bank & Trust Co. v. Jacobson*, 220 Neb. 235, 369 N.W.2d 80 (1985).

On the other hand, if Wurdeman intended the company to issue Renner a share of stock, the fact that Wurdeman did nothing would not mean that Renner did not become a shareholder.

The answer to this problem must be determined from the inferences that are to be drawn from the facts recited in the depositions of the two principals. The record is such that we cannot say as a matter of law what the source of the intended stock acquisition was to be. This is a conclusion that must be drawn by the fact finder, and, accordingly, summary judgment was improperly granted.

COULD WURDEMAN UNILATERALLY TERMINATE THE STOCK RESTRICTION AGREEMENT?

The stock restriction agreement provided that it could be terminated by the written agreement of all shareholders and the company. Such an agreement was executed only by Wurdeman and the company. If Wurdeman was the only shareholder, the agreement on its face was valid and effective. If, however, Renner had become a shareholder, then his consent to the termination agreement was necessary, and the termination agreement would not be valid.

WAS RENNER'S TERMINATION IN BAD FAITH?

Pursuant to the broker-salesperson contract entered into by Renner and the company in 1983, Renner's employment was at will. He contends, however, that the company, bound by an implied covenant of good faith, terminated his employment solely in order to deny him the opportunity to exercise his stock option rights, and, therefore, the company wrongfully terminated that employment in bad faith.

The general rule in Nebraska is that when the 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 it chooses without incurring liability. *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988); *Stratton v. Chevrolet Motor Div.*, 229 Neb. 771, 428 N.W.2d 910 (1988);

Ambroz v. Cornhusker Square Ltd., 226 Neb. 899, 416 N.W.2d 510 (1987).

Furthermore, except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination. *Stratton, supra*; *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986).

However, Renner claims that Wurdeman made oral representations to him that if he provided management services for the company, he would not get paid for the work at the time, but would receive the benefits of the increased profits generated by his labor when he owned the company in the future.

Recently, this court, in *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988), reiterated that an employee's at-will status can be modified by contractual terms that may be created by employee handbooks and oral representations. "Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee." *Id.* at 17, 421 N.W.2d at 12. In *Hebard*, the court went on to say:

> In the case at bar, we express no opinion as to whether the conduct of the appellee, in making certain representations to Hebard, indicates a promise which might constitute terms of an employment contract. Whether such conduct indicates a promise is a question of fact for a trier of fact.

Id. See, also, *Toussaint v Blue Cross*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Ritchie v Mich Con Gas Co*, 163 Mich. App. 358, 413 N.W.2d 796 (1987). Thus, it would seem that there is an unresolved question of fact as to whether or not Wurdeman made representations to Renner and, if so, whether the representations indicated a promise which modified Renner's at-will employment.

DID WURDEMAN INTERFERE WITH RENNER'S CONTRACTUAL RELATIONSHIP WITH THE COMPANY?

One of the basic elements of tortious interference with a

business relationship requires an intentional act inducing or causing a breach or termination of the relationship or expectancy. *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 320 N.W.2d 759 (1982).

For his tortious interference cause of action, Renner, in his second amended petition, alleged that

> Defendant Wurdeman, in his individual capacity, and Defendant Wurdeman of Omaha, Inc. entered into a conspiracy whereby said Defendants . . . terminated the Plaintiff and intentionally interfered with this business relationship [of Plaintiff to buy stock of the company and to act as a broker-salesperson] and Plaintiff's contract rights.

Renner seems to be arguing that Wurdeman the individual did not want to honor the stock option agreement and, therefore, caused himself, as the president of the company, to have the company terminate Renner's employment so that Renner could not satisfy the condition precedent to his right to exercise the option.

This court has said in *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 52, 291 N.W.2d 230, 234 (1980), quoting from *Soft Water Utilities, Inc. v. Le Fevre*, 159 Ind. App. 529, 308 N.E.2d 395 (1974): " 'A corporation cannot conspire with an agent when that agent is *acting within the scope of his authority*. A corporation acts through its agent and the acts of the agent are the acts of the corporation.' " (Emphasis in original.) Therefore, a corporate official can conspire with the corporation only if he is acting in his individual capacity. However, in order "[t]o set forth a claim of conspiracy between a corporation and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties." *Dixon, supra* at 52, 291 N.W.2d at 234.

Defendants claim that Renner's petition fails to allege that Wurdeman acted outside the scope of his corporate duties. Although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, this court has held that in actions not involving extraordinary remedies,

general pleadings are to be liberally construed in favor of the pleader. See *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988). Renner alleged that Wurdeman "in his individual capacity" conspired with the company to interfere with his contract rights. Liberally construing the petition in favor of Renner, it can be said that Renner, by alleging that Wurdeman acted in his individual capacity, was alleging that Wurdeman acted outside the scope of his corporate duties.

The district court found Renner's tortious interference claim to be redundant of his claim that Wurdeman and the company breached the stock option and stock restriction agreements. If Wurdeman and the company acted properly under the terms of the contracts, then there can be no claim for tortious interference with a business relationship. See, *Neff v. World Publishing Company*, 349 F.2d 235 (8th Cir. 1965); Prosser and Keeton on the Law of Torts, *Economic Relations* § 129 (5th ed. 1984); 45 Am. Jur. 2d *Interference* § 26 (1969). If, on the other hand, Wurdeman and the company acted improperly in terminating Renner's employment to prevent the exercise of Renner's rights under the stock option agreement, then Renner does have a basis for claiming that Wurdeman may have acted in his individual capacity and tortiously interfered with Renner's business relationship with the company.

Since it cannot be said as a matter of law that the company had the right to terminate Renner's employment for any cause or no cause at all, summary judgment was as inappropriate on Renner's second cause of action as it was on the first.

WAS THERE A BREACH OF ORAL AGREEMENT?

This claim is, as found by the trial court, redundant of Renner's claim that defendants breached the stock option and stock restriction agreements by wrongfully terminating his employment in order to prevent him from exercising his stock option. Therefore, summary judgment on Renner's third cause of action was proper.

For the reasons set forth above, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DR. IRVIN E. PETERSON, APPELLANT, V. MINDEN BEEF COMPANY, A NEBRASKA CORPORATION, APPELLEE.

434 N.W.2d 681

Filed January 27, 1989. No. 87-357.

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. **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. _____. Where a right has been given and a specific remedy provided by statute, the right can be secured in no other way than that provided by the statute.
4. **Statutes: Words and Phrases.** Generally, "may" used in a statute will be given its ordinary permissive and discretionary meaning unless it would manifestly defeat the statutory object.
5. **Insurance: Claims: Parties.** A person who has a liability claim against an insured of an insolvent member insurer may be a "third party" under the provisions of Neb. Rev. Stat. § 44-2406(4) (Reissue 1984), which is part of the Nebraska Property and Liability Insurance Guaranty Association Act, Neb. Rev. Stat. §§ 44-2401 to 44-2418 (Reissue 1984).
6. **Statutes: Proof.** A proviso in a statute which follows and restricts an enacting clause general in its scope should be strictly construed so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso, and the burden of proof is on one claiming the benefit of the proviso.
7. **Statutes: Legislature: Intent.** In considering the meaning of a statute, courts should, if possible, discover legislative intent from the language of the act and give it effect.

Appeal from the District Court for Kearney County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

David G. Wondra, of Adkins & Wondra, for appellant.

Teresa K. Luther and Craig L. Nelson, of Knapp, Mues, Beavers & Luther, for appellee.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

HENDRIX, D.J.

Plaintiff, Dr. Irvin E. Peterson, appeals from a summary judgment dismissing his action for damages resulting from personal injuries that occurred at the place of business of the

defendant, Minden Beef Company, a Nebraska corporation. The defendant was insured by the Iowa National Mutual Insurance Company.

After Peterson was injured but before the action was commenced, the Iowa Mutual Insurance Company was declared insolvent and placed under an order of liquidation. The plaintiff presented a claim for filing under the Nebraska Property and Liability Insurance Guaranty Association Act, Neb. Rev. Stat. §§ 44-2401 to 44-2418 (Reissue 1984), which provides for the payment of certain claims against insolvent insurance companies. The claim form contained the following: "I understand that my claim is subject to all terms, conditions and limitations of the . . . Nebraska law (Nebraska Property and Liability Insurance Guaranty Association Act, Article 24, Sections 44-2401 through 44-2418)." The filed claim contained a typed reservation at the end of the form, which stated: "Presenting this Claim Form in no way precludes the right to sue Minden Beef Company directly if full and complete settlement is not received from the Nebraska Property & Liability Guaranty Association." The U.S. Department of Labor, because Dr. Peterson was a U.S. Department of Agriculture employee, paid Dr. Peterson certain compensation for which it may be subrogated. The Nebraska Property and Liability Insurance Guaranty Association had not denied Dr. Peterson's claim as of the date of the trial, nor did the plaintiff elect to have the claim processed as one not covered by the Nebraska Property and Liability Insurance Guaranty Association Act within 30 days from the filing of the claim.

The specific statutory provision primarily involved is § 44-2406(4), which reads as follows:

> A third party having a covered claim against any insured of an insolvent member insurer may file such claim with the director pursuant to the provisions of sections 44-127.01 to 44-127.05, and the association shall process such claim in the manner specified in subsections (2) and (3) of this section; *Provided*, that the filing of such claim shall constitute an unconditional general release of all liability of such insured in connection with the claim, unless the association thereafter denies the claim for the

> reason that the insurance policy issued by the insolvent member company does not afford coverage, or unless the claimant shall, within thirty days from the date of filing his or her claim with the director, file with the director a written demand that the claim be processed in the liquidation proceedings as a claim not covered by sections 44-2401 to 44-2418.

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). We find such to be the case, and affirm.

When a claim is filed by a third party, which has not been denied for noncoverage, or wherein the claimant has not filed a written demand that such claim be processed in the liquidation proceedings as provided by § 44-2406(4), the claimant has no right to sue. Statutory language should be given its plain and ordinary meaning, and where the words of the statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). It is not necessary to resolve the differences found in the claim which result from plaintiff's attempt to claim under the law and then make changes in the law. The plaintiff is seeking to unilaterally avoid the clear provisions of the law. This he cannot do by a statement which does not rise to the status of a contract and certainly not to the status of a contract with the defendant. A statement that the maker will not comply with the law is not effective to avoid the law. This is particularly true in this situation because it is a rule in the construction of statutes that where a new right has been given and a specific remedy provided by statute, the right can be vindicated in no other way than that prescribed by the statute. *Waisbren v. Blink*, 207 Wis. 619, 242 N.W. 169 (1932).

Plaintiff asserts he was required to file a claim. In fact, the statutes are clear that filing a claim is an option of claimant. Section 44-2406(4) specifically provides that a third party having a covered claim *may* file such claim. Generally, "may" used in a statute will be given its ordinary permissive and

discretionary meaning unless it would manifestly defeat the statutory object. *County of Keith v. Triska*, 168 Neb. 1, 95 N.W.2d 350 (1959). Nor does Neb. Rev. Stat. § 44-127.01(2) (Reissue 1984) contain conflicting language. It does require a notice to be given, and then states: "Such notice shall require *claimants* to file their claims with the Department of Insurance together with proofs thereof within six months after the date of the first publication." (Emphasis supplied.) It is quite obvious that the only people required to file claims are those who choose to be claimants. Plaintiff has so chosen and is subject to the disadvantages as well as being entitled to the benefits of the act.

The plaintiff asserts that he is not a "third party" as mentioned in § 44-2406(4) and that such designation would only apply in this case to the United States, which has a subrogation claim. The provisions and intent of the statute are to the contrary. The first sentence of § 44-2406(4) designates the other two parties: (1) the insured and (2) the insolvent member insurer. A third party would obviously be a party other than those two. Such designation could not logically mean a subrogated entity in view of § 44-2403(4)(b), which covers subrogation and reads as follows: "Covered claim shall not include any amount due any reinsurer, insurer, liquidator, insurance pool, or underwriting association, as subrogation recoveries or otherwise . . . ."

The plaintiff asserts that summary judgment was premature, apparently because the matter is still being processed through the guaranty association. This position places the burden incorrectly. The filing of a claim triggers the unconditional general release. It is the burden of the plaintiff to show that at least one of the conditions subsequent has occurred. The evidence is conclusive that the association has not denied the claim, and no written demand has been made that the claim be processed in the liquidation proceedings as a claim not covered by the act. One seeking to be excluded from the operation of a statute must establish that the exception embraces him. A proviso which follows and restricts an enacting clause general in its scope should be strictly construed so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso, and the burden of proof is on one claiming

the benefit of the proviso. *Johnson v. School Dist. of Wakefield*, 181 Neb. 372, 148 N.W.2d 592 (1967).

Lastly, while no specific legislative history pertaining to § 44-2406(4) is found, it appears from the language of the act that it was the intent of the Legislature to require an election of remedies by the claimant. In considering the meaning of a statute, courts should, if possible, discover legislative intent from the language of the act and give it effect. *Mitchell v. County of Douglas*, 213 Neb. 355, 329 N.W.2d 112 (1983). Some indication of intent may be gleaned from other sources. In general, the Nebraska Property and Liability Insurance Guaranty Association Act is a model act. Missouri has a similar section, Mo. Rev. Stat. § 375.785(4)(1)(a)c (Vernon Supp. 1989). Several other states have adopted similar provisions found in their insurance codes. One of these is Wisconsin, Wis. Stat. Ann. § 645.64 (West 1980). The committee comment found in the annotation sets out the rationale for the provision and states:

> This section provides for the third party claimant to make a choice between pursuing his claim against the insured and presenting his claim in the liquidation. At first blush it would seem harsh and unnecessary to force such a choice. But this is not the case. Before he has to choose, the claimant has every opportunity to determine whether the insured is individually financially responsible. If he is, the claimant can proceed against him, rather than take his chances in the liquidation. If the insured is judgment proof or of doubtful solvency, the claimant can claim in the liquidation. . . .
>
> . . . It is unfortunate that the innocent third party must relinquish his right against the insured in order to claim in the liquidation but in no other way is it possible to settle the matter expeditiously, efficiently and equitably. . . .

We conclude that the plaintiff has made his election and that the case was properly dismissed by the trial court.

AFFIRMED.

STATE CODE AGENCIES EDUCATION ASSOCIATION, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

434 N.W.2d 684

Filed January 27, 1989. Nos. 87-1060, 88-069.

Statutes. Where a new right is afforded by statute, one who desires such a statutory right must bring himself within the provision of the statute.

Appeal from the Nebraska Commission of Industrial Relations. Reversed and remanded with directions to dismiss.

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

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

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

GRANT, J.

These two appeals were consolidated for hearing in this court. Both are appeals from orders of the Nebraska Commission of Industrial Relations (Commission) entered under the provisions of the State Employees Collective Bargaining Act, Neb. Rev. Stat. §§ 81-1369 to 81-1390 (Reissue 1987). This act was enacted as 1987 Neb. Laws, L.B. 661, and became effective on April 9, 1987. The order appealed from in case No. 87-1060 was signed by the Commission on December 4, 1987.

In case No. 87-1060, the appellee, State Code Agencies Education Association (Association), filed a petition with the Commission, alleging that the State had refused to enter into negotiations with the Association and seeking an order of the Commission directing the appellant, State of Nebraska, to "commence good faith negotiations with respect to terms and conditions of employment for members of the Association . . . ."

The State filed its answer, in which it alleged that it had not refused to enter into collective bargaining with the Association and alleged that the State, pursuant to § 81-1379, was prohibited from entering into such bargaining because

negotiations were not begun before the second Wednesday of September 1987 (September 9), and because the Association had not been certified as the exclusive bargaining agent for the teachers in question before September 9 and had not filed its petition for certification until September 30.

Simultaneously with the filing of its petition, the Association filed an "Application For a Temporary Order," in the same proceedings, seeking an order of the Commission directing the State to "forthwith" commence negotiations. A hearing was held on this application on December 1, 1987.

On December 4, 1987, the Commission issued its order directing that "the State immediately commence negotiations with the State Code Agencies Teacher Association." After so ordering, the Commission's order stated, "The Commission intends to issue no further Order in this matter since the prayer for relief contained in the Petitioner's Petition is substantially the same as in Petitioner's Application for Temporary Order." The State timely appealed to this court.

In this court, the State sets out four assignments of error, which generally present the questions whether a bargaining unit which wishes to enter into contract negotiations with an employer is required under the terms of § 81-1379 to commence negotiations before the second Wednesday in September, or whether, at the latest, the unit must initiate a representation proceeding to be filed on or before the second Wednesday in September. We reverse the order of the Commission.

The record of the hearing on December 1, 1987, shows the following. The Association is an unincorporated association which was certified by the Commission on October 28, 1987, pursuant to a representation proceeding initiated by the Association on September 30, 1987, as the exclusive collective bargaining agent for teachers employed by three State of Nebraska departments: the Department of Correctional Services, the Department of Social Services, and the Department of Public Institutions. The parties have stipulated that before October 28, 1987, the Association "was separately the certified exclusive bargaining agent for the teachers employed by the Department of Correctional Services, the teachers employed by the Department of Public Institutions,

and the teachers employed by the Department of Social Services."

The parties also stipulated that on November 2, 1987, Jerry Kriha, the Association's chief negotiator, sent a letter to Steven Torrence, the State's chief negotiator. In this letter, Kriha referred to the fact that the Association had been certified as the bargaining agent for the teachers above referred to. Attached to the letter was a copy of the Commission order of October 28, 1987, certifying the Association. Kriha requested that "bargaining begin immediately on the 1988-1989 contract."

On November 6, 1987, Torrence responded by letter to Kriha. In this letter, Torrence wrote that the State was aware of the October 28 Commission certification, but that it was the State's position that the Association was "time-barred by the language of the new State Employee's [sic] Collective Bargaining Act from bargaining with the State under it's [sic] new certification for a 1988-1989 contract."

Torrence's letter went on to say that the specific language of the new act was § 11 (codified as § 81-1379). The relevant portions of § 81-1379, as set out in the letter, were:

> The Chief Negotiator [defined in § 81-1371 as "the Chief Negotiator of the Division of Employee Relations in the Department of Personnel"—Torrence, in this case] and any other employer-representative and the exclusive collective-bargaining agent shall commence negotiations on or prior to the second Wednesday in September of the year preceding the beginning of the contract period, except that the first negotiations commenced by any bargaining unit after April 9, 1987, may commence after such September date in order to accommodate any unresolved representation proceedings. All negotiations shall be completed on or before March 15 of the following year.

The letter went on to say that it was the position of the State that the only exception to § 81-1379, as to the beginning of negotiations by September 9, 1987, was for "unresolved representation proceedings initiated prior to the second Wednesday in September . . . ." (Emphasis in original.) In the case of unresolved representation proceedings, § 81-1379

provides that negotiations could commence after the September date "in order to accommodate any unresolved representation proceedings." Torrence's letter pointed out to Kriha that no representation proceedings were pending as of September 9, 1987. The Association's petition was filed November 23, 1987.

Testimony from Torrence at the hearing showed that he knew that Kriha was the director of collective bargaining for the Association "prior to the passage of LB 661 [§§ 81-1369 et seq.] but not until it became certified were they the bargaining agent for the new unit as outlined in LB 661." Torrence amplified his answer when he further testified: "[T]he State Code Agencies Education Association was still the collective bargaining agent for the vertical units that were prescribed prior to LB 661 but not for the new horizontal unit as defined in . . . Section 5 [§ 81-1373] . . . ." Torrence further testified that he and Kriha first discussed collective bargaining between the Association and the State on September 10, 1987, but that Kriha and Torrence had discussions in "early to mid-August when he [Kriha] wanted to talk about ground rules and the bargaining process."

Torrence further testified that during the "early to mid-August" discussions, he told Kriha that "before we would sit down and formally discuss with him the collective bargaining process, [the Association] needed to become the exclusive certified agent for that unit of employees."

Torrence also testified that Kriha "acknowledged that they needed to become certified, and he said he would get in contact with his attorneys to file the necessary petition."

Torrence explained that the new act had created a different situation, in that before the new act took effect on April 9, 1987, there were three separate contracts for the teachers in the three separate units represented by the Association and that before the new act the contracts were "on a vertical basis." Torrence had explained that "81-1374 prescribed the transition from the vertical to the horizontal . . . ." This explanation coincided with the introducer's statement of intent in connection with L.B. 661. That statement set out, in part, that "[t]he bill would: (1) establish occupational horizontal

bargaining units for state employees; (2) provide for historic representation rights for collective bargaining agents in the transition from vertical to horizontal units . . . ." Introducer's Statement of Intent, Committee on Business and Labor, 90th Leg., 1st Sess. (Mar. 2, 1987).

This purpose is reflected in the provision of § 81-1373 which "created twelve bargaining units for all state agencies except the University of Nebraska, the Nebraska state colleges, and other constitutional officers." Section 81-1373(1)(k) defined 1 of the 12 newly created units as "Teachers, which unit is composed of employees required to be licensed or certified as a teacher . . . ." Thus, the Association's members, constituting teachers in the Department of Correctional Services, the Department of Social Services, and the Department of Public Institutions constituted a new horizontal unit, which would have one contract with the State, rather than the situation existing before the act when each of the three units had a separate contract with the State (a vertical concept).

A new concept is established by the new act, and we can see no unfair burden on collective bargaining agents to comply fully with the new law. As set out above, § 81-1379 required that the exclusive bargaining agent "shall commence negotiations on or prior to [September 9, 1987]." The Association chose to so conduct itself that it was not established as the "exclusive bargaining agent" before September 9, 1987, nor did it bring itself within the exception to the critical date, which permitted negotiations to commence after September 9 "in order to accommodate any unresolved representation proceedings."

Neb. Rev. Stat. § 49-802 (Reissue 1988) provides:

> Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter shall be as follows:
>
> (1) When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed.

In *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 685, 325 N.W.2d 648, 651 (1982), we stated, "As a general rule, in the construction of statutes, the word 'shall' is considered

mandatory and inconsistent with the idea of discretion."

The clear language of § 81-1379 provides that negotiations shall commence on or before September 9, 1987. The Commission determined that " 'any (emphasis supplied) unresolved representation proceeding' may delay the commencement of negotiations, regardless of when the certification process is initiated, until a certification order is entered by this Commission." We hold that such interpretation is incorrect. We hold that the negotiations contemplated by § 81-1379 must be commenced by "the second Wednesday in September of the year preceding the beginning of the contract period," and that starting time is extended only to accommodate any unresolved representation proceedings which are pending as of the "second Wednesday" date. Such a construction is demanded by the later specific dates set out in the act, such as: "All negotiations shall be completed on or before March 15 of the following year" (§ 81-1379); "At the initiation of negotiations but no later than December 15" (§ 81-1380); "If the parties in labor contract negotiations do not reach a voluntary agreement by January 1" (§ 81-1381); "No later than January 10" (§ 81-1382); "No party shall file an appeal after March 15" (§ 81-1383); etc. The Legislature itself had clear budgetary reasons for wanting certain timeframes. Senator Jerome Warner, one of the sponsors of the bill, testified before the legislative committee considering L.B. 661 that the Legislature needed to have

> a budget figure during the course of a session, that would be realistic and one that we could address with . . . or could be comfortable with that was going to be fairly firm, and under this proposal why a budget would be a submitted by the, at least an outside numbers would be known by the Legislature and by . . . the Governor for that matter by the . . . fifteenth of . . . March and I think that that becomes exceedingly important in the long run in particular.

Committee on Business and Labor Hearing, 90th Leg., 1st Sess. 78-79 (Mar. 2, 1987). The Legislature has established precise, detailed timeframes for actions under the act in question. With full knowledge of the overall timing requirements, the Association has chosen not to initiate the specific action

necessary to start the whole proceeding. That is its right, but it may not have it both ways. Either the Association, for whatever reason, can live with the situation it finds itself in on the second Wednesday of September or the Association can claim the rights it has under the act by timely starting the procedures of the act. In this case, the Association chose not to act.

Such a construction is clearly consistent with other decisions of this court. In *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 299-300, 363 N.W.2d 362, 365 (1985), with reference to garnishment statutes, we stated:

> Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. See, *Christiansen v. Moore*, 184 Neb. 818, 172 N.W.2d 620 (1969); *Beggs v. Fite et al.*, 130 Tex. 46, 106 S.W.2d 1039 (1937). Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes. *Shevin v. Venderbush Company*, 280 Mich. 499, 273 N.W. 780 (1937); *Liberty Loan Corp. & Affiliates v. Eis*, 69 Wis. 2d 642, 230 N.W.2d 617 (1975).

In this case, the Legislature has enacted statutes giving rights unknown at common law and has provided procedures which allow employees of the sovereign to negotiate with the sovereign. Where a new right is afforded by statute, one who desires such a statutory right must bring himself within the provisions of the statute. See *Johnson v. Toth*, 516 N.E.2d 85 (Ind. App. 1987). Such statutes must be strictly construed. The order of the Commission directing negotiations is reversed.

With regard to case No. 88-069, the Association filed a petition with the Commission requesting a list of special masters and a motion seeking an order of the Commission "waiving mediation under §81-1381, but in the alternative if mediation under §81-1381 is mandatory and jurisdictional, request is hereby made for appointment of a mediator pursuant to such statutory provision." The proceedings in case No. 88-069 present the problems confronting the Commission if orderly statutory procedures are not followed. Section 81-1381 provides for procedures if the parties "do not reach a voluntary agreement by January 1 . . . ." The Association's motion was

filed on January 4, 1988. The Commission ordered that "[m]andatory mediation under Section 81-1381 be commenced immediately," at a time when, by statute, the voluntary, unmediated negotiations must have been completed.

Such order is an extension of the order of the Commission in case No. 87-1060. Since the Commission had no authority to enter the order it did in case No. 87-1060, the Commission order in case No. 88-069 is also without effect.

The orders of the Commission in cases Nos. 87-1060 and 88-069 are reversed. The two causes are remanded to the Commission with directions to dismiss the petition in each case.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. DANIEL G. SUTTON, APPELLANT.

434 N.W.2d 689

Filed January 27, 1989. No. 87-1071.

1. **Search and Seizure: Proof.** When evidence is seized pursuant to consent, and not pursuant to a warrant, the burden is on the government to prove that the search was voluntarily permitted, invited, or agreed to by the persons whose rights were involved. Whether a person voluntarily consented to a search is a question of fact to be determined from the totality of circumstances surrounding the search.
2. **Motions to Suppress: Appeal and Error.** 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. In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly wrong.
3. **Search and Seizure.** A search made pursuant to consent may not exceed the scope of the consent.
4. **Testimony: Trial.** Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness.
5. **Testimony: Trial: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.

6. **Evidence: Trial: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
7. **Sexual Assault: Lesser-Included Offenses.** A substantial step in a course of conduct intended to culminate in a sexual assault in the first degree (sexual penetration) may include a substantial step in a course of conduct intended to culminate in achievement of sexual contact as well, that is, commission of a sexual assault in the second degree.
8. **Jury Instructions: Evidence: Proof.** The trial court is not required to give a jury instruction where there is insufficient evidence to prove the facts claimed.
9. **Criminal Law: Words and Phrases.** To constitute one an accomplice, he must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice.
10. **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 Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

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

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

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

GRANT, J.

This is an appeal from the district court for Sarpy County. The defendant-appellant, Daniel G. Sutton, was charged by information with attempted first degree sexual assault (count I), second degree assault (count II), and possession of cocaine with intent to deliver (count III). He pled not guilty, and the matter was tried before a jury on September 14 to 16, 1987. The jury returned verdicts of guilty on all counts, and the defendant's motion for new trial was overruled. Defendant was sentenced to a term of 2 to 5 years' imprisonment on count I and 2 years' imprisonment on count II, with these sentences to run concurrently. He was sentenced to 3 to 10 years'

imprisonment on count III, to be served consecutively to the sentences imposed on counts I and II.

Defendant appeals, contending the district court erred (1) in admitting into evidence items seized at defendant's home and in failing to grant his motion to suppress said evidence; (2) in its rulings on evidentiary questions concerning defendant's prior use of cocaine, expert testimony regarding the amount of cocaine a user would possess for personal use, and cross-examination of the complaining witnesses on their knowledge of penalties for possession of cocaine; (3) in refusing to permit defendant to testify in surrebuttal regarding prior sales of cocaine to one of the State's complaining witnesses; (4) in its rulings on character evidence; (5) in failing to instruct the jury on self-defense in connection with count II; (6) in failing to instruct the jury on accomplice testimony with respect to count III; and (7) in failing to submit to the jury the lesser-included offenses to attempted first degree sexual assault.

Defendant further contends the district court was biased "towards the prosecution side," and abused its discretion and "prevented [him] from having a fair trial and a fair sentence and a fair disposition of the issues brought to the Court's attention" by (1) making derogatory comments on defendant's credibility at the suppression hearing; (2) allowing the jury to infer that defendant had attempted to tape-record the court proceedings; (3) failing to grant defendant's request to impanel a second black juror; (4) interrupting defendant's testimony so as to put him in a "bad light" before the jury; and (5) not admitting defendant to bail pending presentence investigation and failing to set an appeal bond.

Finally, defendant claims he received an excessive sentence. We affirm defendant's convictions and sentences on counts II and III, and reverse and remand for a new trial on count I.

The record shows the following facts supporting defendant's convictions. On the evening of May 2, 1987, the victim, Suzanne Gibson, and her friend Kristie Beener attended Beener's niece's wedding. After the wedding, the two women attended the reception. Defendant also attended the reception, together with his wife, Valeria; his small son; and his cousin, Nate Lawler. Although Gibson had not met defendant prior to

May 2, 1987, Beener and the defendant were social friends and had worked together at the Omaha Country Club. Beener testified that defendant suggested she and her friends come over to his house following the reception.

At 12:30 a.m., Gibson left the reception with Beener and another woman friend, taking with them a keg of beer left over from the wedding reception. They went to Gibson's home in Omaha, where they continued drinking. Sometime later, Beener telephoned defendant from Gibson's house "to see if he still had people out there."

At about 1:15 a.m., Beener and Gibson drove to the defendant's home. They arrived at 1:45 a.m. and went directly to the basement area of the house. Lawler carried the keg of beer to the basement. For the first half hour after their arrival, Gibson and Beener talked with several people in the basement, including the defendant, Valeria Sutton, Lawler, a female friend of Valeria's, and two small children. Defendant was no longer wearing the suit he wore to the reception, but was wearing pajamas and a robe.

At about 2:30 or 3 a.m., Gibson, Beener, Lawler, and the defendant began to play poker. During the card game, these parties continued to drink beer and started snorting cocaine. The cocaine was on a dinner plate which had been placed on the card table. Gibson testified that she first noticed the cocaine during the poker game and that there was about one-third of a cup of the substance on the plate. Beener testified that the plate of cocaine was not on the table when she and Gibson arrived, and estimated the amount of cocaine on the dinner plate to be about "half a gram." Both Gibson and Beener testified that the defendant set the cocaine up in lines at the table and that all the parties to the card game snorted it through straws or rolled-up dollar bills.

Gibson further testified that during the card game, defendant put his hand on her leg, under her dress at midthigh, and that she told him to stop. Beener testified that "we all kind of laughed it off. I said, 'She's a newly-married woman,' and I said, 'Dan,' I said, 'your wife and kid are upstairs.' "

The poker game ended at 6 a.m., when Beener and Lawler left to buy cigarettes. Gibson was ready to leave at this point,

but agreed to wait until Beener and Lawler returned. Shortly after Beener and Lawler left the house, defendant again tried to put his hand on Gibson's thigh. Gibson objected and stood up. Defendant pulled the front of Gibson's dress down, ripping the back loose and exposing her breasts. Gibson testified that as she tried to leave the room, the defendant struck her on the back of the head with a hard object, and she dropped to the floor. Defendant leaped on top of her from behind and hit her several times with the hard object, which Gibson later determined to be a gun when she observed it during the struggle. An exchange of biting took place, and Gibson saw blood dripping down her arms. Gibson testified that defendant "just kept telling me to do what he said so that he didn't have to shoot me." During the assault, defendant pulled Gibson's panty hose and panties to her knees and told her he was going to "stick his dick in [her] butt."

Gibson testified she did not remember how she got out of the basement. She left defendant's house and sought help from neighbors. Lynn Gawerecki, who did not know Gibson on the date of the assault, testified that Gibson rang her doorbell at about 7 a.m. and "had blood covering down her face and her arms and her hand." Gibson, who appeared to be "really scared" and "hysterical," told Gawerecki that defendant beat her and that he had a gun, and asked her to call the police. Gawerecki called the Sarpy County sheriff's office.

Meanwhile, Beener and Lawler returned to the Sutton home. Valeria Sutton answered the door and asked Beener, "Where's that girl? Dan's got blood on him." Beener went to the basement and saw that there were cards all over the floor. She left the house to look for Gibson, and eventually joined Gibson at the Gawereckis'.

Beener spoke with Gibson shortly after Gibson showered at Gawereckis' house. Beener testified that Gibson appeared to be in control until Beener entered the bathroom. At that time, Gibson became "hysterical" and began crying. Gibson told Beener that she had been attacked immediately after Beener and Lawler left the house and that defendant hit her with a gun and tried to sexually assault her.

Deputy Sarpy County Sheriff Larry Strazdas testified that he

was dispatched to the Gawerecki residence to investigate Gibson's complaint. By the time Deputy Strazdas arrived, Gibson had taken a shower, but she was bleeding from the top of her head and by her right ear, and her hair was "matted." Cpl. John Kucer, who had also been dispatched to the Gawerecki home, observed a cut on the back of Gibson's head, bite marks on her arm, bruising on her jaw, and a laceration close to the ear. The officers talked to Gibson at the Gawerecki residence for approximately half an hour, and Gibson's father took her to Midlands Hospital for treatment.

Corporal Kucer and Deputy Strazdas arrived at the defendant's residence at approximately 7:30 a.m. to question the defendant. Deputy Strazdas testified at trial that when he knocked on the front door of the defendant's house, a man answered. This man identified himself as defendant's "brother," Nate Lawler, and invited Strazdas and Kucer to enter. The officers stayed in the entryway while Lawler went to get the defendant. A few minutes later, defendant came from the bedroom area to the entryway, sat down on the steps facing the front door, and gave the officers his driver's license for identification. He was wearing blue jeans and a dark T-shirt. Defendant did not appear to be disoriented or intoxicated, although Corporal Kucer noticed a smell of alcohol coming from the defendant.

Deputy Strazdas then told defendant he had come from the neighbor's house, where a female had reported that defendant hit her in the head with a gun and attempted to assault her sexually. Defendant denied Gibson's version of events, stating that when Gibson left his basement she tripped and fell and bumped her head, and that he went to bed after Gibson ran out the door. Defendant further stated that he did not own a gun and that the officers "could look around" if they wanted to. Valeria Sutton also appeared at the entryway during this discussion and stated to the officers that defendant did not own a gun and they could look around if they wanted to.

Corporal Kucer and Deputy Joseph Eaton made a cursory search of the basement at that time. Corporal Kucer noticed smudges of blood on a wall leading to the basement, but discovered no blood on the steps. The officers were in the

basement for 5 to 10 minutes and did not find a gun, but seized a film canister and two straws from the basement. Kucer told the other officers to search around the outside of the house to make sure the weapon had not been deposited outside.

Deputy Strazdas searched the kitchen area for a gun while the other two officers were in the basement. When Kucer and Eaton came back upstairs, Strazdas placed the defendant under arrest and handcuffed him. Corporal Kucer took defendant to the Sarpy County sheriff's office.

Deputies Strazdas and Eaton stayed at the house and continued searching for a gun. Valeria Sutton was present in the kitchen when Strazdas went out a sliding glass door onto the deck or porch area of the house. He noticed a stack of bags containing "top soil or fertilizer or whatever" under the deck. After Strazdas moved some of the bags, he discovered an opened bag of charcoal briquettes. He looked in the bag of charcoal and found a purse. Strazdas opened the purse and found a "big wad of money" and "two white squares of some type of a substance in a little plastic bag." Valeria Sutton then came out onto the deck and asked Strazdas what he was doing with her purse. Strazdas held the purse pending the arrival of Investigator Kenneth Benck from the sheriff's office.

Deputy Strazdas met Investigator Benck outside when he arrived at the defendant's house. Strazdas gave the purse to Benck and informed him that the incident involved a gun that was used to strike Gibson and that they were looking for the gun. Strazdas further informed Benck that they had performed a cursory search of the house, and, in order to do a more complete search, he wanted a consent-to-search form signed. Benck then entered the residence and explained the form to Mrs. Sutton. At approximately 9:04 a.m., Valeria Sutton signed the consent-to-search form, which states in part:

> I do hereby authorize representative(s) of the Sarpy County Sheriff's Department to search my residence (or other real estate) located at 14812 Edna St and/or my motor vehicle(s) (Namely) [all vehicles] presently parked or located at 14812 Edna St.
>
> I am giving this written permission to these Sheriff's Deputies, freely and voluntarily, without any threats or

promises having been made to me.

Benck was inventorying Valeria Sutton's purse when Corporal Kucer returned to the residence. Kucer observed that the purse contained "a great deal of money" loose, "balled up," and in small bills. The purse contained $3,032.25 in cash. The "two white squares of some substance" observed by Deputy Strazdas when he found the purse were subsequently determined to be 19 grams of pure cocaine.

After Valeria Sutton signed the consent-to-search form, Deputies Strazdas, Eaton, Kucer, and Benck conducted a thorough search for a handgun, searching "[a]ny area that would afford a size large enough to conceal a handgun."

The officers never found a gun in the Sutton residence. Investigator Benck, however, seized a black shoulder holster from the hall closet, and Deputy Eaton found some marijuana in one of the rooms. Corporal Kucer, searching the fireplace in the living room area, discovered a set of defendant's underwear hidden in the hearth. When Kucer opened up the flue, he found the pajamas the defendant wore during the poker game. The pajamas were wet with blood.

Defendant admitted at trial that there was marijuana and $3,000 cash (which he described as an emergency fund) in his house, but claimed he did not know where the cocaine came from and denied putting it in his wife's purse. He stated that after Beener and Lawler left to get cigarettes, Gibson asked to use the restroom, grabbed her purse, took a few steps, staggered, tripped over the beer keg, and fell down. Defendant testified that when he tried to help Gibson get up, she "started acting crazy," and the two engaged in a struggle. Defendant further testified that after Gibson ran away, defendant told his wife to put the money in a safe place. He admitted that there was indeed blood all over the basement when Gibson left and that he had hidden his clothing in the fireplace.

Defendant testified during direct examination that he had been convicted in Detroit, Michigan, in January 1978, of carrying a concealed weapon. He testified on cross-examination that he used cocaine "through the Seventies and Eighties" and had been treated for drug and alcohol use in 1983.

Defendant first claims the district court erred in admitting into evidence the items seized at defendant's home and in failing to grant his motion to suppress said evidence. When evidence is seized pursuant to consent, and not pursuant to a warrant, the burden is on the government to prove that the search was voluntarily permitted, invited, or agreed to by the persons whose rights were involved. *State v. French*, 203 Neb. 435, 279 N.W.2d 116 (1979). Whether a person voluntarily consented to a search is a question of fact to be determined from the totality of circumstances surrounding the search. *State v. French, supra.*

At the suppression hearing, defendant denied that he had authorized a search of his residence. Deputies Strazdas and Kucer testified at the suppression hearing that both the defendant and his wife denied having a gun in the house and said that the officers could look for a gun if they wanted to. Neither the defendant nor his wife was under arrest when these statements were volunteered. The only conversation the deputies could recall concerning a search warrant of the premises was with Lawler, a houseguest. Neither the defendant nor his wife revoked or limited the consent to search after consent was given.

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. In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly wrong. *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988); *State v. Vann*, 230 Neb. 601, 432 N.W.2d 810 (1988). Here, the trial court resolved the conflicts in evidence in favor of the State and found that defendant did give the deputies permission to search the premises for a gun and that his authorization was volunteered and not coerced. That finding is not clearly wrong.

Defendant cites *State v. Billups*, 118 Ariz. 124, 575 P.2d 323 (1978), and *State v. Pinder*, 126 N.H. 220, 489 A.2d 653 (1985), in support of his claim that the scope of the consent given, if any, was for the house only, and the 19 grams of cocaine should

have been suppressed because it was found underneath the back patio deck. Defendant correctly states that a search made pursuant to consent may not exceed the scope of the consent. *State v. Pinder, supra*; 3 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 8.1(c) (2d ed. 1987).

The *Pinder* and *Billups* decisions are not factually similar to the present case. They hold that the scope of consent to search a "house" could not reasonably be construed to authorize a search of locked outbuildings. Even on that point, there is authority to the contrary. See, *Commonwealth v. Eckert*, 244 Pa. Super. 424, 368 A.2d 794 (1976); *Drummond v. United States*, 350 F.2d 983 (8th Cir. 1965). See, also, *State v. Trahan*, 229 Neb. 683, 687, 428 N.W.2d 619, 622 (1988), where we said, " ' "Curtilage is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs." ' "

The defendant and his wife both claimed there was no gun in the house and gave oral permission for the investigating officers to search their residence for a gun. The purse containing over $3,000 in cash and 19 grams of cocaine was discovered under the back deck of the house, concealed in a bag of charcoal found leaning against the foundation of the house. Since the evidence was discovered within the curtilage of the home in an area that could be described as part of the house, and in a place where a gun could be hidden, it was seized pursuant to the terms of defendant's and Valeria Sutton's oral consent to search. The findings of the trial court to this effect are not clearly wrong, and defendant's first assignment of error is without merit.

Defendant next claims he was unfairly prejudiced at trial as a result of certain rulings pertaining to evidence of his prior acts. The record shows that Beener was allowed to testify during the State's case in chief that she had used cocaine with the defendant "a couple times" in the past. The trial court sustained defendant's objection to Beener's testimony during the State's case in chief that she purchased cocaine from the defendant on previous occasions.

Defendant chose to testify on his own behalf. He testified during his direct examination that he knew there was $3,000 in

cash in his wife's purse on his dresser, but that he had not acquired any portion of the $3,000 emergency fund from selling cocaine. He further testified that he was not running a cocaine business from his house. He denied during direct examination that he ingested cocaine on the night in question, but admitted he smoked marijuana that night. He further testified that he had no kits or packets containing razors or mirrors that would allow him to use and separate cocaine "for either use or to sell." The defendant clearly testified on his direct examination on the subject of his personal use of cocaine.

During cross-examination, the prosecutor asked defendant, "I take it from what you're saying that you've never used cocaine?" Defense counsel objected on grounds of relevancy and that the State was attempting to elicit evidence of specific events. The objection was overruled for the reason that the question did not relate to specific acts. The prosecutor then asked, "Have you ever used cocaine?" to which defendant replied, "Sure have." Defense counsel objected again, on the same grounds, and the objection was overruled. Without a question pending, defendant volunteered the following information: "Well, I've used cocaine through the Seventies and Eighties, some parts of the early Eighties." There was no objection to or motion to strike this volunteered testimony. The line of questioning was pursued, and defendant testified he began using cocaine and other drugs when he was in Vietnam in 1968, that he began participating in a drug treatment program in May 1983, and that he had not used cocaine since that time. After eight similar questions, defense counsel then objected to the line of questioning and moved to strike the testimony about defendant's prior cocaine use. The objection was overruled because it was not timely. Defendant's delay in objecting could be a possible trial tactic in establishing that defendant was a Vietnam veteran who had become dependent on cocaine while in the service of his country. Defendant then testified, over objection, that he had never sold cocaine.

Beener was then called as a rebuttal witness and testified she had purchased cocaine from the defendant at his home four or five times in the past. The trial judge did not allow defendant to testify again in surrebuttal that he had never sold cocaine.

Defendant claims, in his brief at 24, that Beener's testimony that she had used cocaine with him in the past was improperly introduced "to prove that he used or he sold cocaine on the night in question because he had used it before," in violation of Neb. Evid. R. 404(1) (Neb. Rev. Stat. § 27-404(1) (Reissue 1985)), which provides, in part: "Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion . . . ." Defendant further claims the State's cross-examination of him regarding prior sales and use of cocaine also was improper under rule 404(1) and was outside the scope of his direct examination, thus making Beener's rebuttal testimony improper.

In *State v. Thaden*, 210 Neb. 622, 627, 316 N.W.2d 317, 321 (1982), we noted that " 'cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness' and 'anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination.' " The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *State v. Moore*, 221 Neb. 706, 380 N.W.2d 288 (1986); *State v. Thaden, supra*.

We conclude the trial court did not abuse its discretion in allowing the prosecutor to cross-examine defendant regarding prior sales and use of cocaine. During his direct testimony, defendant specifically denied he had received any portion of the $3,000 from selling cocaine or that he was running a cocaine business from his house. Defendant further denied using cocaine on the night in question and denied that he possessed paraphernalia that would allow him to use or sell cocaine. He stated that he did not put the 19 grams of cocaine in his wife's purse and had not seen the cocaine prior to trial. The subjects of whether defendant used cocaine and sold cocaine were within the scope of his direct examination, and were proper subjects for impeachment or rebuttal.

During cross-examination, defendant volunteered the statement that he had used cocaine "through the Seventies and Eighties" and testified that he had participated in a treatment

program for drug and alcohol use. There was no timely objection or motion to strike this testimony, and the trial court did not abuse its discretion in overruling defendant's untimely objection and motion to strike. Defendant verified on redirect that he "went through some sort of drug treatment program in Detroit."

Although the trial court erred in allowing Beener to testify during the State's case in chief that she had used cocaine with the defendant in the past, see *State v. Friend*, 230 Neb. 765, 433 N.W.2d 512 (1988), Beener's testimony on this point is merely cumulative to the defendant's own testimony, which was properly admitted. As such, the error is harmless beyond a reasonable doubt and is not grounds for reversal. See *Friend, supra*.

It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988); *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). The trial court did not abuse its discretion in refusing to allow defendant to repeat his own testimony in surrebuttal that he never sold cocaine.

Defendant further contends the trial court erred in allowing Sarpy County Deputy Sheriff Steve Grabowski, a former narcotics investigator, to testify, based on his years of experience in the field, that he was of the opinion 19 grams of pure cocaine was more than one would possess for one's personal use. Aside from the fact that defendant's objection to Deputy Grabowski's opinion testimony was not timely, the record indicates that Grabowski was properly qualified to testify as an expert on this subject. See *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984). Defendant's assertion to the contrary is without merit.

Defendant also complains he was improperly prevented from cross-examining Gibson and Beener during their rebuttal testimony as to "whether they recognized that it was much more serious to be involved in delivering cocaine than using it." Brief for appellant at 28. The extent of Gibson's rebuttal testimony was that she had taken a gray, not white, purse to the defendant's house; that there was no gun in the purse and that

neither she nor her husband owned a handgun; and that she did not recall seeing one of defendant's witnesses in the basement on the night of May 2. Beener testified during her rebuttal testimony as to her working relationship with the defendant at the Omaha Country Club; that she had purchased cocaine from the defendant on previous occasions; that Gibson had carried a gray or dark-pink purse to defendant's house; and that Beener had never known Gibson to carry a gun. Even if defendant's attempted cross-examination of Gibson and Beener on the subject of their knowledge of the penalties for using and delivering cocaine was relevant, it was outside the scope of the witnesses' rebuttal testimony, and the trial court did not abuse its discretion in sustaining the State's objection to this line of questioning.

Defendant's last assignment of error involving evidentiary rulings is that the trial court erred in interfering with his "character defense on his character trait of being polite and appropriate with women." Brief for appellant at 28. During the examination of the first of seven character witnesses, the court held a hearing outside the presence of the jury to determine the State's foundational objection to the witness' opinion that defendant had a character trait of "chivalrousness or decent conduct around women and with females." The trial court sustained the objection and ruled that it would require foundational evidence that the character witnesses had observed defendant under circumstances as they existed on the night of May 2, 1987, before it would allow the witnesses to testify to more than defendant's general character. Defendant was allowed to present seven character witnesses, six of whom worked with him at Fireman's Fund Insurance Company in Omaha. All seven witnesses testified generally that defendant was of good character, but none had observed defendant in the social environment present in his basement on the night the offenses occurred. The trial court's evidentiary ruling on this point was not clearly wrong, and the defendant's assignment of error is without merit.

Defendant's next three assignments of error pertain to jury "requested" instructions. With regard to count I (attempted sexual assault in the first degree), defendant claims the trial

court erred in failing to submit to the jury the lesser-included offenses to attempted first degree sexual assault. The State has referred us to *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), which holds that there are no lesser-included offenses to attempted first degree sexual assault. That decision was overruled in *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), cited by neither the State nor the defendant. In *Jackson*, we held that

> a substantial step in a course of conduct intended to culminate in a sexual assault in the first degree (sexual penetration) may include a substantial step in a course of conduct intended to culminate in achievement of sexual contact as well, that is, commission of a sexual assault in the second degree. Consequently, within the offense of "criminal attempt," § 28-201, an attempt to commit a particular crime may also include an attempt to commit a lesser-included offense in reference to the designated crime alleged to have been attempted.

Jackson, supra at 856, 408 N.W.2d at 729-30. In light of our decision in *Jackson*, and the facts of this case, we determine that the trial court erred in failing to instruct the jury on the lesser-included offenses of attempted sexual assault in the second degree and third degree. We therefore reverse defendant's conviction on count I and remand the cause for a new trial.

Defendant next claims the trial court erred in failing to instruct the jury on self-defense in connection with count II, second degree assault. Neb. Rev. Stat. § 28-1409(1) (Reissue 1985) provides:

> Subject to the provisions of this section . . . 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.

The record is devoid of evidence that Gibson used unlawful force against the defendant. In addition to Gibson's testimony that defendant assaulted her, defendant himself testified that at first he thought Gibson had overdosed, was unconscious, or

had "lost her mind" when she began to struggle against him. He also described Gibson as "delirious" and testified that he hit her over the head with his fist because she was fighting him. The trial court is not required to give a jury instruction where there is insufficient evidence to prove the facts claimed, *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988), and the trial court did not err in failing to instruct the jury on self-defense.

Defendant also contends that the trial court erred in denying his request that the jury be given a cautionary instruction as to the weight and credibility of the testimony of accomplices.

> "To constitute one an accomplice he must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice . . . ."

Wilson v. State, 170 Neb. 494, 509-10, 103 N.W.2d 258, 269 (1960), *cert. denied* 364 U.S. 887, 81 S. Ct. 178, 5 L. Ed. 2d 108. See, also, *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985). The record does not support defendant's claim that Beener and Gibson were his "accomplices" with respect to count III, possession of cocaine with intent to deliver. The court did not err in refusing defendant's requested instruction regarding accomplice testimony.

Defendant next alleges he was prevented from having a fair trial and sentencing due to the cumulative effect of the trial court's abuses of discretion in pretrial matters, during trial, and after trial. He first claims the court owed him a "gesture towards fairness" and should have manipulated the jury selection procedure to allow a second black juror to be impaneled. Brief for appellant at 37. The State exercised only three of its peremptory challenges during voir dire. The court excused all jurors not challenged in the reverse order in which they had been called. The record does not show, nor does the defendant claim, that the selection of jurors was racially motivated. See *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766

(1987). The trial court did not abuse its discretion in the jury selection process. Defendant's other claims that the trial court abused its discretion in conducting pretrial hearings, the trial itself, and the sentencing hearing are equally without merit.

Defendant claims as his final assignment of error that he received an excessive sentence and should have been sentenced to probation. 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. Jones,* 230 Neb. 528, 432 N.W.2d 523 (1988). Similarly, granting probation, as opposed to imposing a sentence of incarceration, is a matter left to the discretion of the trial court, and a denial of probation will not be disturbed on appeal absent an abuse of discretion. *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985).

We have reversed defendant's conviction for attempted first degree sexual assault. Second degree assault is a Class IV felony, punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both; defendant was sentenced to 2 years' imprisonment. Possession of cocaine with intent to deliver is a Class II felony, punishable by imprisonment for not less than 1 nor more than 50 years; defendant was sentenced to 3 to 10 years. The sentences imposed are well within the statutory limits, and we find no abuse of discretion in the sentences imposed in connection with counts II and III.

The judgment of the district court is affirmed with respect to counts II and III. We reverse defendant's conviction on count I and remand for a new trial on that count.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. DAVID W. JONES, APPELLANT.

435 N.W.2d 167

Filed January 27, 1989. No. 88-006.

1. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
2. **Constitutional Law: Witnesses: Trial.** The defendant must at least make some plausible showing of how an absent witness' testimony would have been both material and favorable to his defense. The constitutional right to compulsory process requires process for competent and material witnesses only.
3. _____: _____: _____. It is only where the trial court excludes relevant evidence without sufficient justification that a defendant's right to compulsory process is violated.
4. **Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of a criminal offense.
5. **Criminal Law: Entrapment: Intent.** In Nebraska, the "origin of intent" test is utilized to determine whether the defendant committed the offense because of entrapment. Under this test, entrapment consists of two elements: (1) The government has induced the defendant to commit the offense charged; and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
6. **Criminal Law: Entrapment: Evidence: Trial.** When a defendant raises the defense of entrapment, the court must determine whether the defendant has presented sufficient evidence to warrant submitting to the jury the issue of entrapment.

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

Charles F. Fitzke, Scotts Bluff County Public Defender, and Rae Ann Schmitz for appellant.

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

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITE, J.

This is a criminal case. Defendant appeals from a conviction from Scotts Bluff County. The appellant, David W. Jones, was found guilty of intentionally delivering cocaine, a Class II

felony, and sentenced to an indeterminate term of 2½ to 3 years at hard labor in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska. The defendant assigns as error the failure of the trial court to grant the defendant's directed verdict motion at the close of the evidence, the failure of the court to grant the motion of the defendant to compel the attendance of out-of-state witnesses, and the refusal of the trial court to give an instruction on the defense of entrapment. After a brief review of the facts precipitating the defendant's arrest, we will address each of these contentions in detail.

Connie R. Aguallo was a paid cooperating individual who volunteered to assist the Nebraska State Patrol and the Scottsbluff Police Department in apprehending drug offenders. Aguallo had compiled a list of people she knew to have drug connections in the community. On May 6, 1987, Aguallo was searched by an officer of the department and wired with a transmitter. She was then given $350 to purchase drugs. She proceeded to the home of Arnold O'Leary and Jeanettia Gray. Aguallo found only Gray at home and asked her if she could get Aguallo some cocaine. Gray responded that she did not have any drugs for sale but knew where she could get some.

The two women got into Aguallo's car and proceeded to 1614 Third Avenue in Scottsbluff. Gray went to the door and returned to the car with a tall man later identified as the appellant, Jones. The appellant entered the car and the three rode to Gray's house to change cars. They entered Gray's car and traveled to the corner of 15th Avenue and 15th Street in Scottsbluff.

While in the vehicle, Aguallo told the appellant that she wished to purchase an 8-ball of cocaine: approximately 3 grams. The appellant told her the cost would be $350, but Aguallo and the appellant finally negotiated a price of $340. Gray and Aguallo then dropped the appellant off and waited for approximately an hour.

The appellant returned to the vehicle with a baggie containing a white powdery substance later analyzed to be cocaine. He asked Aguallo for a line and took a small amount out of the baggie for himself. He then turned the rest of the bag

over to Aguallo. Aguallo placed the baggie in her pocket and returned to her vehicle at Gray's house.

Aguallo turned the baggie of cocaine over to the state patrol. At trial, Detective Mark Overman of the Scottsbluff Police Department identified the individual making the sale of cocaine as the appellant. After being granted immunity from prosecution, Gray also identified the appellant as the individual who procured the drug.

The appellant contends that he was in Newport News, Virginia, from February 18 through July 4, 1987. Sandra Renteria, John Gier, Benjamin Dean, and Donald Williams all testified in support of this assertion. However, on November 4, 1987, the jury returned a verdict of guilty.

The appellant first argues that the trial court was in error in overruling the defense motion for a directed verdict at the close of the appellant's case. This motion was based on the appellant's alleged absence from the State of Nebraska at the time of the commission of the offense, and the appellant contends that the doctrine of *State v. Hunt*, 224 Neb. 594, 399 N.W.2d 806 (1987), controls here, as the testimony against the defendant was of such doubtful character that a conviction based on such evidence cannot be sustained. This contention is without merit. In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988).

In the present case, as evidenced by the facts outlined above, sufficient evidence existed to establish the essential elements of the crime charged. In addition, the evidence was sufficiently reliable to support a finding of guilt. At trial, Detective Overman, Aguallo, and Gray all specifically identified the appellant as the individual making the sale of cocaine. Although the defendant presented witnesses to support his contention that he was not present in the state at the time of the offense, there was sufficient evidence to support the State's theory that the appellant was present, and to submit the identification issue to the jury.

In his second assignment of error, the appellant argues that the trial court improperly excluded witnesses who, he asserts, were necessary in his defense, in violation of his sixth amendment right to compulsory process. See *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986). This assignment of error is also meritless.

Appellant produced a list of potential witnesses on October 29, 1987, 4 days before the trial was scheduled to begin. On September 28, the matter had been set for trial, and discovery and pretrial motions had been ordered at that time. Because of this delay in producing a list of potential witnesses, the trial court found that the motion for attendance of out-of-state witnesses was untimely and without merit. These proposed witnesses were expected to testify that the appellant was in Newport News, Virginia, on May 6, the date of the alleged offense. The delay in producing a list of potential witnesses made it virtually impossible to comply with the requirements of Neb. Rev. Stat. §§ 29-1903 and 29-1908 (Reissue 1985) to subpoena the witnesses prior to trial.

Further, "the defendant must at least make some plausible showing of how an absent witness' testimony would have been both material and favorable to his defense." *State v. Cain, supra* at 802, 393 N.W.2d at 731-32. "The constitutional right to compulsory process requires process only for competent and material witnesses." *Id.* at 802, 393 N.W.2d at 732. At trial, both the appellant and Renteria testified to the effect that the appellant was in Newport News, Virginia, at the time of the offense. Additionally, three other witnesses testified in support of this assertion on the appellant's behalf. Additional testimony would merely have been cumulative. " '[I]t is only where the trial court excludes relevant evidence without sufficient justification that a defendant's right to compulsory process is violated.' " *Id.*, citing *United States v. Bernhardt*, 642 F.2d 251 (8th Cir. 1981). In this action, because the evidence sought to be introduced through these witnesses was cumulative, the appellant's right to compulsory process was not violated.

In his last assignment of error, the appellant challenges the trial court's denial of his requested jury instruction on the theory of entrapment. Entrapment is the governmental

inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of a criminal offense. *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984). This court has held that "[w]here a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment." *State v. Lampone*, 205 Neb. 325, 328, 287 N.W.2d 442, 444 (1980).

In Nebraska, the "origin of intent" test is the test utilized to determine whether the defendant committed the offense because of entrapment. *State v. Swenson, supra*; *State v. Lampone, supra*; *State v. Smith*, 187 Neb. 511, 192 N.W.2d 158 (1971). Under the "origin of intent" test, entrapment consists of two elements: (1) The government has induced the defendant to commit the offense charged; and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *State v. Swenson, supra*.

The State has the burden to prove beyond a reasonable doubt that the defendant was not entrapped. In the present action the agent of the government, Aguallo, approached Gray and asked her if she had any cocaine. Gray responded in the negative, but stated she knew where she could get some. Gray then approached the appellant regarding obtaining some cocaine for Aguallo. Gray was never an agent of the government. Because no agent of the government ever directly approached the appellant, it is difficult to imagine how the appellant can now be claiming that he was entrapped by the actions of the government.

> [E]ntrapment is condemned on account of some misuse of power or impropriety by the state charged with protecting against, not promoting, criminal activity. By injecting a criminal intent where none existed in an individual, the state becomes an instigator of and an accomplice in the activity prohibited by the state's criminal code. In such cases the real culprit is the state rather than the individual accused of violating state law.

State v. Swenson, supra at 823, 352 N.W.2d at 152. In the present case, the State did not solicit the participation of the appellant in any criminal scheme. Instead, Gray approached the appellant, and he readily participated in the criminal enterprise. Because of the lack of governmental involvement, it is not necessary to determine whether any of the other elements of the defense of entrapment were met. The trial court was correct in refusing to instruct the jury on the defense of entrapment.

All of the assignments of error being without merit, the judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WESLEY E. KITT, APPELLANT.

434 N.W.2d 543

Filed January 27, 1989. No. 88-195.

1. **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.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences drawn from the evidence establish a defendant's guilt beyond a reasonable doubt.
3. **Criminal Law: Juries.** A defendant has no right to a jury composed in whole or in part of persons of his own race.
4. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
5. **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: JERRY M. GITNICK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Wesley E. Kitt, pro se.

Robert M. Spire, Attorney General, and Bernard L. Packett for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FAHRNBRUCH, J.

Wesley E. Kitt, through his lawyer, complains that the evidence was insufficient and therefore appeals his jury conviction for the theft of over $1,000 from an ARA Services step van in Omaha. Kitt was sentenced to prison for not less than 5 nor more than 15 years. We affirm.

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. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988); *State v. Swift*, 230 Neb. 373, 431 N.W.2d 643 (1988); *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988).

Taking the view of the evidence most favorable to the State, we conclude that a jury could find the defendant guilty beyond a reasonable doubt based upon the hereinafter-recited evidence.

On May 22, 1987, Rodney Mossey, a driver for ARA Services, had nearly completed his service rounds to businesses in Omaha. He serviced food and drink vending machines and moneychangers. Mossey's final stop for the day was the Sears store at Crossroads shopping center, where he arrived about noon. After unloading certain items, Mossey locked his step van with padlocks and went into the Sears store. Shortly thereafter, a witness entering Sears became aware that two black men were walking near her. When the witness left the store 15 to 20 minutes later, she noticed the same two men leaning against a wall near Mossey's van. The witness walked to her car, turned around, and looked at where the two men had

been standing. One man was gone. The witness heard a noise and saw the taller of the two men she had seen by the Mossey van. The other man walked to the van and boosted the taller man into the vehicle. The man inside the van handed some objects to the man on the outside. He, in turn, put the items into his jacket.

This witness, who was four or five vehicle stalls away from the van, watched the taller man jump out of the vehicle. Both men ran to a four-door blue Chrysler K car with an Iowa license plate and left the scene, the witness testified. The witness wrote down the license number and later gave it to the police. She was later unable to identify either of the two men.

Mossey remained inside Sears until about 12:45 p.m. When he returned to his van, he opened the rear door and noticed that some bags containing money were missing. Mossey then observed that the window on the driver's side of the van was broken. Mossey called the police.

An ARA office manager testified her audit reflected that $1,205.15 was taken from the van.

Patricia Osier, an Omaha police crime lab technician, arrived at the scene around 1:20 p.m., took photographs, and searched for latent fingerprints. Osier testified that four prints lifted from the interior of the ARA van belonged to the defendant. She testified that the prints were "fairly fresh" and that they could have been as fresh as 1 hour old. On cross-examination, Osier testified the prints could have been 2 days old.

Mossey testified that he had the only keys to the step van assigned to him by his employer, ARA. The van is always kept locked at night and at every stop that he makes on his vending machine route, Mossey testified.

From Mossey's testimony the jury could infer that the only means or opportunity the defendant had to enter Mossey's van was to break into it on the day the money was stolen. From Osier's testimony the jury could conclude beyond a reasonable doubt that it was the defendant who broke into the van between noon and 12:45 p.m. on May 22, 1987, and stole the money. We have held that circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences drawn from the evidence establish a defendant's guilt beyond a

reasonable doubt. *State v. Wiggins*, 230 Neb. 632, 432 N.W.2d 824 (1988); *State v. Zellner*, 228 Neb. 272, 422 N.W.2d 96 (1988).

The evidence overwhelmingly supports the verdict of the jury finding the defendant guilty beyond a reasonable doubt.

In 2 supplemental pro se briefs, the defendant makes an additional 24 assignments of error. Six of those assignments claim defendant's counsel was ineffective in the trial court. In one of those assignments, Kitt, a black man, claims his trial counsel failed to object to the exclusion of blacks from the jury venire and failed to make a motion for a mistrial because of deliberate exclusion of blacks. The record affirmatively reflects that no black venireperson was excluded from the jury. To the contrary, the only black juror called for voir dire served on defendant's jury. No peremptory challenge was exercised by the State to exclude any black juror. It has been recognized by the U.S. Supreme Court that a defendant has no right to a jury composed in whole or in part of persons of his own race. See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). See, also, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880).

In his other assignments of error claiming ineffective trial counsel, Kitt says he was prejudiced because his trial counsel failed to make a record of the jury voir dire and closing arguments, during which he claims the State made prejudicial statements. The only statement to the jury by the State that the defendant claims was prejudicial was, "[I]f you find the defendant not guilty as charged, that will be the end of the suit, it's all over." That was a true statement, and we fail to see where it was prejudicial. See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

Kitt also claims his trial counsel was ineffective because he did not assist the defendant in ensuring that all erroneous information and data were eliminated from the presentence report. Review of the sentencing hearing reflects that Kitt made corrections to the report and that the judge based the sentence on the corrected record. Assuming, arguendo, that Kitt's trial counsel failed to assist Kitt on the presentence report, Kitt has failed to show that he was prejudiced.

The defendant claims his appellate counsel was ineffective in representing Kitt in the Supreme Court because he refused to raise pertinent issues on direct appeal. It appears that the defendant has raised all of those "pertinent issues" in his supplemental briefs. We have considered all of them in disposing of this appeal.

With regard to Kitt's other claims of ineffective assistance of trial and appellate counsel, we have held that to sustain a claim of ineffective assistance of counsel, 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. See *State v. Jones,* 230 Neb. 528, 432 N.W.2d 523 (1988).

The defendant has failed to meet this burden of proof. The balance of his claims of ineffective assistance of counsel also have no merit.

With respect to Kitt's claim that his sentence of 5 to 15 years is excessive, this court has held 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. Lewis*, 230 Neb. 224, 430 N.W.2d 686 (1988); *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988).

In sentencing the defendant, the judge considered the defendant's criminal history, which he summarized as collectively indicating a disposition to disrespect the law. The judge found that Kitt was not a fit subject for probation and that imprisonment was necessary because the risk was substantial that during any probation he would continue to engage in criminal conduct. The court said Kitt was in need of correctional treatment and that any sentence less than that imposed would depreciate the seriousness of the crime and promote disrespect for the law.

Kitt was convicted of a Class III felony, which is punishable by not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. Neb. Rev. Stat. §§ 28-511, 28-518(1), and 28-105 (Reissue 1985). Clearly, Kitt's sentence of 5 to 15 years falls within the prescribed statutory limits, and we find no

basis upon which we can say that the trial court abused its discretion.

Kitt claims the trial judge erred by entering the jury room with the jury at the close of the trial. We find no indication of that in the record, nor does the defendant point to any such reference in the record.

We have carefully examined all of the defendant's remaining assignments of error set forth in his briefs and find they have no merit. The defendant's conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. CULLEN, APPELLANT.

434 N.W.2d 546

Filed January 27, 1989. No. 88-200.

1. **Search Warrants: Probable Cause: Affidavits.** To invalidate a warrant on grounds that the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged information was material or necessary to a finding of probable cause.
2. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the Supreme Court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed.
3. **Search Warrants: Probable Cause.** Probable cause is a reasonable suspicion founded on articulable facts. In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required.
4. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause should be paid great deference by reviewing courts, and warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

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

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

FAHRNBRUCH, J.

Michael W. Cullen appeals his jury convictions for first degree sexual assault, use of a weapon in the commission of a felony, and two counts of burglary. We affirm.

For burglary of the sexual assault victim's apartment, Cullen was sentenced to 4 years' imprisonment; for the sexual assault, not less than 10 nor more than 20 years' imprisonment, the sentence to run consecutively to the burglary sentence. Cullen was also sentenced to 1 year's imprisonment for using a deadly weapon to commit a felony, which sentence was ordered to run consecutively to the sexual assault sentence. For burglary of the B.J. Moor apartment, which case was separately docketed but tried with the other charges, Cullen was sentenced to 5 years' imprisonment, that sentence to run concurrently with the other sentences.

Burglary and use of a weapon in the commission of a felony are Class III felonies, punishable by not less than 1 nor more than 20 years in prison, up to a $25,000 fine, or both. First degree sexual assault is a Class II felony, punishable by not less than 1 nor more than 50 years in prison. Neb. Rev. Stat. §§ 28-105, 28-507, 28-319, and 28-1205 (Reissue 1985).

The defendant claims that evidence seized at his residence in Massachusetts should have been suppressed because it was obtained pursuant to an invalid search warrant. The warrant was issued by a Massachusetts magistrate upon the request and accompanying affidavit of a Massachusetts state trooper. A Douglas County, Nebraska, sheriff's investigator worked with the trooper. It is Cullen's contention that the affidavit contained an untrue statement.

To invalidate a warrant on grounds that the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged information was material or necessary to a finding of probable

cause. *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987). See, *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984); *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

On February 22, 1986, a young Omaha woman was forcibly sexually assaulted by a man who broke into her apartment. During the course of the assault, the victim was permitted to go to the bathroom, where the assailant had earlier removed his clothing. She found a checkbook in her assailant's coat pocket. Later, the victim was again permitted to return to the bathroom, where she removed a check from the checkbook and hid it. The check was imprinted with the names "B.J. Moor" and "Carolyn Moor."

The next morning, B.J. Moor, who lived in the same apartment complex as the sexual assault victim, noticed several items, including his wallet and checkbook, missing from his apartment. Because Moor's wallet contained a bank card, Moor called his bank and informed bank personnel of the theft. Moor learned a transaction had been recorded on his account that morning. Moor then called police.

Security officers viewed the video tape of persons using the automatic teller machine that morning. A photograph of the person using Moor's ATM card was obtained. This photograph was included in a six-photo lineup shown to the sexual assault victim. She positively identified the man in the picture obtained from the video camera as her assailant.

The photograph was distributed by the sheriff's department to the media and other law enforcement agencies. A Nebraska state trooper recognized the person in the photograph as her stepdaughter's boyfriend, Cullen. The trooper sent a snapshot of Cullen to the sheriff's office. Another six-photo lineup was arranged and shown to the victim on November 25, 1986. By this time, approximately 9 months had elapsed since the time of the assault. From a photo array containing the snapshot, the victim was not able to positively identify her assailant. However, she did select the snapshot of Cullen, the defendant, as a man who had many characteristics of her assailant.

After conducting this lineup, the sheriff's investigator obtained an arrest warrant for the defendant. Cullen was

arrested in Massachusetts. After Cullen was arrested, the search warrant at issue was obtained. The affidavit accompanying the request for a search warrant included many of the facts surrounding the Omaha crimes. The affidavit also included a statement that the sexual assault victim had identified Cullen from a photo lineup on November 25, 1986, as the assailant who had sexually assaulted her. We note that the only inaccuracy in this sentence is the date given. There was no showing that this inaccuracy was deliberate or made with reckless disregard of the truth. The victim did positively identify her assailant from a bank photograph. In the affidavit given to obtain the search warrant, the Massachusetts state trooper stated he had arrested Cullen and that Cullen, the defendant, was the person in the bank photograph.

The search warrant was served, and several items were removed from the defendant's residence. Among the items seized were a shirt, a coat, and a pair of boots later identified by the victim as those worn by her assailant.

At a suppression hearing prior to trial, the defendant argued that because the victim was not able to positively identify the defendant in the photo lineup shown her on November 25, 1986, the affidavit contained an untrue statement; the warrant issued was, therefore, invalid; and the clothing seized should be suppressed. The court overruled the motion to suppress after finding that the affidavit contained sufficient probable cause to justify a search without the questionable statement.

The duty of the Supreme Court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed. Probable cause is a reasonable suspicion founded on articulable facts. In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required. A magistrate's determination of probable cause should be paid great deference by reviewing courts, and warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner. *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987). See, *State v. Abraham*, 218

Neb. 475, 356 N.W.2d 877 (1984); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

We agree with the trial court's finding that even with the offending sentence removed, the affidavit contains sufficient probable cause for the issuance of a search warrant.

Nearly all of the facts surrounding the burglary and sexual assault are included in the affidavit. The affidavit also includes the fact that Cullen had been arrested for these crimes and that at the time of the arrest, he was wearing boots similar to those worn by the victim's assailant.

Further, the affidavit recites that a pickup truck with Nebraska license plates registered to the defendant was parked outside Cullen's residence. Finally, the affidavit states that "your affiant observed Michael Cullen during his arrest and has observed the photograph taken from the bank previously described in this affidavit and it is my opinion that the subject in the photo is in fact Michael Cullen."

After the offending statement is removed, the remaining facts articulated in the affidavit raise a reasonable suspicion of the probability of criminal activity. We find that those remaining facts are sufficient to ensure that the Massachusetts magistrate had a substantial basis for concluding that probable cause existed to issue the search warrant. We also find the error in the date contained in the affidavit was not deliberate or made with reckless disregard for the truth.

The trial court was correct in overruling defendant Cullen's motion to suppress evidence obtained from his Massachusetts residence pursuant to a search warrant.

The judgments and sentences of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLEN R. KUIL, APPELLANT.
434 N.W.2d 700

Filed January 27, 1989. No. 88-251.

1. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest.
2. _____: _____: _____: _____. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.
3. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Affirmed.

Gary L. Erlewine for appellant.

Robert M. Spire, Attorney General, and William L. Howland for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

BOSLAUGH, J.

The defendant, Allen R. Kuil, was convicted of driving while under the influence of alcoholic liquor, refusal to submit to a chemical test under the implied consent law, and third degree assault upon a police officer. On the first count he was sentenced to 7 days in jail and fined $200, and his license was suspended for 6 months. On the second count he was sentenced to 7 days in jail and fined $200, and his license was suspended for 6 months. On the assault count he was sentenced to 6 months in jail with credit for 14 days' presentence incarceration. All sentences run concurrently.

The defendant has appealed and contends that the trial court erred in overruling his motion to suppress and that he was denied effective assistance of counsel.

There was evidence from which the jury could find that on

August 30, 1987, at about 10:15 p.m., Officer Bolton of the Schuyler Police Department saw a red Ford pickup operated by the defendant, traveling westerly on 11th Street, fail to stop at the stop sign at the intersection of 11th and Highway 15. The pickup proceeded into the intersection approximately two car lengths, into the second lane for northbound traffic, finally stopping just prior to crossing the highway's centerline. Bolton radioed Officer Louden of the Schuyler police force, gave him a description of the pickup, and asked Louden to follow what Bolton considered to be "probably a drunk driver." Louden then followed the red pickup west on 11th Street and saw it enter a dead end area at 11th and Gold Streets. Louden believed the pickup was exceeding the speed limit but was unable to obtain a radar reading. After the pickup had entered a graveled area of the dead end street, it veered off to the left side of the road and spun around, causing the pickup to fishtail and throw dust and gravel from its rear tires. Louden then radioed Bolton and asked him to stop the pickup and hold it until Louden arrived.

After the pickup had been stopped, Louden asked the defendant to produce his driver's license. The defendant also produced his insurance and registration cards, and Louden noticed that the insurance card had expired. When Louden told the defendant that the insurance card had expired, the defendant became upset and began shouting profanities at the officers. Louden noticed an odor of alcohol about the defendant and that the defendant's gait was unsteady—"swaying and staggering." Louden then radioed for assistance from Assistant Chief Rima. Upon Rima's arrival, the officers administered field sobriety tests to the defendant, during which the defendant became verbally abusive. The defendant's performance of the tests was unsatisfactory, and the defendant was asked to submit to a preliminary breath test, which the defendant failed. Louden then placed the defendant under arrest and handcuffed him. When the officers attempted to place the defendant in the police cruiser, he resisted and had to be forcibly placed in the cruiser. After he had been placed in the cruiser, the defendant was told that he was under arrest and the implied consent form was read to him. The defendant again

became verbally abusive. When asked to submit to a blood or urine test, the defendant refused. Assistant Chief Rima then instructed Louden to take the defendant to the jail.

At the courthouse the defendant resisted efforts to book him and place him in a cell. At one point, the defendant grabbed the groin area of one of the officers and was subdued only after being struck with a baton and placed in a choke hold. In addition to bruises, Officer Louden received a laceration inside his lower right eyelid, which became infected.

The defendant's motion to suppress was based upon a claim that the investigatory stop was unlawful.

A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988); *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988). In *State v. Kavanaugh*, 230 Neb. 889, 434 N.W.2d 36 (1989), we stated that police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior. See, also, *State v. Beerbohm, supra*; *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987); *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983).

In *State v. Daniels*, 220 Neb. 480, 370 N.W.2d 179 (1985), the defendant was convicted of driving while intoxicated and resisting arrest. A police officer had observed the defendant's car run a stop sign and then negotiate a "wide angle turn." The officer followed the defendant's car for about 1 1/2 miles, during which time the car was seen to drive " 'to the right, enough to take up the dirt along the shoulder of the road and then curved left to the center and to the right again.' " *Id.* at 481, 370 N.W.2d at 180-81. The officer then stopped the defendant's car and, upon approach of the defendant, noticed an odor of alcohol about the defendant's person. On appeal, the defendant argued that the police did not have probable cause to stop his

vehicle. We held that "there is evidence that the driving of appellant was erratic and that a stop sign was ignored. Therefore, the marshal had 'a particularized and objective basis for suspecting the person stopped of criminal activity.' " *Id.* at 482, 370 N.W.2d at 181. See, also, *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986); *State v. Jefferson*, 196 Neb. 340, 242 N.W.2d 881 (1976).

The facts in this case justified the investigative stop by the officers. Officer Bolton observed the defendant fail to stop at the stop sign at Highway 15, and Officer Louden saw the defendant drive into the dead end area, where he spun his truck around, kicking up dust and gravel and causing the truck to fishtail. The first assignment is without merit.

The second assignment of error relates to alleged ineffectiveness of counsel before and during trial and on the defendant's amended motion for new trial.

Officer Louden had a tape recorder in his pocket which recorded the conversation from the time the defendant's car was stopped until after the defendant had been placed in the police cruiser. The tape recording was received in evidence without objection.

The defendant argues that trial counsel should have filed a discovery motion which would have disclosed the existence of the tape before trial and, thus, have allowed the defendant to meet that evidence. He also contends that counsel erred in failing to object to the introduction of the tape and in failing to request a continuance in order to review the tape, which the defendant considers was highly prejudicial.

To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

The record fails to establish the factors required under *Strickland*. The information recorded on the tape was no different than any information disclosed by the testimony of the police officers at the trial. The tape recording was merely

cumulative to the testimony of the officers. In addition thereto, the defendant has failed to suggest any way in which he could have "met" that evidence. An accurate account of what really happened could hardly be unfairly prejudicial to the defendant.

With respect to the amended motion for new trial, there is no showing as to how an affidavit would have enabled the defendant to avoid the effect of the tape recording.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARIE K. WAKEMAN, APPELLANT.

434 N.W.2d 549

Filed January 27, 1989. No. 88-254.

1. **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.
2. **Pleas: Effectiveness of Counsel.** 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.
3. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
4. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.
5. **Pleas: Effectiveness of Counsel: Waiver.** When a defendant waives her or his state court remedies and admits guilt, that defendant assumes the risk of ordinary error in her or his or the attorney's assessment of the law and facts.
6. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and in the absence of an abuse of discretion by the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
7. **Evidence: Trial: Appeal and Error.** The admission or exclusion of evidence is a matter within the discretion of the trial court, whose ruling is not to be disturbed on appeal absent an abuse of that discretion.

8. _____: _____: _____. It is within the trial court's discretion to admit or exclude evidence on the basis of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion.
9. **Prior Convictions: Proof: Right to Counsel: Waiver: Pleas.** To use a prior conviction as a basis for enhancement, the State need show only that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in conviction.
10. **Prior Convictions: Complaints: Drunk Driving.** An erroneous designation in a complaint of the date on which and the county in which a prior conviction occurred will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol, if the record discloses that the defendant could not have been misled or confused.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

James R. Mowbray, of Mowbray & Walker, P.C., for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

CAPORALE, J.

Defendant, Marie K. Wakeman, appeals her conviction upon a plea of guilty to a charge of third-offense driving while under the influence of alcohol, a violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). She assigns errors which, in summary, assert the district court erred in finding no error by the county court in (1) denying Wakeman's motion to set aside her plea and (2) receiving into evidence records of Wakeman's prior convictions. We affirm.

Wakeman first appeared in the county court without counsel and pled not guilty to one count each of driving while under the influence of alcohol, refusal to submit to a preliminary breath test, and operating a motor vehicle without a proper operator's license.

When Wakeman appeared in county court a second time, she was represented by an attorney, hereinafter referred to as the "former attorney," who stated that a plea agreement had been reached. Pursuant to this agreement, the State dismissed the

refusal to submit and operator's license counts, and Wakeman entered her plea of guilty to the charge of driving while under the influence of alcohol.

The record shows that in accepting Wakeman's plea of guilty, the county court fulfilled the requirements of *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987), and *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), by advising Wakeman of the nature of the charge and the range of penalties, and informing her of the right to trial, the right to confront witnesses against her, and the privilege against self-incrimination. The record fully supports the county court's determination that Wakeman freely, intelligently, voluntarily, and understandingly pled guilty. Furthermore, the record provides a factual basis for the plea, in that the prosecution recited that its evidence would establish that a Lincoln police officer saw Wakeman operating a vehicle in the dark without lights and, after stopping her, found her with an odor of alcohol and to possess watery and red eyes. After two refusals to submit to preliminary breath tests, Wakeman submitted to an Intoxilyzer test, which revealed her blood-alcohol level to be .19 "by breath, weight to volume."

At this second county court appearance, Wakeman, through her former attorney, stipulated to four prior convictions: "on September 11th, 1982 for third offense in Lincoln, Nebraska; of [sic] April 4th, 1982 for second offense in Omaha; and December 2nd, 1981, second offense in Lincoln, Nebraska; May 28th, 1979 in Lincoln, Nebraska."

Following sentencing by the county court, Wakeman appealed to the district court, which determined that Wakeman's guilty plea had been valid and correctly accepted by the county court but that Wakeman had not validly waived, and therefore was entitled to, a hearing on sentencing in the nature of an enhancement hearing. This judgment is not before us in this appeal, and we therefore venture no comment upon it.

Following remand from the district court, Wakeman appeared in the county court with a new attorney for a hearing pursuant to the district court's mandate. At this hearing, a Lincoln police officer testified that after he had arrested Wakeman in the course of the incident upon which this case is grounded, Wakeman informed him that her motor vehicle

operator's license had been issued in her maiden name of Finnigan. Moreover, still another Lincoln police officer identified Wakeman in court as the person he knew by the name of Marie Finnigan.

The county court subsequently received into evidence two records of prior county court convictions, captioned "State of Nebraska vs. Marie K. Finnigan." The first document indicated that Finnigan, on January 7, 1983, with the assistance of counsel, had entered a plea of guilty to operation of a motor vehicle while under the influence of alcohol, second offense, this offense occurring on September 11, 1982, in Lancaster County. Wakeman was subsequently sentenced to a term of probation on this charge, which she apparently completed successfully. The second document indicated that Finnigan, on February 1, 1982, again with the assistance of counsel, had entered a plea of guilty to operation of a motor vehicle while under the influence of alcohol, second offense, this offense occurring on December 2, 1981, in Lancaster County.

After receiving these exhibits into evidence, the county court asked Wakeman's new attorney to present evidence in mitigation of the two prior convictions reflected in those exhibits. The only mitigating factor the new attorney could suggest was that during one of the subject events, Wakeman had been represented by yet a third attorney, who was subsequently disbarred for "a period of time."

The county court then took up Wakeman's motion to vacate and set aside her guilty plea in this case. In this connection, Wakeman adduced testimony from the former attorney to the effect that the present case had been the first she had handled in which her client had been charged with anything greater than first-offense drunk driving. On cross-examination, the former attorney testified as follows:

> Q . . . in your testimony today you've testified in essence Ms. Wakeman contacted you three times. Once either on September 2nd, then once probably September 10th or 11th, and then the — the following day the 11th or 12th. At what time were you retained by Ms. Wakeman for provision of legal services?
>
> [Former attorney] The final call.

. . . .

Q . . . For the purposes of your representation, what was your understanding that you had been retained to do?

[Former attorney] To negotiate a plea for Ms. Wakeman to enter and to plead guilty to Count 1, which was third offense DWI, and Counts 2 and 3 would then be dismissed, and to arrange to have [her] enter that plea in front of [a particular judge]. And —

. . . .

Q Were — was it your understanding that you were to defend Ms. Wakeman of the charges which were filed by the State in this matter?

[Former attorney] No.

. . . .

Q So the first time that you entered into any services with regards to the plea agreement was after the defendant, Mrs. Wakeman, had already indicated to you her decision to enter a plea of guilty to the first count for exchange of dismissals for Count 2 and 3.

[Former attorney] Yes.

. . . .

Q . . . Had Ms. Wakeman indicated to you that she had talked to other attorneys with regards to the defense of the charges against her?

[Former attorney] Yes.

Q And did she inform you in fact that — that the fees that you were quoting were substantially less than that being quoted by other attorneys she had contacted?

[Former attorney] Yes.

. . . .

Q Was it your understanding that you had no obligation to try to defend the matter, but simply to get this before a different judge and to improve her chances for probation?

[Former attorney] Yes.

Q And in your mind was that a limited scope of representation?

[Former attorney] Yes.

Wakeman called as an expert witness an attorney who testified that he "would not advise a client to plead without at

least reviewing the prior convictions . . . [c]ertainly to make sure that I had at least two that were good." In this witness' opinion,

> there was certainly inadequate investigation of the complaint in the priors and the manner in which the plea itself was handled in terms of advisement of the counsel, in terms of her dealing with the prosecutor, and with the waiver of the enhancement hearing under the — under the facts of this case.
>
> Q So your opinion is [the former attorney is] not a reasonably competent — was not a reasonably competent defense attorney in this case?
>
> . . . .
>
> [Witness] As to — as to the enhancement side of the case, yes.
>
> . . . .
>
> . . . And one other area —
>
> . . . .
>
> . . . And that would be in the advice that I understood her to give regarding the chances of probation being 50-50.

In connection with her first summarized assignment of error, Wakeman argues that her plea was not voluntarily entered inasmuch as, according to Wakeman, her former attorney afforded her ineffective assistance, and, thus, the court erred in refusing to permit the withdrawal of that plea.

A criminal defendant has a constitutional right not only to counsel but to the effective assistance of counsel. *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988). 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. Reddick, supra.*

To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense; that is, there must be a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Kuil, ante* p. 62, 434 N.W.2d 700 (1989); *State v. Kitt*,

ante p. 52, 434 N.W.2d 543 (1989); *State v. Uwanaka*, 230 Neb. 808, 433 N.W.2d 540 (1989). In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial. *State v. Harton*, 230 Neb. 167, 430 N.W.2d 313 (1988).

The record before this court fails to support either element of this test. Regarding the first element, Wakeman has failed to prove that her former attorney's performance was deficient. The post hoc testimony of Wakeman's expert regarding what he, in hindsight, might have done is insufficient, standing alone, to prove that the former attorney, by acting differently, performed deficiently. Moreover, a lawyer is not required to be infallible. When a defendant waives her or his state court remedies and admits guilt, that defendant assumes the risk of ordinary error in her or his or the attorney's assessment of the law and facts. *State v. Scholl*, 227 Neb. 572, 419 N.W.2d 137 (1988).

Regarding the second element of the test, Wakeman has clearly failed to show a reasonable probability that, but for her former attorney's representation, Wakeman would not have pled and would have insisted upon going to trial. Quite the contrary, the record in this case is clear and uncontroverted: the former attorney did not advise Wakeman to plead guilty; rather, Wakeman informed the former attorney of her decision to enter such a plea, and merely asked the former attorney's assistance in doing so before a particular judge of the county court. Wakeman has offered no evidence whatsoever either that she was influenced in her decision by anything the former attorney did or said, or that she would have done anything differently had the former attorney taken it upon herself to offer any unsolicited advice.

The right to withdraw a plea previously entered is not absolute, and in the absence of an abuse of discretion by the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987). Taking the steps set out by this court in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), is

sufficient to assure that a plea represents a voluntary and intelligent choice among the alternate courses of action open to a criminal defendant. *State v. Wiley*, 225 Neb. 55, 402 N.W.2d 311 (1987). The county court having complied with the requirements of *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987), and *State v. Irish, supra*, in accepting Wakeman's plea of guilty to third-offense driving while under the influence of alcohol, we find no abuse of discretion, and we therefore conclude that Wakeman's first assignment of error is without merit.

In her second summarized assignment of error, Wakeman takes the position that the county court erred in receiving into evidence records of Wakeman's prior convictions. The admission or exclusion of evidence is a matter within the discretion of the trial court, whose ruling is not to be disturbed on appeal absent an abuse of that discretion. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988). More specifically, it is within the trial court's discretion to admit or exclude evidence on the basis of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Trevino, supra*; *State v. DeGroot*, 230 Neb. 101, 430 N.W.2d 290 (1988).

In Wakeman's view, the county court erred for one or all of the following reasons: (1) the prior convictions were had in the name of "Marie Finnigan," not "Marie Wakeman"; (2) the records of prior conviction were inadequate on their face; and (3) there was a material variance between the details of prior convictions recited in the complaint and the evidence of prior convictions adduced at the enhancement hearing such as to constitute a denial of due process.

Wakeman's first argument can only be described as absurd. The record clearly establishes that the names "Wakeman" and "Finnigan" describe one and the same person.

Regarding Wakeman's second argument, the rule is that to use a prior conviction as a basis for enhancement, the State need show only that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in conviction. *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). Both records

received by the county court establish on their face that Wakeman was represented and accompanied by counsel at the time she entered her pleas of guilty to the two prior offenses recorded.

Finally, Wakeman notes that the complaint in this case recites a prior conviction for an offense occurring in Douglas County on April 4, 1982, yet the evidence offered at the enhancement hearing proved a prior conviction for an offense occurring in Lancaster County on December 2, 1981; Wakeman argues, in sum, that this represents such a variance of proof from pleading that she has been denied due process of law.

Wakeman acknowledges this court's holding in *State v. Jameson*, 224 Neb. 38, 44, 395 N.W.2d 744, 748 (1986), that

> just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.

Nevertheless, Wakeman argues that a variance involving both date and county is sufficient to mislead or confuse the defendant, even if a variance of date alone is not.

Wakeman has put forth no evidence that she was misled or confused by the variance which occurred. In fact, it is clear that Wakeman was not misled or confused by the variance between complaint and proof, for in tendering her guilty plea in the county court, she stipulated to the very conviction which the State later, following remand, proved. Although, following the intervening reversal and remand by the district court, that stipulation was no longer effective as such, it remained nevertheless a matter of record, amply demonstrating that Wakeman was fully aware of the arsenal of prior convictions at the State's disposal. Moreover, no greater burden was imposed on Wakeman in locating records of prior convictions, as all convictions proved in the county court involved offenses occurring in Lancaster County; apart from the misidentification of date, then, all records were equally

accessible to Wakeman. Thus, Wakeman's final argument is also without merit.

Since the record sustains none of Wakeman's assignments of error, the judgment of the district court is hereby affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

As expressed in my dissent in *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), a defendant's procedural inability to question the constitutional validity of a prior conviction used for enhancement of a penalty denies due process required by the Nebraska and U.S. Constitutions. Today the majority renews *Oliver*; I renew my dissent.

BEAVER LAKE ASSOCIATION, A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. MICHAEL H. SORENSEN AND CYNTHIA A. SORENSEN, APPELLANTS.

434 N.W.2d 703

Filed February 3, 1989. No. 86-1055.

1. **Equity: Appeal and Error.** In an appeal of an action in equity, 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 the facts rather than the other.
2. **Laches.** The defense of laches is not a favored one, and it will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right, to the prejudice of his adversary.
3. **Restrictive Covenants: Estoppel: Waiver.** Building restrictions may be released, waived, or abandoned, or the right to enforce them may be lost by estoppel.
4. **Appeal and Error.** An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal.
5. **Restrictive Covenants: Injunction.** A mandatory injunction is an appropriate remedy for a breach of a restrictive covenant.

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

Jeffrey D'Agosta and Larry A. Duff for appellants.

E. Michael Slattery, of Case, Reinsch & Slattery, P.C., for appellee.

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

MORAN, D.J.

Michael H. and Cynthia A. Sorensen, defendants, appeal from an order of the district court for Cass County issuing an injunction in favor of Beaver Lake Association (Beaver Lake), plaintiff, and requiring the Sorensens to comply with the covenants and restrictions on real property in the Beaver Lake Subdivision of Cass County, Nebraska. We affirm.

In an appeal of an action in equity, 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 the facts rather than the other. *Obermeier v. Bennett*, 230 Neb. 184, 430 N.W.2d 524 (1988).

The covenants and restrictions pertaining to the Beaver Lake Subdivision were recorded in the office of the Cass County register of deeds. These restrictions were upheld by this court in *How v. Baker*, 223 Neb. 100, 388 N.W.2d 462 (1986). The restrictions involved in this appeal require property owners in the subdivision to submit all building plans and materials for approval and to obtain written permission from the board of directors for building construction within 50 feet of the normal waterline as shown on the plats of the Beaver Lake Subdivision. The architectural committee, appointed by the Beaver Lake board of directors, has authority to approve or disapprove of building plans submitted by property owners.

The Beaver Lake Subdivision is also subject to the Cass County zoning rules and regulations.

The Sorensens owned two adjoining lots in the subdivision. Michael read the covenants and restrictions at the time the couple purchased the first lot. As required by Beaver Lake, the Sorensens obtained a building permit in 1979, prior to constructing a boathouse on their lakefront lot. The plans showed a wooden structure, referred to as a "deck" at trial,

adjoining the boathouse on two sides. The deck was raised off the ground and supported by wooden posts driven into the ground. Construction was completed in 1980. Sometime in 1983 or 1984, the Sorensens constructed a small storage shed on the adjoining lot but did not obtain a permit for the construction.

In the spring of 1985, one corner of the deck heaved out of the ground due to frost. Michael began repairing the deck during the first week of March. In the process, he reset the wooden posts, extending the width of the deck by 18 inches to 2 feet beyond the width shown in the plans submitted to Beaver Lake in 1979. He also "put a shade top on top of it," constructing what Beaver Lake representatives referred to as a "gazebo." The construction was completed around the end of May or the beginning of June 1985. Michael did not submit plans to or obtain permission from the architectural committee before beginning this project.

On May 9, 1985, William Nelson, the chairman of Beaver Lake's architectural committee, wrote a letter to Michael concerning the construction he was undertaking on the deck. The letter also noted the existence of the shed on the adjacent lot. The letter requested that Michael comply with the building restrictions by submitting to the architectural committee plans for the deck construction and plans or pictures of the storage shed, or bringing the requested material to the committee's meeting on June 5, 1985.

Michael did not submit the materials requested in the letter, nor did he attend the June 5 meeting. At trial, Michael stated he did not comply with the Beaver Lake building restrictions on the deck structure because he did not think the restrictions applied, because he was repairing an existing structure. Further, he did not think permits were required under the Cass County zoning regulations, since the cost of the structures did not exceed $1,000.

Sometime during the deck construction, Nelson attempted to talk with Michael, but was asked to leave the property. Michael testified he asked Nelson to leave because Michael did not know Nelson and Nelson did not identify himself. The dispute remained unresolved, and Beaver Lake commenced this action

for an injunction on January 17, 1986.

Following a bench trial, the judge ordered the Sorensens to obtain the proper permits or variances, or, alternatively, to remove the storage shed and the gazebo structure appended to the boathouse, and repair the deck to its approximate dimension and structural appearance prior to the damage. The Sorensens appeal.

The first assignment of error alleges the trial court erred in finding their construction activity violated the restrictive covenants. The evidence clearly shows the construction did violate the subdivision restrictions; therefore, the lower court did not err in its holding.

The Sorensens' second assignment of error alleges Beaver Lake is guilty of laches in waiting to bring the action until January of 1986 and, therefore, should not be allowed to enforce the restrictions against the Sorensens. The defense of laches is not a favored one, and it will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right, to the prejudice of his adversary. *State ex rel. Marsh v. Nebraska St. Bd. of Agr.*, 217 Neb. 622, 350 N.W.2d 535 (1984).

The facts in this case fall far short of establishing a laches defense. Although there was evidence indicating the Sorensens' boathouse was visible from Beaver Lake's clubhouse, and the board of directors and the clubhouse manager would have been able to see the construction as it was taking place, the letter from the architectural committee was sent before the construction was completed. Further, a representative of Beaver Lake attempted to talk with Michael during construction, but was turned away.

It is clear the Sorensens had ample notice that Beaver Lake considered the covenants and restrictions to be applicable to their activities, but ignored the notice. Further, filing this action 8 months after the completion of the construction does not constitute an unreasonable delay. Lastly, it does not appear the Sorensens expended a significant amount of money on the project; therefore, there was little, if any, prejudice to them by the delay. Given the foregoing facts, the second assignment of error is without merit.

The third assignment of error alleges Beaver Lake is

estopped from enforcing the covenants and restrictions by its acquiescence to similar conduct by the Sorensens. The Sorensens claim Beaver Lake lost its right to enforce the restrictions against them for the deck construction by failing to enforce the covenants and restrictions against them with regard to the small storage shed. This argument is also without merit.

Building restrictions may be released, waived, or abandoned, or the right to enforce them may be lost by estoppel. *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976). However, the facts in this case do not support a claim of estoppel. The evidence suggests Beaver Lake did not learn of the existence of the shed until after Michael began "repairing" the deck structure. Upon learning of its existence, Beaver Lake took steps to enforce the covenants and restrictions. Further, even if Beaver Lake did have prior knowledge of the shed's existence, the violation was trivial and will not support an estoppel argument.

For the first time on appeal, the Sorensens attack the covenants and restrictions as vague and confusing, focusing on the description of the shade top on the deck as a gazebo. " '[A]n issue not presented to or passed upon by the trial court is not an appropriate issue for consideration on appeal.' " *State v. Blair*, 230 Neb. 775, 778-79, 433 N.W.2d 518, 521 (1988). Therefore, we do not address this claim.

A mandatory injunction is an appropriate remedy for a breach of a restrictive covenant. *Pool v. Denbeck, supra.*

Having reviewed the record de novo, we find no error on the part of the lower court.

AFFIRMED.

PATTI JETER, APPELLEE AND CROSS-APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF FREMONT, COUNTY OF DODGE, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

435 N.W.2d 170

Filed February 3, 1989. No. 87-214.

1. **Estoppel.** 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.
2. **Parliamentary Law.** In the absence of a contrary statutory provision, a majority of a quorum which constitutes a simple majority of a collective body may act for that body.
3. **Legislature: Statutes: Presumptions: Intent.** The Legislature is presumed to know the language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.
4. _____: _____: _____: _____. The omission of a word in an amendment of a statute will be assumed to be intentional and for a purpose. Where it is apparent that a substantive portion of a statute has been omitted from an amendment thereof, courts have no authority to supply the omission.

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

Neil W. Schilke, of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf & Boggy, for appellant.

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

Robert A. Bligh for amicus curiae Nebraska Association of School Boards.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and JAMES MURPHY, D.J.

JAMES MURPHY, D.J.

At a special meeting of the Fremont board of education on April 29, 1986, three of four members present voted against renewing the teaching contract of Patti Jeter. Two members were absent.

Jeter sought review in the district court by petition in error. The district court found that Jeter did not have tenure when the school board decided against renewing her contract. However, the district court vacated the action of the school board because such action required a majority of the members of the school board. The court then ordered her reinstatement.

From this order the school board appealed, and Jeter cross-appealed asserting error in the district court's finding that she was not a tenured teacher on April 29, 1986. Jeter also asserts that the school board is estopped from denying tenure.

A probationary certificated teacher shall mean a teacher who has served under a contract with a school district for less than 3 successive school years in any school district. Neb. Rev. Stat. § 79-12,107(3) (Reissue 1987).

Jeter was in her third year with the school district when the school board decided not to renew her contract. Therefore, she was still a probationary certificated teacher when the school board acted.

Jeter contends that a "recommendation for tenure" by a staff member in 1985 was sufficient to terminate her probationary status. This recommendation, which was made during Jeter's second year with the school district, was not acted upon by the school board. Therefore, she remained a probationary certificated teacher when the school board decided against renewing her contract the following year.

Jeter maintains that the school board is estopped from denying tenure by reason of the recommendation for tenure.

As stated in *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 186 N.W.2d 711 (1971), and reiterated in *Weiner v. Hazer*, 230 Neb. 53, 58, 430 N.W.2d 269, 272 (1988):

> " '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." ' . . ."

In this case, the elements of equitable estoppel are lacking in every respect. There was no false representation or concealment of material facts by the school board. Certainly, Jeter had knowledge or the means of knowledge of the truth as to the status of her employment. She had no right to assume that the school board would act on the recommendation of the staff member. Therefore, the school board is not estopped from asserting her status as a probationary certificated teacher.

The district court's finding that on April 29, 1986, Jeter was a probationary certificated teacher is supported by all the evidence in the record and is correct. Therefore, we find for the school board on Jeter's cross-appeal.

The only question remaining to be resolved is whether the action of the school board in deciding not to renew the Jeter contract required a majority of all the members of the school board or a majority vote of the quorum present and voting.

Before the enactment of 1982 Neb. Laws, L.B. 259, in 1982, probationary and permanent teachers were treated alike in this respect by the Legislature, and termination required an affirmative vote by a majority of the members of the school board. In *Houser v. School Dist. of South Sioux City*, 189 Neb. 323, 202 N.W.2d 621 (1972), it was held that "a majority of the members of the board" meant a majority of all members of the board.

With the enactment of L.B. 259, the Legislature retained this requirement for permanent teachers. Neb. Rev. Stat. § 79-12,115(3) (Reissue 1987) provides: "A majority of the

members of the school board shall render its decision to amend, cancel, terminate, or not renew a certificated employee's contract . . . ."

But in setting out the procedure for terminating probationary teachers, this language was eliminated. Neb. Rev. Stat. § 79-12,111(4) (Reissue 1987) provides: "The school board may elect to amend or not renew the contract of a probationary certificated employee for any reason it deems sufficient if such nonrenewal shall not be for constitutionally impermissible reasons . . . ."

Neb. Rev. Stat. § 79-12,116 (Reissue 1987) provides: "Hearings involving the question of the nonrenewal of a probationary certificated employee's contract . . . shall not be due process hearings and shall not be required to meet the requirements of section 79-12,115 . . . ."

Only in the event of action by a committee (a procedure which was not used in this case) is a majority of the members of the board required for nonrenewal of a probationary teacher's contract. Neb. Rev. Stat. § 79-12,117 (Reissue 1987).

In *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 121, 54 N.W.2d 409, 419 (1952), this court construed an amendatory statute by comparing it with its predecessor. It was stated:

> The Legislature is presumed to know language used in a statute and if a subsequent act on the same or similar subject uses different terms in the same connection the court must presume that a change in the law was intended. Likewise the omission of a word in an amendment of a statute will be assumed to be intentional and for a purpose. Where it is apparent that a substantive portion of a statute has been omitted from an amendment thereof courts have no authority to supply the omission.

Prior to 1982, the vote to terminate the contract of any teacher, permanent or probationary, required an affirmative vote of a majority of the membership of the board under Neb. Rev. Stat. § 79-1254 (Reissue 1981). After 1982, when § 79-1254 was repealed and L.B. 259 became effective, permanent teachers retained this protection of a majority membership requirement, and probationary teachers lost it.

In *Houser v. School Dist. of South Sioux City, supra*, the

court held that in the absence of a contrary statutory provision, a majority of a quorum which constitutes a simple majority of a collective body may act for that body.

In the school board's meeting of April 29, 1986, four members of an entire membership of six were present and constituted a quorum. Three voted against renewal. By majority vote of the quorum, Jeter's contract was not renewed, and the district court erred when this action was vacated.

Jeter does not contend that the decision of the school board was based on constitutionally impermissible grounds. An examination of the record indicates an evidentiary basis for the school board's decision.

Therefore, the decision of the school board on April 29, 1986, is supported by the evidence and authorized by statute.

Accordingly, the order of the district court setting aside that decision is reversed, and Jeter's cross-appeal is dismissed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. JONATHAN WILLIAM, APPELLANT.

435 N.W.2d 174

Filed February 3, 1989. No. 88-229.

1. **Death: Proximate Cause: Words and Phrases.** Proximate cause has been defined by this court as "a moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred."
2. **Proximate Cause: Words and Phrases.** Conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct.
3. **Criminal Law: Death: Proximate Cause: Intent.** An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient intervening cause, to the resulting death. It is the cause without which the death would not have occurred and the predominating cause, the substantial factor, from which death follows as a natural, direct, and immediate consequence. It is unnecessary for "proximate cause" purposes that the particular kind of harm that results from

the defendant's act be intended by him or her. In many situations giving rise to criminal liability, the harm that results is unintended, yet is directly or indirectly caused by an act of the defendant. In such cases, where the death or injury caused by the defendant's conduct is a foreseeable and natural result of that conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible.

4. **Criminal Law: Homicide: Motor Vehicles: Negligence.** Contributory negligence is not a defense to a charge of motor vehicle homicide. The issue is whether defendant's violation of law was a contributing factor to the death.
5. _____: _____: _____: _____. When one drives a motor vehicle in violation of law pertaining to the operation of such vehicles on the public highway and, in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter, and the contributory negligence of neither the deceased nor the driver of the car in which deceased was riding when killed can be invoked to relieve the former of criminal responsibility.
6. **Criminal Law: Homicide: Motor Vehicles: Negligence: Proximate Cause: Evidence.** In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, are not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another.
7. **Criminal Law: Homicide: Proximate Cause.** The fact that some other agency combined with the act of the defendant to cause the death is not a defense unless the other agency is an efficient intervening cause.
8. **Negligence: Statutes: Proximate Cause.** A violation of a statute or ordinance enacted in the interest of public safety is evidence of negligence, but the rule cannot be made applicable unless there is some causal relation between the violation and an accident.
9. **Trial: Testimony: Witnesses.** Opinion testimony by a lay witness is permitted only where it is rationally based on the perception of the witness and it is helpful to a clear understanding of his or her testimony or the determination of a fact in issue. It is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine.

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

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

Edward F. Fogarty, of Fogarty, Lund & Gross, for amici curiae Everett Lee Stewart, Sr., and Lois Stewart, special

administrators of the Estate of Pamela Jean Stewart, deceased.

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

HASTINGS, C.J.

Defendant appeals from his conviction by a jury of the crime of felony motor vehicle homicide. He assigns as error the sustaining of the State's motions in limine thereby excluding testimony (1) as to police department policy as to pursuit of motor vehicles, (2) concerning the fact that the driver of the vehicle with which his vehicle collided was driving on a suspended license, and (3) of opinion by lay witnesses that the driver of the automobile with which defendant's vehicle collided could have avoided the collision. We affirm.

On the evening of August 20, 1987, Officer Brian Haskell of the Omaha Police Division was on duty. He spotted a motorcycle driven by defendant near a liquor store, which motorcycle the officer had attempted to stop 4 days earlier and which had successfully escaped.

The defendant left the parking lot and drove out into the street with his girlfriend, Pamela Stewart, riding behind him on the motorcycle. The officer followed the defendant and learned over the radio that the motorcycle was not a stolen vehicle, but that the license plate had expired. The defendant pulled into another parking lot, and the officer, thinking the defendant was going to stop, turned on his rotating red lights on the top of his cruiser. The defendant then left the parking lot and took off at a high rate of speed. The officer pursued him and activated his emergency equipment (headlights, red lights, hazard flashers, siren, etc.).

The chase continued for approximately 2 minutes through residential streets. Although the speed limit in the area was 25 m.p.h., the speeds at which the defendant and the officer were traveling exceeded the speed limit. Officer Haskell testified that the defendant was going approximately 70 m.p.h., and that he (the officer) was traveling up to 55 m.p.h. during the pursuit. The defendant ran four stop signs during the chase. The officer testified that if he had been able to stop the defendant, he would have arrested him for reckless driving.

As the defendant approached the intersection of 43d and Ohio Streets, heading west, he ran a stop sign and collided with a Corvette automobile which had entered the intersection from the north. Witnesses estimated the motorcycle's speed at the time of the collision as anywhere from 60 to 90 m.p.h. The accident reconstruction expert testified that the motorcycle was going 53 to 60 m.p.h., and the defendant testified he was going under 50 m.p.h.

Upon impact, both the defendant and Stewart were thrown from the bike. Stewart was thrown 131 feet from the point of impact and struck her head on the concrete base of a light pole. Stewart died of multiple skull fractures and brain damage. The defendant was not seriously injured.

POLICE PROCEDURE ON PURSUIT OF VEHICLES

The evidence adduced during the offer of proof showed that the officer was aware of police procedures regarding vehicle pursuits; that he was supposed to consider road conditions, traffic, pedestrian traffic, officer safety, and safety of those not involved in the pursuit; and that he, the officer, did consider the nature of the defendant's crime, the speeds involved in the pursuit, the residential location of the pursuit, the volume of vehicle and pedestrian traffic, the time of day, the road conditions, and the weather conditions. Although defendant's counsel indicated he had obtained several policies, orders, and rulings that the police department has concerning motor vehicle pursuits, those were not made a part of the record. The evidence during the offer of proof did reveal that the officer believed several times during the pursuit that the defendant was ending the chase, that there were no children or pedestrians in the streets, that traffic was light, and that the motorcycle went substantially faster than the officer's cruiser.

Defendant argues that he should have been allowed to present evidence of the police department's policies on the pursuit of motor vehicles in order to show that Officer Haskell's conduct contributed to the victim's death. The defendant contends that the evidence was necessary as bearing on the issue of proximate cause.

Disregarding the fact that not knowing what the policies were, we are unable to determine whether they might be

relevant or not, we will discuss the general principles of proximate cause as may be applicable in this case.

Proximate cause has been defined by this court as "a moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred." *State v. Sommers*, 201 Neb. 809, 811-12, 272 N.W.2d 367, 369 (1978). " 'It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death. . . .' " *State v. Lytle*, 194 Neb. 353, 358, 231 N.W.2d 681, 685 (1975); *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

A helpful explanation was given in *State v. Dixon*, 222 Neb. 787, 796-97, 387 N.W.2d 682, 688 (1986), quoting in part from *State v. Spates*, 176 Conn. 227, 405 A.2d 656 (1978):

> Conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct. . . .
>
> . . . .
>
> ". . . An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death. It is the cause without which the death would not have occurred and the predominating cause, the substantial factor, from which death follows as a natural, direct and immediate consequence. [Citations omitted.] It is unnecessary for 'proximate cause' purposes that the particular kind of harm that results from the defendant's act be intended by him. In many situations giving rise to criminal liability, the harm that results is unintended, yet is directly or indirectly caused by an act of the defendant. In such cases, where the death or injury caused by the defendant's conduct is a foreseeable and natural result of that conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible."

The trial court held that the defendant's conduct was the proximate cause of the victim's death and that the officer's conduct was thus irrelevant. The defendant disagrees, claiming

that evidence of the officer's contributory negligence may be material to whether the defendant's actions were a proximate cause of death.

The case of *State v. Rotella*, 196 Neb. 741, 246 N.W.2d 74 (1976), is somewhat analogous to the present case. There, the defendant, who allegedly was driving on the wrong side of the road when he collided with the deceased's car, was convicted of motor vehicle homicide. On appeal, he complained of the trial court's refusal to allow him to present evidence that the deceased had a quantity of amphetamines in his system sufficient to impair his decisionmaking ability. The trial court determined this evidence to be irrelevant.

This court defined the issue thus: "Essentially what defendant is seeking to prove is contributory negligence on the part of the deceased. However, contributory negligence is not a defense to a charge of motor vehicle homicide. *The issue is whether defendant's violation of law was a contributing factor to the death.*" (Emphasis supplied.) *Id.* at 743, 246 N.W.2d at 76. The court then cited from other decisions holding that negligence or unlawful acts by another will not absolve the defendant.

> "When one drives a motor vehicle in violation of law pertaining to the operation of such vehicles on the public highway, and, in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter, and neither contributory negligence of deceased nor the driver of the car in which deceased was riding when killed, can be invoked to relieve the former of criminal responsibility."

Id. at 744, 246 N.W.2d at 76, citing *Vaca v. State*, 150 Neb. 516, 34 N.W.2d 873 (1948).

> "In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, [are] not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another."

Rotella, supra at 744, 246 N.W.2d at 76, citing *Hoffman v. State*, 162 Neb. 806, 77 N.W.2d 592 (1956).

The reasoning of the foregoing cases extends to the present circumstances. Regardless of whether the officer violated police policy or was negligent in his decision to pursue the defendant at high speeds, the defendant's actions were still a proximate cause of the death. The defendant's flight from the officer, his high rate of speed, and his failure to stop at the final stop sign all made up " 'the cause without which the death would not have occurred . . . .' " *State v. Dixon*, 222 Neb. 787, 797, 387 N.W.2d 682, 688 (1986). Under these facts, the officer's actions, even if incorrect, did not serve to negate the conclusion that it was the defendant's conduct which was " 'the efficient cause, the one that necessarily [set] in operation the factors that accomplish[ed] the death. . . .' " *State v. Lytle*, 194 Neb. 353, 358, 231 N.W.2d 681, 685 (1975). "The fact that some other agency combined with the act of the defendant to cause the death is not a defense unless the other agency is an efficient intervening cause." *State v. Meints*, 212 Neb. 410, 414, 322 N.W.2d 809, 812 (1982).

In *State v. Machmuller*, 196 Neb. 734, 246 N.W.2d 69 (1976), wherein the defendant who had threatened officers with a loaded gun taken from the officers' car argued that if the officers had followed their own procedure of locking the car door the incident would never have happened, the court stated that "[t]his effort to shift the blame for what occurred to the police officers by introducing an argument based upon proximate cause does not impress us." *Id.* at 737-38, 246 N.W.2d at 71.

There is no merit to defendant's first argument.

SUSPENDED LICENSE OF OTHER DRIVER

Subsequent to the collision, the driver of the Corvette was issued a citation for driving while his license was suspended. The defense argued that the evidence was probative of proximate cause; that is, the fact that the driver knew his license was suspended *could have* affected his driving as he heard police sirens approaching.

On appeal, the defendant's one-sentence argument on the issue is simply that the evidence was probative of the Corvette

driver's contributory negligence, which is relevant to the issue of proximate cause. Much of the prior discussion of proximate cause is applicable as well to this argument.

Moreover, the defendant has not shown how he was hurt by the exclusion of the evidence. The defense was allowed to thoroughly explore the conduct of the Corvette driver on the evening of the accident. Evidence was presented as to the Corvette's speed, the driver's visibility, and other factors bearing on the driver's role in the collision. The driver himself testified and was cross-examined. The defense was given sufficient opportunity to investigate and present evidence as to whether the Corvette driver was negligent, regardless of whether evidence was presented about the suspended license.

Finally, the dicta in *Benton v. State*, 124 Neb. 485, 247 N.W. 21 (1933), to the contrary notwithstanding, we held in *Crandall v. Ladd*, 142 Neb. 736, 744, 7 N.W.2d 642, 647 (1943), "We are not unmindful of the rule that a violation of a statute or ordinance enacted in the interest of public safety is evidence of negligence [citations omitted], but the rule cannot be made applicable unless there is some causal relation between the violation and an accident."

OPINION EVIDENCE OF LAY WITNESS

Jershin v. Becker, 217 Neb. 645, 351 N.W.2d 48 (1984), although a civil case, decided nearly the same question as is presented here. In *Jershin*, the plaintiff assigned as error the court's refusal to allow an eyewitness to testify with regard to the avoidability of the accident. This court held:

> Opinion testimony by a lay witness is permitted only where it is rationally based on the perception of the witness and it is helpful to a clear understanding of his testimony or the determination of a fact in issue. Neb. Rev. Stat. § 27-701 (Reissue 1979). It is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. *Brugh v. Peterson*, 183 Neb. 190, 159 N.W.2d 321 (1968).
>
> The questions asked of the witness sought his opinion as to each party's opportunity to avoid the accident. These

> were the precise issues to be determined by the jury. The testimony would merely have been the witness' conclusions, and would not be helpful to the jury in resolving the issues. There was no abuse of discretion in the exclusion of the opinions.

217 Neb. at 652, 351 N.W.2d at 53. The reasoning is equally applicable to the present case. An essential issue for the jury to decide was whether the defendant caused the collision leading to Stewart's death. The opinion evidence the defense sought to introduce was intended to have decided the issue for the jury.

In discussing the provisions of Neb. Rev. Stat. § 27-701 (Reissue 1985), this court explained, " 'It is based on the premise that the lay witness' function is to describe what he has observed and that the trier of fact will draw the conclusion from the facts observed and reproduced by the witness. . . .' " *Belitz v. Suhr*, 208 Neb. 280, 285, 303 N.W.2d 284, 288 (1981), quoting from the comment to the Proposed Nebraska Rules of Evidence, rule 701 at 107 (1973).

Finally, the full extent of the offer of proof on this issue was a statement by counsel that "I think if they can be properly qualified as far as foundation and as far as being experienced drivers and if their opinions are helpful, they should be allowed to testify as to their opinion regarding the driving of the Corvette by Rodney Jenson."

There is no merit to any of the errors assigned by the defendant, and the judgment of the district court is affirmed.

AFFIRMED.

CARPENTER PAPER COMPANY OF NEBRASKA, APPELLANT, V. LAKIN MEAT PROCESSORS, INC., AND CHARLES E. LAKIN, APPELLEES.

435 N.W.2d 179

Filed February 10, 1989. No. 87-134.

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. **Corporations: Equity: Liability: Debtors and Creditors.** Proceedings seeking disregard of the corporate entity, that is, seeking to pierce the corporate veil to impose liability on a shareholder for a corporation's debt or other obligation, are equitable actions.
3. **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 credible evidence is in conflict, this court may consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Corporations: Fraud.** When a corporation is or becomes the mere alter ego, or business conduit, of a person, it may be disregarded.
5. _____: _____. Some of the factors which are relevant in determining to disregard the corporate entity on the basis of fraud are (1) grossly inadequate capitalization, (2) insolvency of the debtor corporation at the time the debt is incurred, (3) diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, and (4) the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.
6. **Corporations: Fraud: Debtors and Creditors.** The separate entity concept of the corporation may be disregarded where the corporation is a mere shell, serving no legitimate business purpose, and is used as an intermediary to perpetuate fraud on the creditors.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for further proceedings.

Monte Taylor, of Taylor, Connolly & Kluver, and Carolyn A. Rothery for appellant.

W. Patrick Betterman and Mary Lou Perry, of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellees.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

HASTINGS, C.J.

Plaintiff, Carpenter Paper Company of Nebraska, brought

this action in equity against defendants, Lakin Meat Processors, Inc., and Charles E. Lakin, seeking to set aside as a fraudulent conveyance an assignment to Lakin of the proceeds from the sale of substantially all of Lakin Meat's assets and to pierce the corporate veil to hold Lakin personally liable for a judgment debt of the corporation. Following trial to the court, both causes of action were ordered dismissed. Carpenter Paper appeals from the judgment of the district court.

Plaintiff's eight assigned errors may be summarized as follows: The court erred (1) in failing to find that the assignment of assets from Lakin Meats to Lakin to repay loans made to the corporation constituted a fraudulent conveyance and (2) in failing to permit the corporate veil to be pierced in order to hold Lakin personally liable for the debts of the corporation.

A creditor's action to declare a conveyance fraudulent invokes the equity jurisdiction of a trial court. *Brown v. Borland*, 230 Neb. 391, 432 N.W.2d 13 (1988); *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625 (1986).

Proceedings seeking disregard of the corporate entity, that is, seeking to pierce the corporate veil to impose liability on a shareholder for a corporation's debt or other obligation, are equitable actions. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988).

On appeal to this court, an equity action is reviewed de novo on the record, subject to the rule that where 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. *Obermeier v. Bennett*, 230 Neb. 184, 430 N.W.2d 524 (1988).

Lakin Meat was incorporated in the fall of 1975. Throughout the existence of the corporation, Lakin, who grew up on a farm near Emerson, Iowa, was the president and either the sole shareholder or the majority shareholder. Although the corporation was capitalized at $100,000, there is no indication that any more than $75,000 was paid. However, during the course of the operation of the business, Lakin made personal loans to the corporation on a regular basis at 10 percent interest. The loan balance reached the sum of $\$^1/_2$ million in May of 1979

and rose to balances over $1 million by December 1979. The loan balance was reduced to $37,642.60 by May of 1982. The business of Lakin Meat was the purchase, slicing, packaging, and sale of beef livers to retail outlets.

The original debt of Lakin Meat to Lakin and all subsequent advances were covered at all times by a security interest in all the tangible and intangible personal property of Lakin Meat, including furniture, machinery and equipment, inventory, accounts receivable, and notes. Lakin's security interest was perfected by the filing of a financing statement in the office of the Douglas County clerk on June 14, 1976.

Lakin has been involved in Charles E. Lakin Enterprises and various other sole proprietorships and corporations. Lakin Meat maintained a checking account in its name with the Emerson State Bank in Emerson, Iowa. Lakin also maintained a checking account in the name of Charles E. Lakin with the American National Bank in Omaha, Nebraska. The American National account was used as a "sweep account." As checks were received by some of Lakin's various businesses, including Lakin Meat, the checks were deposited into the American National account.

For every business except Lakin Meat that used the American National account, the exact amount of deposited money would be transferred out of the American National account into the correct account within a few days of receipt. When Lakin Meat needed to have money transferred from the American National account to the Emerson account, someone from Lakin Meat would call the Emerson State Bank and the bank would deposit into Lakin Meat's account a no-signature check on the American National account in the amount requested. Lakin Meat's money was always transferred in round numbers, rather than in the exact amount paid to Lakin Meat, and deposited in the American National account. The claimed purpose of this arrangement was to permit quicker clearance of the checks written to Lakin Meat by its customers.

Lakin Meat had its own place of business, had its own employees, and had a separate office within the Lakin Building for accounting and bookkeeping work. In addition, Lakin Meat had its own letterhead, had its own phone listed under its

own name, and used its own invoices. Checks from customers for accounts receivable were received in the name of Lakin Meat. Lakin Meat had a separate checking account in its own name. Lakin Meat kept a corporate minutes book, kept its books and records separate from the books and records of Lakin's other business entities, and filed separate tax returns.

In March 1981, Lakin Meat sold substantially all of its assets to Prime Meat Processors. Prime Meat agreed to pay $450,000 for Lakin Meat's fixed assets and to buy Lakin Meat's inventory and supplies for cost. In order to transfer Lakin Meat's assets to Prime Meat free and clear of all liens and encumbrances as required by the agreement, Lakin had to consent to the sale so that his security interest would be released. Lakin agreed to give such consent if Lakin Meat would grant him a new security interest in all remaining assets and transfer all proceeds of the sale to him. The agreement was filed in the office of the county clerk for Douglas County on April 15, 1981.

At the closing of the sale, Prime Meat executed and delivered a $450,000 promissory note for the fixed assets and a $196,709.37 promissory note for the inventory. Lakin Meat endorsed the two notes to Lakin.

At the time of the sale, Lakin Meat owed Lakin $1,016,451.11: $853,000 in principal and $163,451.11 in accrued interest. After the sale, Lakin made additional loans to Lakin Meat in the principal amount of $271,500. Subsequently, Lakin Meat made payments of principal and interest to Lakin in the amount of $1,252,766.04, leaving indebtedness in the principal amount of $37,642.60 plus interest. At trial both Lakin and Thomas Pribil, an assistant to Lakin in the management of his various businesses and the owner of 10,000 shares of the stock of Lakin Meat, testified that at the time Lakin Meat made payment on the debt to Lakin, it was believed Lakin Meat had sufficient funds from which to pay off all creditors. According to these witnesses, it was not until May of 1981, when one of Lakin Meat's accounts receivable in the approximate sum of $75,000 proved to be uncollectible, that Lakin Meat was unable to meet the demands of all its creditors.

Carpenter Paper was one of Lakin Meat's creditors. Out of the hundreds of transactions between the two parties in which,

normally, Lakin Meat always paid its accounts in time to receive the regular discount, a dispute arose over five invoices dated July 9, 1979, March 31, 1980, February 19, 1981, March 3, 1981, and March 10, 1981. On the four invoices other than the one dated March 31, 1980, Carpenter Paper claimed Lakin Meat improperly took discounts for prompt payment (apparently totaling some $30) and, therefore, did not pay enough. On the invoice dated March 31, 1980, Lakin Meat refused to pay that portion of the invoice relating to printed liver film which Lakin Meat claimed was defective. Lakin Meat apparently did pay something in excess of $900 on that particular invoice, but the disputed item which was not paid was approximately $5,900. Sometime after the sale of the assets to Prime Meat, Carpenter Paper commenced suit against Lakin Meat in the district court for Douglas County to recover on the disputed amount. On July 7, 1982, Carpenter Paper obtained a default judgment against Lakin Meat in the principal amount of $5,923.28. Unable to find assets of Lakin Meat with which to satisfy its judgment, Carpenter Paper brought the action which is the subject of this appeal.

We find it unnecessary to discuss Carpenter Paper's claim concerning an assignment in fraud of creditors for the reason that we conclude from a de novo review of the record that Lakin Meat was a mere corporate shell, an alter ego of Charles E. Lakin, and we must therefore disregard the corporate entity.

When a corporation is or becomes the mere alter ego, or business conduit, of a person, it may be disregarded. *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986).

> "Some of the factors which are relevant in determining to disregard the corporate entity" on the basis of fraud are: "(1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity."

Id. at 498, 391 N.W.2d at 115, quoting *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980).

Lakin Meat was a subchapter S corporation. Its gross receipts grew to $5 million by fiscal yearend February 29, 1980. Dividends of $200,000 were paid to Lakin in December of 1976 and of $98,000 in May of 1978. The capital was never increased.

Laurence Lanphier, Jr., a C.P.A., testified for the plaintiff and based his testimony on a study done by Robert Morris & Associates. According to Lanphier, in determining adequate capitalization of corporations, he found that as to the ratio of assets to debt, the corporations in the upper quartile of the Robert Morris study would have a ratio of 2.7 to 1, the middle quartile 1.8 to 1, and the lower quartile 1 to 1. Lakin Meat, in 1976, had a ratio of .65 to 1. Using the debt to net worth test, he said that corporations in the upper quartile would normally be found to have such a ratio of .6 to 1 and those in the lower quartile 5.1 to 1. Lakin Meat had a ratio of 7.32 to 1. Based on these tests, it was his opinion that Lakin Meat was thinly capitalized. However, on cross-examination, he gave the opinion that it was grossly inadequately capitalized based on the fact that it ran an overdraft of $100,000 in the bank for 6 years.

William Sweet and Pribil, witnesses for the defendants, simply stated that in their opinion the capitalization was adequate.

Concerning the matter of insolvency, there appear to be two different types of insolvency: equity insolvency, when an entity is unable to currently meet its obligations; and bankruptcy-type insolvency, where the fair value of the assets is exceeded by the amount of its debt. Lanphier gave as his opinion that Lakin Meat was insolvent in the equity sense from its inception down to the final sellout and insolvent in the bankruptcy sense from February 1980 to the end. Opinion testimony of defendants' two witnesses was to the contrary.

It is true that during the life of Lakin Meat, it apparently was able to and did pay all of its creditors on a regular basis except for the default involving Carpenter Paper. However, Lanphier apparently took into consideration that at all times, beginning in 1978, Lakin held notes payable on demand in amounts

varying from $214,000 to over $1 million. This was the result of approximately 225 separate cash advances made by Lakin over the course of 3 years, one advance being as large as $340,000. In the event that Lakin at any time during that 3-year period would have called these notes, Lakin Meat would have been unable to pay them.

Other than the two dividends totaling almost $300,000, and, of course, the final payoff in excess of $1 million, there was no evidence of diversion of corporate funds or assets to Lakin's own use.

In spite of defendants' claims of separate names, bank accounts, office addresses, loans, security interests, etc., the fact remains, readily apparent from an examination of this record, that Lakin Meat was Charles E. Lakin. He controlled the corporation's every move. He ran it as he saw fit. The claimed separate identity was simply a series of complicated and innovative books and accounts. There was a unity of interest as far as Lakin and Lakin Meats were concerned, contrary to the factors in *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986). The separate entity concept of the corporation may be disregarded where the corporation is a mere shell, serving no legitimate business purpose, and is used as an intermediary to perpetuate fraud on the creditors. Lakin's manipulations of the business permitted him to, and he did, terminate the corporation for his own financial well-being to the prejudice of the corporation's creditors.

The judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion. Costs are taxed to the appellee Charles E. Lakin.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WEST TOWN HOMEOWNERS ASSOCIATION, INC., A NEBRASKA CORPORATION, APPELLEE, V. MICHAEL D. SCHNEIDER ET AL., APPELLANTS, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEBRASKA ET AL., APPELLEES.

435 N.W.2d 645

Filed February 10, 1989. No. 87-154.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. It is proper when the pleadings, depositions, admissions, interrogatories, 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.
2. _____. A party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. Thereafter, the burden of producing contrary evidence shifts to the party opposing the motion.
3. **Foreclosure: Proof: Mortgages: Liens.** In a foreclosure suit, the mortgagee must prove the existence of the mortgage lien, the amount and priority thereof, default, and the right to a decree directing sale of the premises in satisfaction thereof.
4. **Foreclosure: Liens.** The purpose of a foreclosure proceeding is not to create a lien but, rather, to enforce one already in existence, to ascertain the amount of the lien and its priority, and to obtain a decree directing the sale of the property.
5. **Liens: Words and Phrases.** A lien has been characterized in this jurisdiction as an obligation, tie, duty, or claim annexed to or attaching upon property by the common law, equity, contract, or statute. A lien is perhaps most accurately described as a right afforded by law to have an obligation satisfied out of particular property.
6. **Foreclosure: Mortgages: Liens: Parties.** Where junior mortgagees are made parties to the foreclosure proceeding, the decree is a foreclosure of all mortgage liens, and junior mortgagees cannot prevent a sale; their rights are sufficiently protected by the opportunity to purchase the property at the sale or to pay off the prior encumbrance prior to the sale.
7. **Foreclosure.** The confirmation of the sale and delivery of the sheriff's deed made under a decree of foreclosure will bar all equity of redemption of junior encumbrances.
8. **Foreclosure: Mortgages.** In foreclosure, if, after the sale of the property and satisfaction of the mortgage, a surplus remains, the court has full power to determine the interests of all parties in the surplus and to do complete and final justice between the parties.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed as modified.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellants.

Terri S. Harder, of Jacobsen, Orr, Nelson & Wright, P.C., for appellee West Town Homeowners Association.

HASTINGS, C.J., WHITE, and CAPORALE, JJ., and REAGAN, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff, West Town Homeowners Association, Inc., a nonprofit homeowners association, brings suit to foreclose a lien for nonpayment of assessments on "Tract F, also known as Lot F, West town Second Addition (Subdivision), a subdivision in the City of Kearney, Buffalo County, Nebraska," pursuant to the terms of a recorded originating declaration of the association. Owners defendants, Michael D. Schneider (Schneider) and Michael D. Schneider, trustee (Trustee), had not paid assessments since July 1985. The trial court granted summary judgment in favor of West Town, assigned priorities of liens, and ordered the sale of Lot F. Defendants Schneider, Trustee, and S & H Enterprises, a Nebraska partnership, appeal. We affirm.

This being an equity action, this court reviews the matter de novo, reaching independent conclusions of fact and law.

These facts have little dispute. On February 19, 1976, J.S.R., Inc., the owner of Lots A through G, Westown Second Subdivision, Buffalo County, Nebraska, executed and filed with the register of deeds for Buffalo County a declaration referring to the last-described lots and providing for extensive rules and regulations for the creation and administration of an association of member homeowners. Included are these provisions:

> Declarant hereby declares that all of the properties described above shall be held, sold, and conveyed subject to the following easements, restrictions, covenants . . . which shall run with the real property above described
>
> . . . .
>
> . . . .

ARTICLE III

. . . .

Section 1. Every owner of a lot . . . shall be a member of the Association. . . .

. . . .

ARTICLE IV

. . . .

Section 1. . . . [E]ach Owner of any Lot by acceptance of a deed therefor . . . is deemed to covenant and agree to pay to the Association: (1) Regular annual maintenance assessments . . . (2) Assessments for capital improvements . . . . The Regular and Special Assessments . . . shall be and constitute until paid a continuing charge against and lien upon such lot or property against which each such assessment is made. . . .

. . . .

Section 6. . . . The [assessment] due dates shall be established by the Board of Directors. . . .

Section 7. . . . Any assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of nine per cent (9%) per annum. The Association may bring an action at law against the Owner personally obligated to pay the same, or foreclose the lien against the property in the same manner as provided by law for foreclosing of mortgages. . . .

Section 8. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage.

In 1976, Schneider became the record owner of Lot F. On August 5, 1976, Schneider gave Home Federal Savings and Loan Association of Lexington, now Home Federal Savings and Loan Association of Nebraska (Home), a mortgage on Lot F to secure his note for $37,900. All parties agree that this recorded mortgage is a first lien on Lot F. On March 9, 1981, Schneider gave defendant Union Bank and Trust Company (Union) a mortgage, which was duly recorded on March 11, on Lot F (also describing other land) to secure his $75,000 note. At a regular meeting of the association held July 27, 1982, the assessment on each lot was fixed at $1,080 per year, payable $90

per month beginning September 1, 1982. None of those assessments for Lot F have been paid since July 1985. On December 31, 1985, Schneider gave a duly recorded mortgage on Lot F to S & H Enterprises, a Nebraska partnership (Schneider and Robert Hyde, partners), to secure a $40,000 demand note. No proceedings at law have been commenced by West Town to recover the unpaid assessments. None of the described secured notes were in default at the time judgment was entered.

Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. It is proper when the pleadings, depositions, admissions, interrogatories, 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).

A lien has been characterized in this jurisdiction as an obligation, tie, duty, or claim annexed to or attaching upon property by the common law, equity, contract, or statute. A lien is perhaps most accurately described as a right afforded by law to have an obligation satisfied out of particular property. See *Dupuy v. Western State Bank*, 221 Neb. 230, 375 N.W.2d 909 (1985). In a foreclosure suit, the mortgagee must prove the existence of the mortgage lien, the amount and priority thereof, default, and the right to a decree directing sale of the premises in satisfaction thereof. *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986).

The purpose of a foreclosure proceeding is not to create a lien but, rather, to enforce one already in existence, to ascertain the amount of the lien and its priority, and to obtain a decree directing the sale of the property. See *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 223 N.W.2d 425 (1974).

West Town filed its foreclosure petition on March 12, 1986, alleging an $810 lien on Lot F for assessments due and unpaid from July 1985 to March 1986, subject to the first lien of Home's mortgage. Defendants Home, Union, and S & H

Enterprises were alleged as having some claim by reason of recorded mortgages. Defendants Schneider, Trustee, and S & H demurred to the petition, which demurrer, after hearing, was denied. Those defendants joined in an answer that preserved their demurrer and that denied generally the petition. Defendants Home and Union answered. On November 17, 1986, West Town filed its motion for summary judgment. On December 1, 1986, defendant S & H filed a cross-petition alleging its mortgage was superior to West Town's lien. At the hearing on December 22, 1986, summary judgment was entered for West Town.

A party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. Thereafter, the burden of producing contrary evidence shifts to the party opposing the motion. *City Bank & Trust Co. v. Van Andel*, 220 Neb. 152, 368 N.W.2d 789 (1985).

In support of its motion, West Town filed copies of the pleadings, requests for admissions, interrogatories and answers, affidavits, certified copies of four prior lawsuits between West Town and Schneider relating to the collection of unpaid assessments on Lot F, and other records. This evidence shows that there was no genuine question of material fact at issue, and West Town was entitled to judgment as a matter of law. The countershowing made by appellants was limited to affidavits, one with attachments, indicating that the notes secured by the mortgages held and owned by Home, Union, and S & H were not in default.

The trial court granted West Town's motion, finding that there were no genuine issues of material fact and that West Town was entitled to judgment as a matter of law; that there was due to Home on its note $34,297.19 and interest at 9¼ percent, and its mortgage was a first lien on Lot F; that there was due West Town $1,521.60 for unpaid assessments and interest, which sum was a valid second lien on Lot F; and that there was due Union on its note $23,318.89 with interest at 15½ percent, and its mortgage was a third lien on Lot F. The court ordered that if the amount of West Town's and Union's liens was not paid within 20 days, all equity of redemption in Lot F be foreclosed; that Lot F be sold as upon execution and the

proceeds be brought into court to be applied upon confirmation of the sale to the costs and the sums found due; and that all defendants except Home be foreclosed of all right, title, interest, and equity of redemption in and to Lot F.

Assignment of error No. 1 is as follows: "The Trial Court erred in finding that the Plaintiff-Appellee could foreclose a lien against real estate created by private contract between the parties for non-payment of assessments." This concerns interpretation of the terms contained in the declaration. Appellants argue that there are no clear provisions in the declaration and proceedings that the assessments were specifically made against Lot F and for the assessments' due dates. West Town claims the protection of res judicata in that these issues were decided in its favor, as shown by the certified records of four prior lawsuits between Schneider and West Town. One lawsuit appeared in this court, *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 907, 341 N.W.2d 588, 590 (1983), wherein we said,

> "Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered . . . cannot again be litigated between the parties and privies, whether the claim or demand, purpose, or subject matter of the two suits is the same or not."

Dicta is noted in that reported case that West Town was a condominium association subject to the Condominium Property Act, Neb. Rev. Stat. §§ 76-801 to 76-823 (Reissue 1981). All of the parties in the case at bar agree that West Town is not a condominium association subject to that act.

The defense of res judicata may be raised for the first time in a summary judgment proceeding. *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982).

West Town correctly argues that the issues of the liability of Lot F for assessments and their due dates are established by the prior proceedings, and res judicata applies. Further, the declaration provides that the unpaid assessments on the lots were a lien subject to being foreclosed in the same manner as the foreclosure of mortgages.

Assignment of error No. 2 reads: "The Trial Court erred in failing to find the amounts owed to the fourth lien holder, Defendant-Appellant S & H Enterprises, A Nebraska Partnership." That was an issue presented by the pleadings, and the evidence shows that there was $40,000 due to S & H from Schneider secured by the mortgage. The reason for the failure of the trial court to make such a finding does not appear in the record; however, such failure is harmless and not reversible error, since it is clear that S & H's mortgage lien was a fourth priority (last), and no substantial right of any appellant was affected. "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, 743, 359 N.W.2d 83, 86 (1984). See, also, Neb. Rev. Stat. § 25-853 (1985). The findings and order of the trial court are modified to show $40,000 was due from Schneider to defendant S & H on a demand note secured by a mortgage on Lot F that had a priority of a fourth lien on Lot F, which lien was foreclosed as provided in the trial court's decree.

Assignment of error No. 3 states: "The Trial Court erred in its determination of the priority of the lien holders and the amounts owed to the lien holders." All parties agree that Home's mortgage is a first lien. Appellants argue that since Union's mortgage was filed March 11, 1981, prior to the attachment of the assessment lien on August 1, 1985, Union's mortgage was second in priority, and, therefore, West Town's lien was a third lien, apparently on the theory that priority depends upon the time when the lien attached. See *Omaha Nat. Bank v. Continental Western Corp.*, 203 Neb. 264, 278 N.W.2d 339 (1979). West Town's response is twofold: (1) The appellants do not have standing to appeal the priority issue, and (2) the declaration's article IV, § 8, provides in part, "The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage," and, by interpretation, all liens, except Home's, are inferior to the assessment liens.

Ordinarily, Union, as the owner-holder of the "Union mortgage," would be the party having standing to object to that part of the judgment assigning third priority to its mortgage; however, in *Federal Farm Mtg. Corporation v. Ganser*, 145

Neb. 589, 592, 17 N.W.2d 613, 615 (1945), a mortgage foreclosure action, the court held that the mortgagor had standing to object to the confirmation of a sale, stating, " 'An appealable interest exists when the judgment or decree so affects a party or privy to the record that he would derive a substantial benefit from its modification or reversal.' " From a review of this record, there is no showing that appellants would derive a substantial benefit from a modification of the judgment on the issue of priority.

Further, "priority of a mortgage may be changed by agreement of the parties." *Meek v. Gratzfeld*, 223 Neb. 306, 311, 389 N.W.2d 300, 304 (1986). That same result was accomplished here when Union admitted a third priority, the only evidence at the summary judgment hearing was that the Union mortgage had third priority, and defendants failed to make either an objection or a contrary showing at the hearing, as they were required to do. See *City Bank & Trust Co. v. Van Andel*, 220 Neb. 152, 368 N.W.2d 789 (1985). The third claimed error is without merit.

Assignment of error No. 4 sets out: "The Trial Court erred in entering a Decree of Foreclosure and an Order of Sale pursuant to a single filing of a Motion for Summary Judgment, when all other lien holders neither join in nor file Motions for Summary Judgment." Apparently, appellants' argument is that upon the foreclosure of West Town's lien, the mortgage liens of Union and S & H survive as viable liens unless each joins in the application for foreclosure of all liens. No authorities are cited, and the law is otherwise. Neb. Rev. Stat. § 25-1330 (Reissue 1985) is West Town's authority to make application for summary judgment. Where junior mortgagees are made parties to the foreclosure proceedings, the decree is a foreclosure of all mortgage liens, and junior mortgagees cannot prevent a sale; their rights are sufficiently protected by the opportunity to purchase the property at the sale or to pay off the prior encumbrance prior to the sale. See *Keller v. Boehmer*, 130 Neb. 763, 266 N.W. 577 (1936). The confirmation of the sale and delivery of the sheriff's deed made under a decree of foreclosure will bar all equity of redemption of junior encumbrances. See *Shackley v. Homer*, 87 Neb. 146, 127 N.W. 145 (1910). If, after

the sale of the property and satisfaction of the mortgage, a surplus remains, the court has full power to determine the interests of all parties in the surplus and to do complete and final justice between the parties. See *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 223 N.W.2d 425 (1974).

Assignment of error No. 5 reads: "The Trial Court erred in finding that there was no genuine issue as to any material fact, and that the Plaintiff-Appellee was entitled to a judgment as a matter of law." From a full reading of the record, there is no genuine issue of any material fact, and, as a matter of law, the trial court properly entered the summary judgment in favor of West Town and against all defendants, subject only to the modification of the court's findings to state that defendant Schneider owed defendant S & H $40,000 on a note dated December 31, 1985, secured by a recorded mortgage on Lot F, which is a fourth lien on Lot F, junior and inferior to the liens of all other parties, and to include in the judgment the amount of the S & H note to be paid as one of the liens within 20 days from the judgment.

AFFIRMED AS MODIFIED.

BONNIE BROWN, APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF WILCOX, COUNTY OF KEARNEY, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

435 N.W.2d 184

Filed February 10, 1989. No. 87-271.

1. **Records: Appeal and Error.** The requirement that a transcript of the proceedings in the lower tribunal be filed with a petition in error is mandatory and jurisdictional.
2. _____: _____. In a proceeding in error, additional evidence may not be received, and the issues must be determined solely from the transcript filed with the petition.

Appeal from the District Court for Kearney County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

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

Kent E. Person, of Person, Dier, Person & Osborn, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

PER CURIAM.

This is an appeal in a proceeding in error to review the order of the board of education of the Wilcox, Nebraska, school district terminating the employment of the plaintiff, Bonnie Brown, as a teacher.

The original petition in error does not appear in the record filed in this court. The amended petition in error alleged that the plaintiff is a certificated teacher who was employed by the defendant district for the 1985-86 contract year. At a hearing on May 9, 1986, the board of education considered the termination of the plaintiff's contract, and on May 12, it terminated her contract.

The trial court found that the plaintiff was a "probationary certificated employee" as defined in Neb. Rev. Stat. § 79-12,107(3) (Reissue 1987) and that the plaintiff had failed to establish any error in the proceedings of the board of the defendant district. The trial court affirmed the order of the board not renewing the plaintiff's contract for the 1986-87 school year. The plaintiff has appealed.

In this court the plaintiff contends that the trial court erred in determining that the board of the defendant district could refuse to renew the plaintiff's contract and that the record supports the action of the board. We do not reach the plaintiff's contentions, because the record before us is not sufficient to permit such a review of the action of the board.

Neb. Rev. Stat. § 25-1905 (Reissue 1985) requires that a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified be filed with the petition. This requirement is mandatory and jurisdictional. Additional evidence may not be received, and the issues must be determined solely from the transcript filed with the petition.

School Dist. No. 39 v. Farber, 215 Neb. 791, 341 N.W.2d 320 (1983); *Jackson v. Jensen*, 225 Neb. 671, 407 N.W.2d 758 (1987); *Downer v. Ihms*, 192 Neb. 594, 223 N.W.2d 148 (1974); *Anania v. City of Omaha*, 170 Neb. 160, 102 N.W.2d 49 (1960).

At the trial in the district court, a transcript of the proceedings before the board was received in evidence without objection as exhibit 1, and an uncertified "Bill of Exceptions" was received as exhibit 2. No filing marks appear on exhibit 1 to indicate that it was filed with the petition in error as in *Ostler v. City of Omaha*, 179 Neb. 515, 138 N.W.2d 826 (1965), and so far as the record indicates, no transcript was filed with the amended petition in error. However, since the statements of counsel made on the record at the time exhibit 1 was offered at the trial in the district court indicate that a copy of exhibit 1 had been filed in the office of the clerk of the district court at some time, for the purposes of this opinion we assume exhibit 1 was a copy of a transcript that was filed with the original petition in error.

There is nothing in the record to indicate that the "Bill of Exceptions," received in evidence as exhibit 2, was a part of the transcript filed in the district court. The fact that the "Bill of Exceptions" was received in evidence is of no consequence, because the case must be determined upon the basis of the transcript filed with the petition in error, and additional evidence may not be received.

An examination of the transcript discloses no error in the proceedings. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELIJAH JONES, APPELLANT.
435 N.W.2d 650

Filed February 10, 1989. No. 87-1150.

1. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless

clearly erroneous. When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.

2. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
3. _____: _____. A convicted defendant seeking a reversal of the conviction or sentence for the reason that counsel's assistance was deficient must show 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.
4. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel.

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

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Douglas J. Peterson for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITE, J.

Defendant, Elijah Jones, appeals from an order of the district court for Douglas County denying his motion for postconviction relief. The thrust of defendant's motion to vacate and set aside judgment and sentence is a claim of ineffective assistance of counsel.

In *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984), this court affirmed the judgment and sentence of the district court for Douglas County which found the defendant guilty of first degree murder and sentenced him to a term of life imprisonment. One of the two errors we addressed in that appeal was whether there was sufficient evidence to find the

defendant guilty of premeditated first degree murder. The defendant claimed that he was acting in self-defense and did not have sufficient time to think about the shooting, therefore rebutting any question of premeditation. In determining that the defendant's assignment of error lacked merit, we said: "Based upon the testimony of eyewitnesses, the physical evidence at the scene, and the expert testimony by the pathologist, the jury could have concluded beyond a reasonable doubt that Jones killed Kelly purposely and with deliberate and premeditated malice, notwithstanding the conflict in the evidence." *Id.* at 439, 350 N.W.2d at 13. As noted above, there was some conflict in the evidence. However, there were several eyewitnesses who saw the defendant shoot and kill Elijah Kelly on November 19, 1979. The evidence adduced at trial showed that the defendant had gone to an Omaha cardroom twice looking for the victim, once at 6 p.m. and later at 11:15 p.m. When the defendant returned to the club the second time, the victim was seated at a table playing cards. The defendant shot the victim several times as he was attempting to get up from the card table. While the victim was on the floor, apparently trying to crawl away from the table, the defendant followed him around the table, leaned over, and fired the remaining bullets into the victim's back. The evidence also showed that the victim was dressed in a manner that made concealment of a weapon unlikely, and later investigation disclosed that there was no weapon on the victim.

The defendant, in his motion, alleges that he was denied effective assistance of counsel in that his counsel failed to contact and call several witnesses whose testimony allegedly would have established the defendant's claim of self-defense.

> A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous. [Citations omitted.] " 'When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least

> as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.' "

State v. Painter, 229 Neb. 278, 280-81, 426 N.W.2d 513, 515-16 (1988).

As we stated in *State v. Hawthorne*, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988):

> [T]o 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.

A convicted defendant seeking a reversal of the conviction or sentence for the reason that counsel's assistance was deficient must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986).

A review of the record in the postconviction hearing reveals that the defendant has failed to meet his burden. Of the witnesses listed in the defendant's motion whom the defendant's counsel failed to call or contact, we note that only one of them witnessed the shooting. Further, the record shows that if that particular witness had been called to testify, despite defendant's allegations to the contrary, that witness would have provided testimony further incriminating the defendant. With regard to the remaining witnesses, who were not eyewitnesses to the shooting, we fail to see how the testimony of these additional witnesses would have established the defendant's claim of self-defense, especially in light of the fact that there were four eyewitnesses who testified that to the best of their knowledge the victim did not have a gun at the time of the shooting, and

there was evidence showing that the victim was shot several times in the back while attempting to crawl away on the floor.

In addition, " 'The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel.' " *State v. Broomhall*, 227 Neb. 341, 342, 417 N.W.2d 349, 351 (1988). The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD J. DONHAUSER, APPELLANT.

435 N.W.2d 186

Filed February 10, 1989. No. 88-067.

1. **Rules of Evidence: Other Acts.** It is well established that Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant evidence of other crimes, wrongs, or acts for purposes other than to prove the character of a person in order to show that such person acted in conformity with that character. Thus, § 27-404(2) permits evidence of other crimes, wrongs, or acts if such is relevant for a purpose other than to show defendant's propensity or disposition to commit the crime charged.
2. **Other Acts: Intent: Intoxication: Evidence.** Other acts may be used as relevant evidence to counter a defendant's contention that at the time of the offense his action lacked the requisite criminal intent due to intoxication.
3. **Testimony: Other Acts: Trial.** The scope of testimony relating to other acts and offenses by the defendant is a matter to be determined in the discretion of the trial court.
4. **Lesser-Included Offenses.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. The determination of whether an offense is a lesser-included offense is controlled by the elements of the crimes as set forth in the statutes and not by the facts presented in the particular case at issue.
5. **Lesser-Included Offenses: Jury Instructions.** The fact that the elements of the lesser-included offense may be present in a case of the greater offense is not sufficient to invoke the lesser-included offense instruction if it is possible to commit the greater offense without at the same time committing the lesser offense.

6. **Jury Instructions.** The trial court retains discretion in the wording of jury instructions.
7. **Jury Instructions: Appeal and Error.** All the instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.

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

John R. Brogan for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITE, J.

The defendant, Richard J. Donhauser, appeals from a conviction in the district court for York County. Defendant was charged with two counts of assault on an officer; one count of assault, third degree; and one count of resisting arrest. A jury found the defendant guilty on all four counts. Defendant was sentenced to 1 year on each count, to be served concurrently.

On October 25, 1986, sometime between 7:30 and 9:30 p.m., the defendant went to the lounge at the Camelot Inn in York, Nebraska, after spending the earlier part of the day drinking at a friend's house and at a couple of bars in the area. By the time the defendant had arrived at the Camelot Inn, he had consumed approximately 4 beers and 25 mixed drinks. While at the inn, the defendant had four or five more drinks. The Nebraska National Guard was holding a convention at the Camelot Inn that same weekend, and several members were relaxing in the lounge. Apparently with no provocation, the defendant shoved Gary Ramsay, a guardsman, and knocked him down to the floor. Another guardsman, Mark Felker, bent over to help Ramsay up. As Felker was helping Ramsay, the defendant hit Felker in the face with his fist, knocking him on the ground senseless, breaking his glasses, chipping a tooth, and giving him a bloody nose, bloody lip, and black eye. Another patron of the inn restrained the defendant, and the police were summoned.

Deputies Hansen and Rogers of the York County Sheriff's

Department responded to the call. Upon arrival at the inn, Deputy Hansen approached the defendant, put his hands up, and told the defendant to calm down so that he could talk to him. The defendant stated that he was not "going to fucking jail" and hit Deputy Hansen in the face with his fist. Deputy Hansen then jabbed the defendant with his nightstick to subdue him. Despite being jabbed in the stomach with the nightstick, the defendant resisted handcuffing, and both deputies had to restrain and handcuff the defendant. After being handcuffed, the defendant was advised that he was under arrest for striking a police officer.

The deputies were forced to carry the defendant to the police cruiser because he refused to walk to the car. Once at the cruiser, the defendant refused to get into the car, by forcing his body between the car door and the frame around the windshield and by refusing to bend over. When the defendant was placed in the back seat of the cruiser, he continued to resist arrest by kicking at the deputies and placing his feet against the back door to prevent the door from being closed. Deputy Rogers transported the defendant to jail. En route to jail from the inn, the defendant threw his legs over the front seat and proceeded to repeatedly kick Deputy Rogers in the head, shoulders, and back of his arm with defendant's cowboy boots. The blows inflicted by the defendant on Deputy Rogers left several painful red marks on the deputy's head, shoulders, and arm. The defendant persisted in resisting arrest after arriving at the sheriff's department by kicking at the officers, refusing to walk, and yelling obscenities.

During the trial, the State called Lewis R. Edwards, Jr., to testify about a fight between himself and the defendant which took place at the Village Inn at York one evening in June 1986, approximately 4 months prior to the incident which led to the filing of the charges in the case at bar. Defendant's counsel's objection on the grounds that Lewis' testimony was not proper rebuttal was overruled.

At the instruction conference, the defendant's counsel offered proposed jury instructions Nos. 8, 9, 10, and 11, which would have instructed the jury on both count I and count II that it could find the defendant (1) guilty of assault on an officer,

third degree; (2) guilty of resisting arrest; (3) guilty of obstructing a peace officer; or (4) not guilty. The court refused to give the defendant's proposed jury instructions on the grounds that obstruction of a police officer and resisting arrest are not lesser-included offenses of assault on an officer, third degree. Defendant's counsel also submitted a proposed instruction on the defense of intoxication. The court refused defendant's request and gave the standard intoxication defense instruction as contained in NJI 14.31.

The defendant assigns four errors, which can be consolidated into three. He alleges that the district court erred in (1) allowing the State to offer the testimony of Lewis regarding the fight between the witness and the defendant; (2) refusing to give defendant's proposed jury instructions Nos. 8, 9, 10, and 11 on lesser-included offenses; and (3) refusing to give defendant's proposed jury instruction on the defense of intoxication.

Addressing the first assignment of error, the defendant's defense was that he lacked the requisite intent. In support of this theory, the defendant produced testimony that he was too intoxicated to be able to form the requisite intent and that he had a character for peacefulness. The State offered Lewis' testimony to rebut this evidence by showing that the defendant had been involved in other assaults while drinking, thus demonstrating that defendant did have the requisite intent. The trial court allowed the testimony over defendant's objection, finding that Lewis' testimony was "offered . . . to rebut the opinion that the defendant lacked the ability to form the necessary intent and evidence of other acts, similar acts is admissible to prove that element of the case."

Neb. Rev. Stat. § 27-404(2) (Reissue 1985) states:

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

(Emphasis supplied.)

It is well established that the foregoing statute is an

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

State v. Rincker, 228 Neb. 522, 529, 423 N.W.2d 434, 439 (1988). Other acts may be used as relevant evidence to counter a defendant's contention that at the time of the offense his action lacked the requisite criminal intent due to intoxication. *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985). The scope of testimony relating to other acts and offenses by the defendant is a matter to be determined in the discretion of the trial court. *State v. Casados*, 201 Neb. 726, 271 N.W.2d 849 (1978). As this testimony was plainly offered for the purpose of showing intent under § 27-404(2), it was proper, and the trial court did not abuse its discretion in admitting the testimony.

Defendant's second assignment of error involves the doctrine of lesser-included offenses.

> To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. . . .
>
> . . . [T]he determination of whether an offense is a lesser-included offense is controlled by the elements of the crimes as set forth in the statutes and not by the facts presented in the particular case at issue.

State v. White, 217 Neb. 783, 785, 351 N.W.2d 83, 85 (1984). Assault on an officer in the third degree, obstructing a peace officer, and resisting arrest are defined by Neb. Rev. Stat. §§ 28-931, 28-906, and 28-904 (Reissue 1985), respectively. The statutes in pertinent part provide as follows.

Section 28-931 provides: "A person commits the offense of assault on an officer in the third degree if he or she *intentionally, knowingly, or recklessly* causes bodily injury to a peace officer . . . while such officer . . . is engaged in the performance of his or her official duties." (Emphasis supplied.)

Section 28-906 states:

> A person commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he *intentionally* obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer . . . acting under color of his official authority.

(Emphasis supplied.)

Section 28-904 provides: "A person commits the offense of resisting arrest if, while *intentionally* preventing or attempting to prevent a peace officer, acting under color of his or her official authority, from effecting an arrest of the actor or another . . . ." (Emphasis supplied.)

Obstructing a peace officer and resisting arrest are not lesser-included offenses of assault on an officer in the third degree. Third degree assault on an officer can be committed "knowingly, or recklessly," while obstructing a peace officer and resisting arrest may only be committed "intentionally." Further, it is quite possible that a person may commit third degree assault on an officer without violating § 28-906, which requires a person to obstruct, impair, or hinder the enforcement of the law. In addition, a person may also commit third degree assault on an officer without violating § 28-904, which requires a person to prevent the effecting of an arrest.

> As this court has said before, the fact that the elements of the lesser-included offense may be present in a case of the greater offense is not sufficient to invoke the lesser-included offense instruction if it is *possible* to commit the greater offense without at the same time committing the lesser offense.

State v. White, supra at 786, 351 N.W.2d at 86. Therefore, since the defendant could have committed the greater offense of third degree assault on an officer without having committed either obstructing a peace officer or resisting arrest, the trial court was correct in not allowing the defendant's proposed jury instructions Nos. 8, 9, 10, and 11 on lesser-included offenses.

The final assignment of error is also without merit. "[T]he trial court retains discretion in the wording of jury instructions." *State v. Reeves*, 216 Neb. 206, 218, 344 N.W.2d

433, 442 (1984). " ' " ' "All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error." ' " ' " *State v. Rincker*, 228 Neb. 522, 533, 423 N.W.2d 434, 442 (1988). It is clear that NJI 14.31 correctly states the law on the issue of intoxication as a defense. An examination of the instructions given to the jury which are contained in the record reveals no prejudicial error, since all the instructions read together and taken as whole correctly state the law, are not misleading, and adequately cover the issues. The trial court was correct in rejecting defendant's proposed instruction on intoxication and, instead, giving NJI 14.31.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD JAMES ELLEFSON, APPELLANT.

435 N.W.2d 653

Filed February 10, 1989. No. 88-175.

1. **Postconviction: Proof: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief, which is available only when a constitutional right has been infringed or violated; and the findings of the district court will not be disturbed unless clearly erroneous.
2. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** An alleged criminal has the constitutional right to the effective assistance of counsel.
3. **Effectiveness of Counsel: Proof.** To sustain a successful claim of ineffective assistance of counsel, a defendant must prove that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
4. **Judges: Recusal: Appeal and Error.** A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's 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.
5. **Judges: Recusal: Presumptions.** A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.

6. **Attorneys at Law: Effectiveness of Counsel.** A defense attorney has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
7. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel.

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

Rodney W. Smith for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

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

HASTINGS, C.J.

Defendant has appealed from the judgment of the district court which denied his motion for postconviction relief after an order refusing to disqualify the trial judge from conducting such proceedings. We affirm.

Following a trial by jury, defendant was convicted of an August 11, 1981, burglary and first degree sexual assault committed in rural Knox County. The evidence upon which he was convicted included a description by the victim, footprints roughly matching defendant's boots, tire tracks matching the tires on defendant's truck, and an oral and written confession by the defendant. On direct appeal, raising among other claims that his confession was the result of threats and promises and the product of incomplete *Miranda* advice, his conviction was sustained. See *State v. Ellefson*, 214 Neb. 747, 336 N.W.2d 88 (1983).

Raised on appeal from the denial of postconviction relief are the refusal of the trial judge to recuse himself and a claim of ineffective assistance of counsel.

A defendant seeking postconviction relief has the burden of establishing a basis for such relief, which is available only when a constitutional right has been infringed or violated; and the findings of the district court will not be disturbed unless clearly

erroneous. *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988); *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988).

An alleged criminal has the constitutional right to the effective assistance of counsel. *Reddick, supra.* To sustain a successful claim of ineffective assistance of counsel, a defendant must prove that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *State v. Kuil, ante* p. 62, 434 N.W.2d 700 (1989).

A motion to disqualify a judge on the ground of bias or prejudice is addressed to the judge's 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. *Reddick, supra.* A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987).

The facts of this case relating to the original conviction are set forth in detail in *Ellefson, supra.* Following his conviction, and from June 29, 1984, to February 7, 1986, the defendant wrote seven letters to the district judge, generally declaring that he had been wrongfully convicted and demanding that the judge release him.

The defendant points to four specific areas in which he believes that his trial counsel was ineffective: in failing to investigate more thoroughly the possibility that one of the defendant's coworkers in the area of the crime was the perpetrator, in not calling a medical expert to refute the testimony of the State's expert serologist, in not investigating the men who obtained his confession, and in not presenting sufficient evidence to support a change of venue.

COWORKER AS PERPETRATOR

Defendant claims that his trial counsel was ineffective in not calling any of the coworkers to testify and in not investigating their backgrounds. Trial counsel did not check the criminal records of the coworkers, but he did locate and talk to every one of them. Counsel testified that he knew of the physical description which the victim had given of the attacker and that none of the defendant's fellow workers matched that description. Thus, he did not feel it prudent to call these men to the stand.

To assert a successful claim of ineffective assistance of counsel, a defendant must prove that his attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area, that the defendant's interests were not conscientiously protected, and 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).

The evidence does not support the defendant's claim of ineffective assistance of counsel. A defense attorney has " 'a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary.' " (Emphasis supplied.) *Id.* at 281, 426 N.W.2d at 516, citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Trial counsel did investigate the possibility that one of the defendant's coworkers could have been the attacker, and after meeting with them, made a reasonable determination that, as none of them matched the physical description given by the victim, no benefit would be derived from putting them on the stand.

The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. Broomhall*, 227 Neb. 341, 417 N.W.2d 349 (1988). In counsel's judgment, calling the fellow employees to the stand would not have helped the defendant's case. That decision was proper under the circumstances. See *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986).

In any event, defendant has not shown what good would have come from calling the employees to the stand; i.e., he has not shown a necessary component of an ineffective assistance of counsel claim, namely, prejudice. "But even assuming counsel failed to conscientiously pursue an investigation of all potential witnesses, defendant has not met his burden of showing prejudice." *State v. Andrews*, 223 Neb. 830, 834, 394 N.W.2d 638, 641 (1986).

FAILURE TO CALL MEDICAL EXPERT

At trial, the State called a witness, a forensic serologist, who

testified about the possible origin of the blood and semen stains found on the victim's bedding. The witness testified that the victim had type A blood, that she is a "secretor," and that her PGM type is 2-1. The defendant also has type A blood, is a secretor, and has PGM type 1-1. After testing the stains on the bedding, the expert testified that the person who had the semen either had to be a type A secretor or a nonsecretor. She testified that 52 percent of the general population could fit within these classifications.

Defendant claimed that the failure of his counsel to call a medical expert for the purpose of presenting evidence on the enzyme testing in the light most favorable to the defendant constitutes ineffectiveness of counsel. Defendant feels that the fact that the victim was a 2-1 secretor whereas the defendant was a 1-1 secretor was "exculpatory evidence."

On cross-examination by trial counsel, the State's expert testified that the test results did not point to any one person, and that the semen could have come from 52 percent of the general population. This is really the only "exculpatory" value the evidence had for the defendant. The witness further testified that although the PGM type found in the stain on the sheet was 2-1 and the defendant's type is 1-1, this is not necessarily "exculpatory," as the expert testified that a semen stain actually contains a mixture of semen and the victim's vaginal fluid, and, thus, the presence of the victim's PGM type 2-1 substance was not unusual.

Trial counsel did not conduct an independent analysis of the hair and body fluid samples. His strategy in dealing with the scientific evidence was to concentrate on the fact that the test results did not pinpoint the defendant as the perpetrator and that more than one-half of the general population could not be ruled out as being the victim's assailant. He had read materials on PGM testing. Based on the fact that the victim's body fluid mixes with the semen and that the victim's PGM type was 2-1, he determined that it would be inappropriate to call his own witness and have that witness subject to the State's cross-examination as to how the perpetrator *could* have been the defendant. He decided instead to concentrate on the fact

that the tests could not positively identify the defendant as the assailant.

In the present case, defendant's trial counsel performed as a lawyer possessing ordinary training and skill in the criminal law should have performed. He familiarized himself with the materials on the subject of PGM testing, and he knew what the State's evidence would be. He then made a conscious strategic decision not to call an expert witness for the defense, who could have done more harm than good by admitting on cross-examination that the tests did not rule out the possibility that the defendant was the assailant.

As stated in *State v. Fries*, 224 Neb. 482, 486, 398 N.W.2d 702, 705 (1987), "[T]he record discloses that the decision not to call an expert witness was carefully made and based on trial strategy," and "[t]he fact that the strategy proved unsuccessful [i.e., that the defendant was convicted] does not sustain a finding of ineffectiveness of counsel."

Finally, defendant has again failed to show in what manner he was prejudiced by this decision of his counsel.

INVESTIGATION OF OFFICERS TAKING CONFESSION

Defendant claims that his confession was "false" and made as the result of threats and promises made by the deputy sheriff and the parole officer who interrogated him.

Although trial counsel did not have investigations done on these two people, he did examine the background and credentials of the two men at the preliminary hearing and at the hearing on the motion to suppress. He stated that he was able to explore any motivation that the men might have had to lie or "frame" the defendant.

A review of the record of the hearing on the motion to suppress and at the trial indicates that trial counsel did an admirable job of cross-examining both the deputy and the parole officer and that a great amount of information as to the men's employment histories, relationship with the defendant, etc., came out on both direct examination and cross-examination.

The defendant made no showing that, had an extensive background investigation of these two men been conducted,

information would have been made available by which to impeach their testimony regarding the truth of their version of how the confession was obtained.

CHANGE OF VENUE

Finally, as a basis for proving ineffective assistance of counsel, defendant argues that his attorney did not present sufficient evidence in support of his motion for change of venue.

Trial counsel, on two different occasions, moved for a change of venue. Both motions were denied. He testified that he made one concerted effort to get affidavits from people in the community to the effect that defendant would be unable to get a fair trial in the county. He went from door to door and talked to approximately 20 or 25 people. He also talked to various clients and people he met during his daily activities. In spite of these efforts, he could not get anyone to sign an affidavit which would support a change of venue. Of the people with whom he spoke, they either were not aware of the case or felt that the defendant could get a fair trial in the county. Counsel also testified that he generally was comfortable having the trial in Knox County. He encountered no prejudice when picking the jury.

Again, other than the fact that he was convicted, defendant offers nothing to indicate that there was in fact any bias in the community, nor does he suggest what the result of a public opinion poll or survey would have disclosed. He has failed in his burden to show that he was prejudiced by what he terms lack of action on the part of his lawyer.

RECUSAL OF JUDGE

As previously stated, on seven different occasions following his conviction, defendant wrote letters to the trial judge, generally declaring that he had been wrongfully convicted. He then moved to have the judge recuse himself from hearing the motion for postconviction relief on the grounds that the court could be biased because of its receipt of those letters. He argues on appeal that this correspondence was of a "threatening and accusatory nature" and that the judge was biased against him and should not have heard his motion for postconviction relief.

A motion to disqualify a judge on the ground of bias or

prejudice is addressed to the discretion of the judge, 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. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988).

Thus, the defendant has the burden of showing that the court was actually biased or prejudiced, and, hence, it is not sufficient to merely show that the court *could* have been biased or that an *appearance* of impropriety was created.

Moreover, a party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984).

To carry defendant's claim to its logical conclusion, all any party in a legal proceeding would have to do in order to disqualify a judge would be to write a series of nasty letters, and then claim "foul."

A review of the record discloses that there was no basis for requiring the district judge in this instance to disqualify himself.

There is no merit to any of defendant's contentions on appeal. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. URBAN E. CARR, APPELLANT.
435 N.W.2d 194

Filed February 10, 1989. No. 88-199.

1. **Criminal Law: Insanity.** As a defense to a charge against an accused, insanity must be shown to exist at the time of the offense charged.
2. **Criminal Law: Insanity: Pleas: Proof.** Any person prosecuted for any offense may plead that he or she is not responsible by reason of insanity at the time of the offense, and in such case the burden shall be upon the defendant to prove the defense of not responsible by reason of insanity by a preponderance of the evidence.
3. **Criminal Law: Insanity: Proof.** To take advantage of the insanity defense, a defendant must prove, by a preponderance of the evidence, that at the time of the crime the defendant had a mental defect (such as feeblemindedness) or a

mental disease which impaired the defendant's mental capacity to such an extent that the defendant either (1) did not understand the nature and consequences of what the defendant was doing *or* (2) did not understand that what the defendant was doing was wrong and that the defendant could be punished.

4. **Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them.
5. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless the evidence is not sufficient to support the findings.

Appeal from the District Court for Douglas County: KEITH HOWARD, 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., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FAHRNBRUCH, J.

The defendant, Urban E. Carr, appeals his conviction for attempted first degree sexual assault, claiming he should have been found not responsible by reason of insanity. We affirm the conviction.

Carr was charged with attempted first degree sexual assault for attacking a 76-year-old woman as she was walking her dog in Omaha on April 27, 1987. Carr was found to be incompetent to stand trial and was committed to the Lincoln Regional Center. On October 27, 1987, Carr was judged competent to stand trial. He was found guilty after a November bench trial. By stipulation, evidence at the trial consisted of police and mental health reports.

After reviewing reports prepared by mental health professionals, the court at the sentencing hearing found Carr to be a mentally disordered sex offender with a treatable disorder. Carr was sentenced to not less than 4 nor more than 6 years' imprisonment. He was ordered committed to the Lincoln Regional Center for treatment, pursuant to Neb. Rev. Stat. § 29-2915 (Reissue 1985).

Attempted first degree sexual assault is a Class III felony.

Neb. Rev. Stat. §§ 28-201 and 28-319 (Reissue 1985). A Class III felony carries a penalty of 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).

Carr raised the defense of not responsible by reason of insanity.

As a defense to a charge against an accused, insanity must be shown to exist at the time of the offense charged. *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

Neb. Rev. Stat. § 29-2203 (Reissue 1985) in part provides:

> Any person prosecuted for any offense may plead that he or she is not responsible by reason of insanity at the time of the offense and in such case the burden shall be upon the defendant to prove the defense of not responsible by reason of insanity by a preponderance of the evidence.

In Nebraska, the test for insanity as a defense in a criminal case is whether an accused at the time of committing the crime had the capacity to understand the nature of the act committed and whether the accused was able to distinguish right from wrong with respect to the act committed. See *State v. Robertson, supra*. To take advantage of the insanity defense, a defendant must prove, by a preponderance of the evidence, that at the time of the crime the defendant had a mental defect (such as feeblemindedness) or a mental disease which impaired the defendant's mental capacity to such an extent that the defendant either (1) did not understand the nature and consequences of what the defendant was doing *or* (2) did not understand that what the defendant was doing was wrong and that the defendant could be punished. See, *State v. Robertson, supra*; *Thompson v. State*, 159 Neb. 685, 68 N.W.2d 267 (1955); *Washington v. State*, 165 Neb. 275, 85 N.W.2d 509 (1957); *Schwartz v. State*, 65 Neb. 196, 91 N.W. 190 (1902).

Carr was evaluated by two psychiatrists. One of the psychiatrists, Dr. Bruce D. Gutnik, prepared a report after evaluating Carr on May 4, 1987. Dr. Gutnik concluded that it was impossible to determine whether Carr was sane or insane at the time of the crime because Carr was too psychotic to

cooperate with the evaluation.

After reevaluating Carr on October 5, 1987, Dr. Gutnik reported the following:

> With regard to sanity or insanity at the time of the alleged crime, it is difficult to state an opinion since Mr. Carr denies having been involved in the crime. With reasonable medical certainty, Mr. Carr's condition has been serious and psychotic for quite some time and I believe he was most likely psychotic at the time of the alleged crime. Whether or not he was legally insane at the time of the alleged crime is another question entirely and with the information available to me at this time I cannot make a distinct determination.

A third report prepared by Dr. Gutnik on October 20, 1987, which is based only on a review of his two earlier evaluations, concludes that at the time of the attempted evaluation of Carr on May 4, 1987, Carr would have been deemed legally insane, since he did not know rightness or wrongness of his acts, nor at that time did he understand the consequences of his behaviors either to others or to himself. Dr. Gutnik points out that the alleged crime occurred on April 27, 1987, about a week before he attempted the first evaluation. Because of the close proximity in the time, Dr. Gutnik concluded, after reviewing all of the information, Carr was most likely, with reasonable medical certainty, insane at the time of the alleged crime. He based this conclusion on the fact that a mere week after the time of the alleged crime Carr was quite insane.

The other examining psychiatrist, Dr. L.E. Woytassek, made no determination as to whether the defendant was sane or insane at the time of the crime, but addressed only Carr's competency to stand trial.

A police report entered into evidence states that at the time of his arrest, Carr talked in a very incoherent manner and would not answer questions. The reporting officer stated that when he attempted to give Carr his *Miranda* rights, Carr continued to talk, claiming that he was Jesus Christ and that he lived with God, and would not talk further. While en route to the police station, Carr told a police officer, "I've been bad tonight."

The victim told police she noticed Carr behind her as she was

walking her dog. She hurried across the street to enter her home. Carr grabbed her from behind, lifted her, and carried her to a parking lot. The victim reported that as she was being carried, Carr punched her in the head and face numerous times. The victim yelled and fought as she was being attacked. Four men who were walking near the scene heard the victim yelling for help. One of the witnesses reported that he saw Carr on top of the victim and that the victim was kicking in an effort to get away. The witness yelled, "hey," and Carr got up and ran. Carr was arrested as he was leaving the area.

The reports state that the morning after the crime, Carr was taken to a police interview room, where he was advised of his *Miranda* rights. Carr answered yes to all questions and indicated to the officer that he would talk about his arrest. The officer reported that during the interview Carr appeared to be very knowledgeable as to the fact that an older woman was with a dog in the general area where he was the night of the crime, but was adamant in saying that he did not attack her.

The trial court found that Carr voluntarily, intelligently, and understandingly waived his right to trial by jury and proceeded with a bench trial. Carr relied on the defense of not responsible by reason of insanity. By stipulation, trial was had on written police reports concerning the crime and mental health reports on the defendant.

The court found that Carr committed the acts charged. In determining whether Carr met his burden of proving by a preponderance of the evidence that he was insane within the legal meaning of that term, the court considered all three of Dr. Gutnik's reports. The court noted that Dr. Gutnik twice stated that it was impossible for him to give an opinion on insanity and that Dr. Gutnik made the determination that Carr was insane without any additional information. This court has repeatedly held that triers of fact are not required to take opinions of experts as binding upon them. *Joyner v. Steenson*, 227 Neb. 766, 420 N.W.2d 278 (1988); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985).

The court also considered Carr's previous mental difficulties and institutionalizations. These led the court to believe Carr was aware of how he should act in a situation of this kind. The

court questioned whether Carr feigned incoherence immediately after his arrest. The court noted that at 9 a.m. the next morning Carr was perfectly coherent. The court found Carr failed to prove by a preponderance of the evidence that he was insane at the time of the crime.

The verdict of the finder of fact on the issue of insanity will not be disturbed unless the evidence is not sufficient to support the findings. *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

Defendant's conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD M. DIESING, APPELLANT.

435 N.W.2d 190

Filed February 10, 1989. No. 88-230.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a 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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
3. **Circumstantial Evidence: Convictions.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish a defendant's guilt beyond a reasonable doubt.
4. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

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

Gregory M. Schatz, of Stave, Coffey, Swenson, Jansen & Schatz, P.C., for appellant.

Robert M. Spire, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FAHRNBRUCH, J.

Edward M. Diesing appeals the Douglas County District Court's affirmance of his conviction of what is commonly called "driving while intoxicated," a violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987).

After his Douglas County Court trial, the defendant was placed on probation for 6 months, he was required to attend alcohol education classes, his driver's license was impounded for 60 days, and as a condition of probation, he was required to pay a $100 fine and costs of prosecution. We affirm.

Diesing assigns four errors: (1) that the evidence is insufficient to show he was operating his vehicle on a public highway or street; (2) that the evidence is insufficient to show that he was under the influence of alcohol at the time the accident occurred; (3) that the trial court erred in not sustaining his motion for a directed verdict at the end of the State's evidence; and (4) that the trial court erred in not sustaining his motion for a directed verdict at the end of all the evidence.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Wiggins*, 230 Neb. 632, 432 N.W.2d 824 (1988); *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988).

Diesing was involved in a property damage accident in the 3900 block of Dewey Avenue in Omaha, Nebraska. The Omaha police department was notified. The defendant told the responding police officers that he had struck the rear of a parked automobile. Diesing testified that his Jaguar

automobile was parked in the driveway of a residence where he was visiting. He had been asked to move his car so another person could leave. Diesing moved his car from the driveway and attempted to park parallel with the curb. While parking, Diesing struck the rear of a parked car.

Two responding police officers, upon arrival at the scene, noticed Diesing had glassy eyes and slurred speech, and was unable to walk without swaying. The odor of alcohol about Diesing was strong. The officers asked Diesing to perform several field sobriety tests. He had difficulty saying the alphabet, was unable to stand on one leg for 30 seconds without hopping, and could not walk forward and back in a heel-to-toe manner. Diesing did hesitantly, though acceptably, touch his nose with his finger.

The defendant was eventually taken to the police station, where he submitted to a breath alcohol content test. The test results showed that Diesing had an alcohol concentration of .15 of 1 gram by weight of alcohol per 210 liters of his breath. Section 39-669.07, the statute under which the complaint was brought, provides that it is unlawful for any person to operate or be in the actual physical control of a motor vehicle when such person has a concentration of .10 of 1 gram or more by weight of alcohol per 210 liters of his or her breath. A violation of § 39-669.07 may also be proved by showing that a person operated or was in physical control of a motor vehicle while under the influence of alcoholic liquor. The defendant admitted to having three beers prior to the accident and claimed to have consumed one more beer while waiting for police officers to arrive.

Implicit in the trial court's judgment are findings that the accident at issue occurred on a city street and that Diesing was in violation of § 39-669.07 at that time. These are findings of fact. Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988); *State v. Ladehoff*, 228 Neb. 812, 424 N.W.2d 361 (1988).

We first consider Diesing's claim that the evidence is insufficient to show he was operating his vehicle on a public

highway when the accident occurred. Neb. Rev. Stat. § 39-602 (Reissue 1988) defines a highway as "the entire width between the boundary limits of any street . . . which is publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel."

Diesing complains that there is no *direct* evidence that he was operating his vehicle on a street. There is, however, considerable circumstantial evidence. We have held that circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish a defendant's guilt beyond a reasonable doubt. *State v. Wiggins, supra*; *State v. Zellner*, 228 Neb. 272, 422 N.W.2d 96 (1988).

The evidence presented at trial most favorable to the State showed that Diesing had moved his vehicle from the driveway at 3910 Dewey Avenue in Omaha and was attempting to park parallel with the curb when the accident occurred. The owner of the car Diesing struck was visiting in the house next door to the apartment house where Diesing was a guest. When investigating officers arrived, Diesing's vehicle, which had not been moved after the accident, was parallel with the curb. One officer testified that the car was partially in the lane of traffic and not properly parked. One officer stated that Diesing's vehicle had a punctured radiator and two officers testified radiator fluid leaked on the road. Diesing testified the accident happened directly in front of 3910 Dewey Avenue. The only reasonable inference that can be drawn from this evidence is that the defendant moved his car from a driveway onto a city street and was attempting to park on the street when the accident occurred.

When viewed most favorably to the State, the evidence and all reasonable inferences drawn therefrom are sufficient to support the trial court's finding beyond a reasonable doubt that Diesing was operating his vehicle on a public street at the time of the accident.

In his second assignment of error, Diesing contends that there is no evidence he was intoxicated when he struck the parked car. At trial, the defendant stipulated that when tested by the police officers his breath alcohol content was .15 of 1 gram by weight of alcohol per 210 liters of his breath.

It is apparently Diesing's contention that he was not intoxicated until after he consumed one beer while waiting for officers to arrive at the accident scene. Diesing said that beer was his fourth in a period of about 2 hours. One officer testified that he met Diesing at the accident scene and was with him for an hour and a half. During that time, Diesing never claimed he drank beer while waiting for the police to arrive at the scene. One of the officers testified that approximately 7 minutes elapsed between the time the accident occurred and the time police received the call and arrived on the scene. Diesing showed numerous signs of intoxication when the officers arrived at the scene. Two policemen who were at the scene testified that in their opinion the defendant was under the influence of alcohol and should not have been driving. From the evidence presented, the trial court could easily conclude beyond a reasonable doubt that Diesing was not only under the influence of alcohol and should not have been driving, but also that he had more than .10 of 1 gram by weight of alcohol per 210 liters of his breath at the time of the accident. Either condition is a violation of § 39-669.07 when a defendant operates or has physical control of a motor vehicle upon a public street.

We conclude that the findings of fact by the trial court, namely, that Diesing was operating his motor vehicle on a city street while under the influence of alcohol, are not clearly wrong. The trial court did not err in refusing to direct a verdict in favor of the defendant at the end of the State's case or at the end of all the evidence.

In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988); *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988). There was no basis in Diesing's case for the trial court to direct a verdict either at the conclusion of the State's evidence or at the conclusion of the trial.

The judgment and sentence of the trial court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E.C. TRAMMELL, APPELLANT.

435 N.W.2d 197

Filed February 10, 1989. No. 88-299.

1. **Physician and Patient.** Communications between a patient and a physician for the purpose of diagnosis or treatment of a physical, mental, or emotional condition, not intended to be disclosed to third persons, are privileged.
2. **Physician and Patient: Sexual Assault: Evidence.** The patient-litigant exception is not applicable to the complaining witness in a prosecution for sexual assault with respect to treatment for a previous mental condition.
3. **Constitutional Law: Trial: Witnesses: Words and Phrases.** Confrontation means more than the right to confront the witness physically; the primary interest secured by confrontation is the right of cross-examination.
4. **Pretrial Procedure: Evidence: Impeachment.** Generally, a trial court has some discretion in the matter of discovery, where material is sought for impeachment purposes.
5. **Pretrial Procedure: Evidence: Impeachment: Witnesses: Testimony.** If the claimed impeaching information is privileged, there must be a showing that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be excluded. Upon such a showing, the court may then afford the State an opportunity to secure the consent of the witness for the court to conduct an in-camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for the purposes of cross-examination. If the defendant does make such showing and such consent is not forthcoming, then the court should exclude the testimony of the witness.
6. _____: _____: _____: _____: _____. If the in-camera inspection does reveal relevant material, then the witness should be given an opportunity to decide whether to consent to release of such material to the defendant or have her testimony excluded.
7. **Prior Convictions: Right to Counsel: Waiver.** In order to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Robert M. Spire, Attorney General, and William L. Howland for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

BOSLAUGH, J.

The defendant, Robert E.C. Trammell, was convicted of first degree sexual assault and of being a habitual criminal. He was sentenced to imprisonment for 15 to 25 years with credit for presentence incarceration. He has appealed and contends the trial court erred in refusing to permit him to discover and present evidence concerning the victim's past and present psychiatric condition. He also contends the trial court erred in receiving evidence concerning a prior felony conviction.

The record shows that the assault took place at the victim's apartment in Lincoln, Nebraska, on November 5, 1986. The victim had become acquainted with the defendant in October 1986, and he had befriended her on a number of previous occasions, giving her rides and gifts of furniture and clothing. On these previous occasions, there had been no sexual contact between the victim and the defendant.

On November 5, 1986, at about 2 p.m., the defendant came to the victim's apartment, wanting to talk. According to the victim, the defendant was staggering, acting "differently," and appeared to be mad. The defendant accused her of "messing around with three other guys." She testified that the defendant "beat me up," that he hit her with an open hand on the side of her head several times, and that he also struck her in the left rib area with a closed fist, causing her to cry. The defendant reacted to her crying by telling her to shut up and repeatedly striking her. The victim tried to fight him off, but he kept hitting her. The defendant then made her go into the bedroom and have vaginal, rectal, and oral sex with him without her consent. She was forced to engage in vaginal intercourse about six times, rectal intercourse two to three times, and oral intercourse one to two times. Some of the sex acts took place in the living room. The defendant left at about 4 p.m. The victim then put on her clothes and walked to the Bel-Air Home, where she reported the assault to her landlady's niece, Cathy Bienka Thomas, and the police were called.

Thomas testified that the victim came to the Bel-Air Home and reported that she had been sexually assaulted.

Officer Robert Citta, a Lincoln police officer, testified that he went to the Bel-Air Home at 1640 hours and investigated the case. He testified the victim reported a sexual assault to him. He took her first to her apartment, where he gathered evidence, and then to the Lincoln General Hospital emergency room, where a sexual assault examination was performed and a "rape kit" was procured.

Sandra Sons, the victim's landlady and the owner of Bel-Air, testified that when the victim came to Bel-Air on November 5, 1986, she was frightened, had bruises, and was crying.

The examining physician, Dr. James Billups, found the presence of sperm, indicating that the victim had experienced sexual contact within the prior 24 to 48 hours. He saw the victim again on November 11, 1986, at which time there was a complaint of pain in the rib area, and x rays revealed a fractured rib. The rib bruises were three separate and distinct bruises.

Det. Gregory Sorensen interviewed the victim and presented a photographic array to her. The victim selected the photograph of the defendant as being the person who had assaulted her.

Dr. Reena Roy, a forensic serologist, testified that she examined the various items from the sexual assault kit and the victim's clothing. She found semen on the vaginal swab, on the crotch area of the victim's panties, on the crotch area of the victim's pants, and on the inside of the victim's T-shirt. She testified that the defendant was a nonsecretor and, based on her testing, that the semen she found could have come from the defendant. She could not eliminate the defendant as the source of the semen. She testified that 20 percent of the people are nonsecretors and that taking into account all of the factors, including the fact that the defendant was a PGM 1 type, approximately 12 percent of the black male population fit the category of the defendant, that is, nonsecretors with that PGM type. Dr. Roy had found PGM 1 markers on the vaginal swab, the crotch area of the panties, and the crotch area of the victim's pants.

The victim is a single woman, 40 years of age. She completed one-half of the ninth grade. She did not complete high school because she had a nervous breakdown when she was 13 years of age and was institutionalized on three different occasions at the

Lincoln Regional Center, the last admission being when she was 27 years of age. The victim testified that at the time of the assault, she was taking 5 mg of Prolixin, a prescription medication which she had been taking since being at the Lincoln Regional Center. She described the medication as a sedative and stated that it worked to calm her nerves, that the 5 mg dosage was not a strong dosage, and that the medication's effect was minimal. The victim testified that she took Prolixin only part of the time, about every other day, and that she could not recall whether she had taken the medication on the day of the assault.

Dr. Billups, the physician who treated the victim at the emergency room on the day of the assault, testified that 5 mg of Prolixin was a normal dose for an adult and that it was usually prescribed to control a psychosis. Dr. Billups defined persons with psychotic behavior as ones who are not able to think rationally and to conduct their affairs in a normal manner and testified that they may have difficulty with reality. Additionally, he stated that for those psychotic individuals not on medication, they can display psychotic behavior at one moment and soon thereafter appear normal. He further testified that if an individual had been taking Prolixin for many years and then stopped taking the drug, there could be a return to a psychotic condition.

Prior to trial, the State filed a motion in limine requesting that the defense be prevented from adducing evidence regarding past physical or mental illnesses and previous hospitalizations of the victim. The defense contested the State's motion and requested an evidentiary hearing in order to show the court the need for the defense to "make inquiry of [the victim's] mental abilities and capacities in order to explain . . . sharp conflicts in the facts in this case." Defense counsel told the trial court that the defense wanted to call the victim and one of her treating physicians. Regarding the physician, the defense wanted to inquire as to whether he prescribed Prolixin for the victim, whether he continued the prescription for her, why he prescribed the medication for her, and what effect the drug would have upon her mental capacity. Defense counsel then asked the victim to waive her physician-patient privilege in the interest of the defendant's having a fair trial. The victim stated,

on the record, that she did not choose to waive her privilege as to prior hospitalizations at the Lincoln Regional Center or as to treatment other than that necessitated by the assault.

The trial court sustained the motion in limine and denied the request of the defendant. The trial court stated that the defense could ask the victim if she was ever in the regional center, whether she had ever had mental problems, and whether she was taking any drugs and the effects of those medications on her. The court prohibited testimony from her doctors, but would allow the defense to call an expert witness to testify regarding the effects of certain medications. The defendant renewed his request to present evidence concerning the past and present treatment of the victim several times during the trial.

The defendant contends that the ruling of the trial court which prevented the defendant from obtaining the medical records concerning the victim's hospitalization at the regional center and prevented the defendant from calling any of the physicians who treated the victim at the regional center and her personal physicians whom she has been consulting at this time denied him due process of law, prevented him from having a fair trial, and curtailed his right of confrontation and right to compulsory process.

So far as the records of the victim's hospitalization at the regional center are concerned, or testimony concerning treatment of the victim while she was confined in the regional center, these were matters which occurred some 12 or 13 years before the offense involved in this case was committed. Those matters were too remote to have any relevance at this time, and there was no error in refusing to permit the defendant to explore those matters. The right to inquire concerning the victim's current treatment, however, is a different matter.

Neb. Rev. Stat. § 27-504 (Reissue 1985) provides that communications between a patient and a physician for the purpose of diagnosis or treatment of a physical, mental, or emotional condition, not intended to be disclosed to third persons, are privileged.

With respect to the defendant's contention that the patient-litigant exception is applicable and constituted a waiver of the privilege, the victim was a witness, not a party, and thus

had not placed her condition in issue. See *People v. Rocco*, 21 Cal. App. 3d 96, 98 Cal. Rptr. 365 (1971).

The fact, however, that the physician-patient privilege protects from disclosure confidential communications between the victim and physicians who are treating her for her mental condition does not mean the defendant is without remedy. In such a situation, where the witness refuses to waive the privilege, the result is that the testimony of the witness is inadmissible because the defendant is prevented from full and, perhaps, effective cross-examination of the witness. This result has been recognized in several decisions. It appears to be the only method by which both the right of the witness and the right of the defendant may be accommodated.

In *State v. Esposito*, 192 Conn. 166, 471 A.2d 949 (1984), the defendant was convicted of kidnapping and sexual assault. Before trial the defendant sought to examine records of the Connecticut Mental Health Center pertaining to the victim. With respect to the defendant's right to examine the records in question, the Connecticut Supreme Court said at 178-80, 471 A.2d at 956:

> The sixth amendment to the constitution of the United States guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state criminal proceedings. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). . . . Confrontation means more than the right to confront the witness physically; the primary interest secured by confrontation is the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). . . .
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> Generally, a trial court has some discretion in the matter of discovery where material is sought for impeachment purposes. *State v. Januszewski*, supra, 171. If, however, the claimed impeaching information is privileged there must be a showing that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be stricken. Upon

> such a showing the court may then afford the state an opportunity to secure the consent of the witness for the court to conduct an in camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for the purposes of cross-examination. If the defendant does make such showing and such consent is not forthcoming then the court may be obliged to strike the testimony of the witness. . . . If the in camera inspection does reveal relevant material then the witness should be given an opportunity to decide whether to consent to release of such material to the defendant or to face having her testimony stricken in the event of refusal.

See, also, *State v. Burak*, 201 Conn. 517, 518 A.2d 639 (1986).

The trial court was in error in permitting the victim to testify without permitting the defendant to discover and produce evidence concerning the current treatment of the victim's mental condition. The error requires that the judgment be reversed and the cause remanded for further proceedings.

The defendant's other assignment of error relates to a certified copy of a conviction for sodomy which was received at the enhancement hearing. The exhibit in question disclosed that the defendant was represented by counsel. That is sufficient when the conviction is offered for enhancement purposes. In order to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989).

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. WESLEY S. BAKER, APPELLANT.

435 N.W.2d 202

Filed February 10, 1989. No. 88-386.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
2. **Verdicts: Evidence: Appeal and Error.** After a jury has considered all the evidence and convicted the defendant, the jury verdict may not, as a matter of law, be set aside for insufficiency of evidence if the evidence sustains some rational theory of guilt.
3. **Lesser-Included Offenses: Proof: Words and Phrases.** The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

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

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITE, J.

This is an appeal from Douglas County, Nebraska, following a conviction for theft by receiving stolen property. After a jury trial, the defendant was found guilty and sentenced to a term of 18 months' to 3 years' imprisonment.

On July 23, 1987, at approximately 1 a.m., the defendant was seen driving a green model 4440 John Deere tractor with a red cultivator attached in the rural area of Douglas County. Pursuant to a sheriff's directive to conduct a field check of any farm equipment on the road in that area, a sheriff's deputy stopped the defendant. The officer who halted the tractor

recognized the defendant, who, when questioned, told the officer that he was on his way to cultivate a beanfield for Tony Vencil. To explain his presence on the road at 1 o'clock in the morning, the defendant stated he had overslept. The officer did not detain the appellant and contacted a dispatcher, who subsequently contacted Vencil. The dispatcher notified the officer that Vencil did not have anyone cultivating his land at that time.

The officer then began to relocate the tractor and the driver, as he believed the tractor to be stolen. Approximately an hour later, the officer found some tractor tread marks in the road near where he had stopped the defendant, and followed them to a cornfield, where the tractor was found. The engine was still warm. The defendant was later located and charged with theft by receiving stolen property.

The appellant assigns as error the district court's refusal to set aside the verdict, contending that the evidence was insufficient to sustain his conviction as a matter of law. In addition, the appellant maintains that the trial court erred in refusing to give his proposed jury instruction on the lesser-included offense of unauthorized use of a vehicle.

In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. This court will not set aside a conviction if the verdict is supported by relevant evidence. After a jury has considered all the evidence and convicted the defendant, the jury verdict may not, as a matter of law, be set aside for insufficiency of evidence if the evidence sustains some rational theory of guilt. *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987). In this action, the evidence adduced at trial supports the jury's verdict.

The evidence establishes that the appellant was identified as the person in possession of a John Deere model 4440 tractor with a red cultivator attached driving on an unpaved county

road at approximately 1 a.m. on July 23, 1987. The officer who stopped the appellant recognized him at the time of the stop. When questioned regarding his driving a tractor on a deserted road at 1 a.m., the appellant told the officer that he was on his way to cultivate a beanfield for an individual by the name of Tony Vencil. After a report was taken by the officer, identifying the tractor in detail, the appellant headed off in the direction of the Vencil farm, but returned shortly thereafter to say that the cultivator would not fit over a bridge. The officer had a dispatcher contact Vencil, who informed the dispatcher that the appellant was not working for him. After following the tracks the tractor had left on the road, the deputy found the abandoned tractor a short time later. The engine was still warm, apparently from recent use. The identification numbers on the tractor matched those of a tractor sold to Clarence Clover. Clover testified that he knew the defendant but had not given the defendant permission to drive his tractor. This evidence, and the remainder of the evidence contained in the record, when "viewed and construed most favorably to the State," is sufficient to sustain the verdict of guilty returned by the jury.

The appellant next assigns as error the failure of the district court to give a requested jury instruction on a lesser-included offense. The appellant contends that the offense of unauthorized use of a motor vehicle, as defined in Neb. Rev. Stat. § 28-516 (Reissue 1985), is a lesser-included offense of theft by receiving stolen property, as defined in Neb. Rev. Stat. § 28-517 (Reissue 1985). This assertion is without merit.

The appellant urges our repudiation of the rule this court established in *State v. White*, 217 Neb. 783, 351 N.W.2d 83 (1984), regarding the existence of a lesser-included offense. We refuse to do so. In *White*, we stated at 785-86, 351 N.W.2d at 85-86:

> The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. [Citations omitted.]

. . . .

> As this court has said before, the fact that the elements of the lesser-included offense may be present in a case of the greater offense is not sufficient to invoke the lesser-included offense instruction if it is *possible* to commit the greater offense without at the same time committing the lesser offense.

(Emphasis in original.) See, also, *State v. Arthaloney*, 230 Neb. 819, 433 N.W.2d 545 (1989).

Section 28-517 provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner."

Section 28-516 provides in pertinent part: "A person commits the offense of unauthorized operation of a propelled vehicle if he intentionally exerts unauthorized control over another's propelled vehicle by operating the same without the owner's consent."

A brief examination of these statutes evidences that unauthorized use of a motor vehicle is not a lesser-included offense of theft by receiving stolen property. It is not "impossible to commit the greater without at the same time having committed the lesser." *State v. White, supra* at 785, 351 N.W.2d at 85. To the contrary, as stated by the district court:

> The lesser included offense that you're suggesting that I instruct on requires operation of a motor vehicle where the crime for which he stands charged does not require operation of any motor vehicle. You could commit the crime of theft by receiving stolen property by just having it in your possession, whether it be a wagon or a car or a truck or it could be a necklace. It could be just about any kind of movable property. It doesn't have to be operated.

Therefore, the appellant's second assignment of error is also without merit. The judgment of the district court is affirmed.

AFFIRMED.

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLEE, V. HAROLD A. SWANSON, EVELYN E. SWANSON, AND HAROLD H. SWANSON, APPELLANTS, UNITED STATES OF AMERICA ET AL., APPELLEES.

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLEE, V. HAROLD A. SWANSON AND EVELYN E. SWANSON, APPELLANTS, UNITED STATES OF AMERICA ET AL., APPELLEES, DAVID METHENY, INTERVENOR-APPELLEE.

435 N.W.2d 659

Filed February 17, 1989. Nos. 86-700, 86-701.

1. **Judgments: Parties: Appeal and Error.** Only a party aggrieved by an order or judgment can appeal; one who has been granted that which he or she sought has not been aggrieved.
2. **Motions for New Trial.** A motion for new trial is addressed to the discretion of the trial court.
3. **Motions for New Trial: Evidence: Proof.** In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that it was not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.
4. **Contracts: Fraud.** To require the discharge of a party to a written instrument on the ground of alteration, it must appear that the alteration was material as well as fraudulent.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed.

John I. Sutton for appellants.

T. Randall Wright and Terry L. Fredricks, of Dixon & Dixon, P.C., and Thaddeus G. Fenton for appellee FDIC.

Mary L. Buford, of Buford Law Offices, for intervenor-appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

CAPORALE, J.

In case No. 86-700, a replevin action, the district court entered judgment against defendants-appellants, Harold A.

Swanson; his wife, Evelyn E. Swanson; and Harold H. Swanson, granting First National Bank, Tekamah, Nebraska, in whose place and stead the plaintiff-appellee, Federal Deposit Insurance Corporation, has been substituted, a priority security interest in a certain crop and the right to take immediate possession of specified equipment. In case No. 86-701, a foreclosure action, the district court divested the aforenamed defendants-appellants Harold A. Swanson, and his wife, but not the aforenamed Harold H. Swanson, who is not a party in this case and therefore has no standing herein, of their various interests in certain parcels of real estate. The two cases were then appealed to this court and consolidated for briefing and argument. The five assignments of error presented in the single brief filed by the replevin defendants and the foreclosure defendants, hereinafter collectively referred to as the "defendants," merge to assert, in effect, that the district court erred in each action by failing to grant them a new trial because of newly discovered evidence. Appellee David Metheny, the apparent lessee of the foreclosed property, claims to be an intervenor and joins the plaintiff in resisting defendants' efforts. In each case, we affirm.

The parties agree that the copy of the financing statement and security agreement given to plaintiff's predecessor by Harold A. Swanson on or about February 24, 1976, and which was attached to and incorporated as a part of the replevin petition and later received in evidence, had been altered to inaccurately reflect in plaintiff's predecessor a security interest in Harold A. Swanson's 1984 soybean crop, which security interest did not in fact exist. However, the original of the document on file with the Burt County clerk at all times remained in its genuine condition. While the plaintiff claims the altered copy, which apparently came from its predecessor's files, was innocently attached to the replevin petition by its predecessor's attorney without knowledge of the modification and later innocently offered and received in evidence, the defendants claim that such was done fraudulently. The two officers of plaintiff's predecessor who were called as witnesses by the defendants testified they did not know who had altered the document or when the alteration was made. Defendants

presented no other evidence on the issue of how and when the change was made.

It appears that Harold A. Swanson discovered the alteration in September of 1985, when he, at his attorney's request, reviewed the records of the county clerk in connection with other litigation. Defendants complain that in reliance on the altered document the district court, on May 31, 1985, issued an order in the replevin action granting plaintiff's predecessor a security interest in the subject crop superior to that of Harold H. Swanson. They also claim that as the note which secured the foreclosed mortgages referred to the financing statement and security agreement, alteration of the copy of the document in the possession of plaintiff's predecessor invalidated the note and thus voided the mortgages which the note secured, leaving nothing to be foreclosed.

The replevin action is easily resolved, for while the district court did not vacate its earlier judgment giving plaintiff's predecessor the right to take immediate possession of the specified equipment, the district court did vacate its May 31, 1985, order granting the plaintiff's predecessor a superior lien in the 1984 soybean crop. Inasmuch as the replevin defendants question only the validity of the lien priority established by the May 31 order, and the court below vacated that priority, they have no basis on which to appeal to this court. Only a party aggrieved by an order or judgment can appeal; one who has been granted that which he or she sought has not been aggrieved. See, *Saum v. L. R. Foy Constr. Co., Inc.*, 190 Neb. 783, 212 N.W.2d 648 (1973); *Douglas County v. Kountze*, 84 Neb. 506, 121 N.W. 593 (1909); *Horton v. State*, 60 Neb. 701, 84 N.W. 87 (1900); *Sturtevant Co. v. Bohn Sash & Door Co.*, 59 Neb. 82, 80 N.W. 273 (1899).

The foreclosure action, however, requires more analysis. We begin by recalling that a motion for new trial is addressed to the discretion of the trial court; further, in order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that it was not merely cumulative, but competent,

relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989).

The foreclosure defendants' premise that the note which referred to the financing statement and agreement was vitiated when a copy of the referenced document was altered, and thus voided the mortgages which secured the note, is incorrect. In *First Nat. Bank v. Hull*, 189 Neb. 581, 204 N.W.2d 90 (1973), this court, in concluding that the change made on the security agreement in question therein was authorized by the debtor, nonetheless observed that, in any event, to require the discharge of a party to a written instrument on the ground of alteration, it must appear that the alteration was material as well as fraudulent.

Assuming, but not deciding, that the alteration of the copy of the financing statement and security agreement was fraudulent, it was not material, for the document has not been shown to bear any relationship to the procurement of the note by plaintiff's predecessor, nor to the amount of the note, nor to the defendants' default on the note, nor to the consequences of that defalcation. In short, the alteration has not been shown to have any functional relationship to the note whatsoever. So far as the record shows, the only relationship between the note and the altered copy of the document is that the former instrument refers to the original of the latter instrument. Evidence of such alteration and relationship between the note and altered copy cannot be said to be "competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted." *Fisher Corp. v. Consolidated Freightways, supra* at 842, 434 N.W.2d at 24. Thus, it cannot be said the district court abused its discretion in overruling the foreclosure defendants' motion for new trial.

AFFIRMED.

ELIZABETH J. AMES, APPELLANT, V. CLARK F. HEHNER, M.D., APPELLEE.

435 N.W.2d 869

Filed February 17, 1989. No. 86-915.

1. **Limitations of Actions: Pleadings: Demurrer.** A petition alleging a cause of action not commenced within the time prescribed by the appropriate statute of limitations is subject to a demurrer.
2. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
3. _____: _____. If a plaintiff fails to allege additional facts to show the tolling of a statute, it has, in effect, failed to allege facts sufficient to constitute a cause of action.
4. **Demurrer: Pleadings: Appeal and Error.** A demurrer which challenges the sufficiency of the allegations is a general one. In our review of a ruling on a general demurrer, this court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
5. **Limitations of Actions: Malpractice.** If the basis of a malpractice claim is continuing negligent treatment, then the statute of limitations does not commence to run until the treatment ends.

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

Earl G. Greene III and Edward L. Wintroub, of Wintroub & Rinden, for appellant.

William M. Lamson and Thomas D. Wulff, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

PER CURIAM.

This is an appeal from the district court for Madison County. Plaintiff-appellant, Elizabeth J. Ames, filed a medical malpractice action against defendant-appellee, Clark F. Hehner, M.D., and Our Lady of Lourdes Hospital on June 11, 1985. Ultimately, the hospital was voluntarily dismissed from the suit by the plaintiff, and the action was continued against Dr. Hehner as the sole defendant. Subsequent to the filing of

plaintiff's fourth amended petition, the defendant filed a demurrer which alleged that the petition failed to state a cause of action and that the petition, on its face, revealed that the action was barred by the applicable statute of limitations. The district court sustained the demurrer on the basis that the action was barred by the statute of limitations. Plaintiff-appellant's sole assignment of error alleges that the district court erred in holding that the action was time-barred.

A petition alleging a cause of action not commenced within the time prescribed by the appropriate statute of limitations is subject to a demurrer. *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984). If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985). If a plaintiff fails to allege additional facts to show the tolling of a statute, it has, in effect, failed to allege facts sufficient to constitute a cause of action. *George P. Rose Sodding & Grading Co. v. Dennis*, 195 Neb. 221, 237 N.W.2d 418 (1976).

A demurrer which challenges the sufficiency of the allegations is a general one. In our review of a ruling on a general demurrer, this court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988).

Given this standard of review, we must accept as true the following facts set forth in the petition. On February 13, 1981, Ames underwent a surgical procedure known as a thoracotomy at Our Lady of Lourdes Hospital. The surgery was performed by the defendant, Dr. Hehner. Following her return to consciousness after surgery, Ames began suffering pain in her right shoulder and arm. The condition grew progressively more painful and disabling, and eventually involved her right hand as well.

Dr. Hehner continued to treat Ames for her "underlying physical condition and the painful and progressively disabling symptomatology of her right shoulder, arm and hand" through

December 1982. He repeatedly assured Ames that her condition was not permanent and that it would improve. During the period of time from February 13, 1981, to December 1982, Dr. Hehner referred Ames to other physicians, "who were unable to properly diagnose [her] condition." Ames alleges that she "sought advice and treatment for her condition from several physicians" and that these physicians were unable to diagnose her condition.

It was not until August of 1984 that Ames' condition was diagnosed as "Klumpke's paralysis," a condition of paralysis resulting from "ischemia and nerve pressure caused by improper arm positioning" during her 1981 surgery. At this time, Ames became aware that her condition was not a temporary postoperative condition, but was, in fact, a permanent disability. Ames filed her petition on June 11, 1985.

The statute of limitations for medical malpractice actions is contained in Neb. Rev. Stat. § 25-222 (Reissue 1985), which states as follows:

> 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; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

(Emphasis supplied.)

We believe that Ames' petition does state a cause of action that, on the face of the petition, was barred by the 2-year statute

of limitations contained in § 25-222. The "act or omission" (the surgery) alleged to be negligence took place on February 13, 1981. Ames' petition was filed June 11, 1985, well beyond the 2-year time limit.

However, the additional facts alleged in the petition are adequate to show that Ames did not and could not reasonably have discovered her injury and the cause of action within that 2-year time limit.

During reargument to this court, the appellee made the argument that if we found that the 2-year time limit did not run from the moment Ames woke from surgery and felt pain, which we in fact reject, then the statute commenced running on the last day Dr. Hehner treated Ames in December 1982. If that were true, it is alleged, then Ames "discovered" her injury in August of 1984 and had until December 1984 to file suit, which she did not. We agree.

Appellee's argument relies on the "continuing treatment exception" to the professional negligence statute of limitations as set forth in *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941). Recently, in *Tiwald v. Dewey*, 221 Neb. 547, 550-51, 378 N.W.2d 671, 673 (1985), we said:

> *Williams v. Elias, supra*, involved a malpractice suit against a physician who had misdiagnosed the plaintiff patient's injuries and had continued to treat those injuries under the misdiagnosis. We held that "[i]t was not the error in the diagnosis originally made by defendant but its adherence thereto and course of treatment that brought about the injuries." *Williams, supra* at 662, 1 N.W.2d at 124. We then held that "[t]he treatment and employment should be considered as a whole, and if there occurred therein malpractice, the statute of limitations should begin to run when the treatment ceased." *Williams, supra* at 663, 1 N.W.2d at 124.
>
> . . . The malpractice in *Williams* can be characterized as a continuing tort because the physician persisted in continuing and repeating the wrongful treatment because of the incorrect diagnosis. Thus, the statute of limitations did not begin to run until the continuing negligent treatment which was the basis of the plaintiff's claim had

ended.

The exception is applicable in this case, since Ames alleges, among other allegations, that Hehner was negligent

> [i]n failing to properly advise Plaintiff during the course of her *continuing treatment* since the surgery of February 13, 1981 and through December, 1982, of the true cause of her injuries and disabilities; the proper diagnosis, and of affirmatively concealing the same; [and in] failing to properly examine, test, diagnose and treat the Plaintiff since the surgery of February 13, 1981 *through* December, 1982....

(Emphasis supplied.)

Taking facts pled in the petition in a light most favorable to Ames, the petition alleged adequate facts which excused the operation and the bar of the 2-year statute of limitations. However, we hold the statute commenced running on the last day Dr. Hehner treated Ames in December 1982 and that the statute had run by December 1984, barring her suit.

The district court's decision sustaining defendant's demurrer is affirmed.

AFFIRMED.

WHITE, J., dissenting.

We are faced in this appeal with the application of a complicated set of rules, i.e., the statute of limitations and case law relating to medical malpractice.

The continuing treatment rule first pronounced by this court in *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941), had, as its purpose, the rescue of otherwise barred claims when the physician continued to treat the physical condition long after the act or incident of medical malpractice occurred. Overtones of fraud, misrepresentation, and estoppel appear to be the justification offered for the creation of the doctrine.

On the other hand, the discovery rule in Neb. Rev. Stat. § 25-222 (Reissue 1985) recognized that in the area of medical treatment an unexpected condition may occur, but the naming of the cause is not infrequently difficult to immediately specify.

No dispute exists that suit was brought here within 1 year of the discovery of the act of malpractice and that discovery was made more than 2 years after the act of malpractice, thus

seeming to place the action squarely within the limits described in § 25-222.

Inherent in the majority view is the notion that what was thought to be a shield against the bar of the statute has now become a sword cutting off the appellant's recourse to the courts.

Obviously, I believe the continuing treatment rule has no application to this factual situation. Further, I submit that if a suit is clearly brought within the statute under one theory, it ought not be barred if it offends another and different theory of limitation.

SHANAHAN, J., dissenting.

In an ironic 180° maneuver, this court has transformed the discovery doctrine, previously an equitable solution to the harshly literal onus of a statute of limitations, into a more severe burden on one who, through diligence, discovers a previously undiscovered cause of action. Whereas equitable consideration, inherent in the discovery doctrine, formerly assisted and protected the diligent, today the majority of this court molds the discovery doctrine into a hindrance and peril to the diligent.

I agree with one conclusion reached by this court's majority, namely, Ames did not discover, and reasonably could not have discovered, the existence of her cause of action until August of 1984, when a physician first diagnosed the condition which is the subject of Ames' malpractice action. The majority then proceeds to hold that, because Ames discovered her cause of action within 2 years from Hehner's final treatment in December 1982, she had only 4 months, which was the remainder of the 2-year statute of limitations in August of 1984, to file her lawsuit.

The continuing treatment rule, as well as the discovery rule, originated in equity. This court was equitably applying a judicially fashioned discovery rule long before the Legislature prescribed the discovery provision of Neb. Rev. Stat. § 25-222 (Reissue 1985). See, e.g., *Johansen v. Union Stock Yards Co.*, 99 Neb. 328, 156 N.W. 511 (1916); *Dryden v. Omaha Steel Works*, 148 Neb. 1, 26 N.W.2d 293 (1947); *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962); *Acker v. Sorensen*, 183

Neb. 866, 165 N.W.2d 74 (1969). Codification of a judicially fashioned equitable principle does not annihilate the equitable considerations which engendered the judicial principle eventually codified.

The plain language of § 25-222 dictates that Ames' petition stated a cause of action which is not barred by the statute of limitations. Section 25-222 requires a plaintiff to bring a malpractice action within 2 years "after the alleged act or omission . . . *providing the basis for such action* . . . ." (Emphasis supplied.) If a plaintiff is unable to discover a cause of action within the 2-year limitation, the plaintiff is allowed to file a petition within 1 year after discovery of the cause of action. In the light of the provisions of § 25-222, it is clear that the "act or omission . . . providing the basis for" Ames' medical malpractice claim was Hehner's negligent surgery performed on February 13, 1981. Ames' malpractice claim is based on Hehner's negligence in the surgical procedure performed on Ames, not Hehner's failure to properly diagnose Ames' condition. Thus, under the plain language of the statute, Ames was required to file her action within 2 years after February 13, 1981, unless she was unable to discover her cause of action during the 2-year period after the negligence occurred. As correctly noted by the majority, Ames was unable to discover her cause of action until August 1984, more than 2 years after the surgery which is the basis for her malpractice claim. Ames is entitled, therefore, to the additional year provided by § 25-222 and, as a result, had until August of 1985 in which to file her petition. Because Ames' petition was filed in June of 1985, I conclude that her petition was not subject to successful attack by demurrer based on the 2-year statute of limitations contained in § 25-222.

Under the majority's approach, the action for negligence in Hehner's repeated misdiagnosis of Ames' condition is time-barred because the misdiagnosis was discovered, but not made the subject of a lawsuit, within the 2-year limitation of § 25-222. However, Ames alleged other instances of Hehner's negligent conduct as the basis for her claim, namely, mispositioning her during surgery, failing to use an arm board during surgery, and failing to supervise support personnel at the

hospital, all of which were undiscovered negligent omissions notwithstanding Ames' diligence during the 2 years immediately after the specified omissions. As allowed by § 25-222, Ames filed her petition within 1 year after discovery of Hehner's negligence. Thus, Ames' claim based on Hehner's negligent omissions regarding the surgical procedure is clearly not time-barred.

Ames' petition was not subject to successful attack by a general demurrer, which is sustainable only when the petition, that is, the entire petition, fails to state facts sufficient to constitute a cause of action. See Neb. Rev. Stat. § 25-806(6) (Reissue 1985).

> " 'If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.' " [Citation omitted.] A single paragraph of a statement of a cause of action is not subject to a demurrer on the ground that it does not state a cause of action if the pleading as a whole states a cause of action.

Joiner v. Pound, 149 Neb. 321, 325, 31 N.W.2d 100, 103 (1948) (quoting *Central Nebraska Public Power and Irrigation District v. Walston*, 140 Neb. 190, 299 N.W. 609 (1941)). See, also, *Alexander v. Thacker*, 30 Neb. 614, 618, 46 N.W. 825, 826 (1890) ("[W]hen a petition contains more than one count, and a general demurrer is directed against the entire pleading, and is not limited to a particular count, if any count states a cause of action, such demurrer must be overruled").

If this court's majority were correct regarding its application of the continuing treatment rule, we are faced with a situation where some of the allegations in Ames' petition refer to a time-barred claim for negligence, while other allegations in the same petition set out a timely claim. In such a situation, a general demurrer to the cause of action as a whole is not sustainable, since the plaintiff is entitled to proceed on those allegations which state a cause of action not barred by the statute of limitations. See, *Southwest Mines D. Co. v. Martignene*, 49 Ariz. 88, 64 P.2d 1031 (1937); *Lewis v. Fahn*, 113 Cal. App. 2d 95, 247 P.2d 831 (1952); *State ex rel. Att'y Gen. v. Norcross*, 132 Wis. 534, 112 N.W. 40 (1907); *Atlanta, K. & N. Ry. Co. v. McKinney*, 124 Ga. 929, 53 S.E. 701 (1906).

See, also, 51 Am. Jur. 2d *Limitation of Actions* § 465 (1970).

In keeping with Nebraska law governing a demurrer and in the light of sound decisions of other courts, I conclude that Hehner's demurrer to Ames' petition should have been overruled because Ames' allegations demonstrate that she filed the negligence action within the time limit prescribed in § 25-222.

Assuming that the continuing treatment rule could be applied as suggested by the majority, this court would encounter the situation of two equally applicable but conflicting time limitations. In that situation, we must apply the statutorily supplied "one year from discovery" rule, in which case Ames' petition survives a demurrer, or apply the continuing treatment rule with an abbreviated time of 4 months remaining under the 2-year statute of limitations, which the majority uses to bar Ames' suit. In a conflict of time limits imposed by applicable statutes of limitations, the longer period of limitations governs. *Crum v. Johnson*, 3 Neb. (Unoff.) 826, 92 N.W. 1054 (1902). See, also, *Thiel v. Taurus Drilling Ltd. 1980-II*, 218 Mont. 201, 710 P.2d 33 (1985); *Shew v. Coon Bay Loafers*, 76 Wash. 2d 40, 455 P.2d 359 (1969); *Gillette Dairy, Inc. v. Mallard Mfg. Corp.*, 707 F.2d 351 (8th Cir. 1983). Thus, the continuing treatment rule, even if applicable, cannot operate to bar Ames' suit because utilization of the continuing treatment rule would result in an application of a shorter statute of limitations contrary to Nebraska precedent. See *Crum v. Johnson, supra*.

The majority has with one broad stroke unfortunately painted this court into a jurisprudential corner from which there is no logical escape. In the present case, the majority holds that Ames had 4 months after discovery to file her petition. What about the plaintiff who discovers the cause of action 1 month before the 2-year period expires? One week? The very last day of the 2-year period? Under the rule fashioned by this court's majority, each of the plaintiffs in the illustrative abbreviated periods, who has diligently discovered a malpractice cause of action, will have but a matter of a few weeks, days, hours, or even minutes to commence an action against the tort-feasor at the risk of preclusion by the statute of

limitations. However, if the illustrative plaintiffs do not discover the malpractice cause of action in the waning days of the statutory time limitation, on diligent discovery after the initial 2-year period, each plaintiff has an additional year to file an action for malpractice. Consequently, the rule adopted by the majority penalizes the diligent who discovers a cause of action in the dwindling days of the 2-year period prescribed by § 25-222 because such a plaintiff is allowed but a relatively short time to file a malpractice action. On the other hand, a less inquisitive plaintiff who, nevertheless, discovers the malpractice after the 2-year period has expired, will have a full year from discovery to file a malpractice action. A result so incongruous was not intended by the Legislature and should not be invented by this court.

Under § 25-222, Elizabeth Ames' petition stated a cause of action which, as a whole, was not barred by the statute of limitations. Therefore, the general demurrer filed by Hehner should have been overruled. Accordingly, I would reverse the judgment of the district court and remand this cause for further proceedings.

JOHN MAHLER, APPELLANT, V. LYLE BELLIS, DOING BUSINESS AS L & B CONSTRUCTION COMPANY, APPELLEE.

435 N.W.2d 661

Filed February 17, 1989. No. 86-950.

1. **Appeal and Error.** In a law action tried to the court, the findings of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In a nonjury law action, the evidence must be considered in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence.
2. **Accord and Satisfaction.** To constitute an accord and satisfaction there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance.
3. **Accord and Satisfaction: Intent.** The key element of accord and satisfaction is the intent of the parties, which, although as a general rule presents a question of

fact, becomes a question of law when the evidence creates no conflict as to intent.

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

Kurt A. Hohenstein, of Rager & Hohenstein, P.C., for appellant.

William L. Binkard for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

BUCKLEY, D.J.

Plaintiff-appellant, John Mahler, hired defendant-appellee, Lyle Bellis, a construction contractor, to do some remodeling to plaintiff's house. The written contract involved the conversion of an existing garage into a room enlarged by a 12- by 20-foot addition.

During the construction, numerous problems arose, and this suit followed. Plaintiff alleged that the defendant did not perform in a workmanlike manner and did not follow the terms of the written contract, causing plaintiff to sustain damages to repair and replace defendant's faulty work.

Defendant denied plaintiff's allegations and by way of affirmative defense alleged that an accord and satisfaction was reached as to all of the disputes between the parties.

The case was tried to the court without a jury, resulting in a judgment for the defendant and a dismissal of plaintiff's petition. The trial court specifically found that "there was an accord and satisfaction as to all items of damage claimed by plaintiff other that [sic] the footings, the cracks in the drywall and the shingles." The court further found that as to those items, the plaintiff failed to establish either that the work was done improperly or in breach of the contract or that any damages resulted therefrom.

In a law action tried to the court, the findings of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In a nonjury law action, the evidence must be considered in the light most favorable to the successful party, with conflicts resolved in favor of the

successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence. *Nebraska State Bank v. Rasmussen*, 225 Neb. 81, 402 N.W.2d 688 (1987).

The contract was executed in July 1984, requiring payment totaling $15,036. Plaintiff paid $7,500 when the contract was executed; the balance was to be paid upon completion.

Plaintiff testified that after construction began, the first problem that arose concerned the footings for the addition. Defendant told him that as they were digging the footings they struck something in the ground, which concerned the plaintiff because it was in the area where he knew there was some type of sewage disposal system. Plaintiff said defendant told him there was no problem because what they encountered was solid and had not moved. Defendant then proceeded to pour the footings before they were inspected by the building inspectors. The room included a loft, and while it was being constructed, plaintiff noticed the roof sagging, whereupon construction was halted and plaintiff retained a structural engineer, who redesigned the loft support system. Construction then continued, and the balcony and supports were built according to the engineer's design.

About mid-August 1984, defendant said the project was finished and requested payment of the balance due under the contract. Plaintiff told him that several things had not been done at all or were not done properly. These included failure to form up some concrete put in next to the patio area, installation of a screen with holes, installation of a fireplace pipe with a color that did not match the color of existing pipe sections, failure to pay the costs for retaining the engineer to redesign the loft support system, failure to clean up tar and glue from the concrete floor, and failure to clean up the windows and woodwork. Plaintiff had also discussed with defendant his concern over the way that the new roof was tied into the existing structure; that it was just a piece of tin pounded down over the top of the shingles, which appeared very rough and unsightly. Defendant told him that it was the normal way to do that type of a tie-in and that he would not change it without waiving his guarantees.

Plaintiff testified that on August 31, 1984, the parties met to

discuss plaintiff's concerns just described, which plaintiff says were the only problems he was aware of at that time. They went over each item and the monetary impact on the contract. Some of the items plaintiff did not push further. The parties agreed that the contract price would be adjusted for the chimney pipe that plaintiff obtained and installed himself, for engineering costs, and for cleaning the concrete floor. The total adjustment was $600. Plaintiff paid defendant $1,500 at that meeting and paid the balance of the contract 2 to 3 weeks later.

Plaintiff contends that after the negotiated settlement, he encountered further problems not known to him or discussed on August 31, 1984, resulting from defendant's failure to complete work required by the contract or to complete it properly. The defendant's position is that all disputes were settled at the August 31 meeting, constituting a complete accord and satisfaction, but that if any items were not settled then, defendant's evidence more than supports the trial court's findings that no damages were sustained through any fault of defendant.

To constitute an accord and satisfaction there must be (1) a bona fide dispute between parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance. *Meyers v. Frohm Holdings, Inc.*, 211 Neb. 329, 318 N.W.2d 716 (1982).

The key element of accord and satisfaction is the intent of the parties, which, although as a general rule presents a question of fact, becomes a question of law when the evidence creates no conflict as to intent. *Rosenberg v. Lincoln Fed. Sav. & Loan Assn.*, 219 Neb. 689, 365 N.W.2d 809 (1985).

Defendant testified that the August 31 meeting resulted in a settlement of all of the plaintiff's complaints and that final payment by the plaintiff finalized the settlement and the matter was over. Plaintiff does not seek damages for any item he was aware of at the settlement meeting, but only those items he discovered afterward. Defendant admitted on cross-examination that none of these items were discussed. The evidence will not permit a finding that the parties intended that the August 31 meeting settled any items of damage other than those known by the plaintiff and considered by the parties at

that meeting. Therefore, there was no accord and satisfaction as to any of the items of damage claimed by the plaintiff in this suit. However, there is evidence that supports a finding for the defendant as to each element of damage. We take them up separately.

UNEVENNESS OF THE FLOOR

The contract called for a water drain in the floor of the old garage to be closed and the floor area leveled. After the "settlement" meeting and while plaintiff was painting the room, he spilled some water which collected at the drain area. He offered no other evidence that the area had not been leveled as required by the contract and no evidence of the cost to do the work that defendant presumably failed to do. This item fails for lack of any evidence of damages.

INSTALLATION OF DRYWALL

Plaintiff testified that the drywall was uneven. His engineer said that the variances he observed were not unusual and that the Sheetrock was in pretty good shape except for one area under one window on one side of the room, where it was not properly finished. Tom Kavanaugh, employed by a lumberyard as a contractor, salesperson, estimator, and designer, testified that the windows were constructed and installed in a workmanlike manner. Darrell Hackett, a carpenter who subcontracted most of the work from defendant, testified that he installed the Sheetrock and that all of his work was done in a workmanlike manner. There is sufficient evidence to support a finding for the defendant on this item.

INADEQUATE FOOTINGS

Plaintiff dug under some footings and had them examined by the engineer, who felt they were shallow and extended over an underground obstruction or tank. The engineer took sightings then, and again in late May 1986, to determine if there was any settling. He found no changes of any significance and concluded that the footings, even if shallow, had not effected any settling of the house. The trial court found that "while the footings may not have been properly inspected prior to being poured, there is no evidence that they are inadequate, and there was no evidence that the structure was settling or would settle in the future." These findings are supported by the evidence.

ROOF

Plaintiff examined the roof and discovered large areas where the shingles were not sealed together. He also observed on the gable end that the shingles were starting to rise off the edge. When plaintiff raised a shingle further, the nail along the edge popped out. The engineer examined the roof and found that nails seven-eighths inch in length were used. He gave his opinion that the nail must be long enough to penetrate the shingle thickness and go completely through the plywood sheeting beneath so that from the inside the tip of the shingle nail can be observed. Examining the inside, he found the extreme tip of only one nail, with no other nail penetration. He concluded that the shingle nails used were too short, subjecting the roof to being blown off in the wind. His remedy of the situation would entail removal and replacement of the shingles and the installation of a ridge ventilator to prevent accumulation of vapor underneath the plywood sheeting. His estimate of the cost to effectuate this repair was $2,610.

Marvin Simons, the roofer hired by defendant, testified that the roof was three tab shingles, 240 pound, with 15 pound felt underlay on a 1/2-inch plywood base. He measured the thickness of two layers of shingles at a total of three-sixteenths of an inch and added approximately one thirty-second of an inch for the felt underlay. He concluded that the length of nail that was used would penetrate the shingles, felt, and just through the plywood. He felt that the point of the nail should not protrude through the bottom of the plywood because it would draw frost and would create a moisture problem. He concluded that the roof was installed in a reasonably workmanlike manner.

The trial court found that

> the Plaintiff has not established that the roof was installed in an improper manner, and, although there was some testimony that an improper length of nail was used in attaching the shingles to the roof, Plaintiff did not establish by a preponderance of the evidence that he has suffered any damage as a result thereof.

Although the evidence was in sharp conflict, there was sufficient competent evidence to support the trial court's

findings, and we cannot say they are clearly wrong.

CRACKS IN WALLS

Several months after the project was finished, plaintiff noticed cracks in the drywall directly under the beams which were a part of the redesigned loft support system. They ran from the ridge beam to the floor of the loft, then underneath the loft, then directly down to the bottom of the drywall. The cracks were described at first as hairline but widening gradually to over a quarter of an inch, but thereafter fluctuating in width. The engineer described the cracks as being above the point where the support beam reaches the east and west walls. When asked on cross-examination what was causing the cracking in the Sheetrock, he answered,

> Well, speculate that temperature and humidity are combining to increase the dimensions of the ceiling over that area to the point that it pulls the sheet rock joints apart and the joints instead of being a straight up and down joint below the massive beam that goes like this, and that's what the crack does, it follows that.

The trial court found that

> while there does appear to be a problem with cracks in the dry wall installed, there is no evidence to establish that those cracks are as a result of the Defendant's failure to do his work in a workmanlike manner. The fault could just as well be laid to a change in the design of the structure.

The trial court's findings are not only permissible under the evidence, but are the only ones permitted. There was no evidence whatsoever that the cracks resulted from poor workmanship by defendant or that he failed to follow the requirements of the contract. Plaintiff did not want vertical support columns for the loft as originally planned by defendant. His engineer redesigned the horizontal beam to obtain the necessary support. If the cracks resulted from the beam design, such design was plaintiff's, not defendant's. The engineer's opinion of the cause of the cracking will not permit the conclusion that it resulted from any improper work of the defendant.

CONCLUSION

Having examined the evidence and finding that there is

competent evidence to support a finding for the defendant as to every item of damage claimed by the plaintiff, we conclude that the judgment of the district court dismissing plaintiff's petition should be affirmed.

AFFIRMED.

RONALD L. SCHROER, PERSONAL REPRESENTATIVE OF THE ESTATE OF HELEN M. SCHROER, DECEASED, APPELLANT, V. JOHN SYNOWIECKI ET AL., APPELLEES.

435 N.W.2d 875

Filed February 17, 1989. No. 87-147.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt.
2. _____. 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 material facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** On an appellate review of a summary judgment, this court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Innkeepers: Liability: Negligence.** The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
5. _____: _____: _____. The possessor of the premises is not bound to anticipate the unforeseeable independent acts of third persons, and it is only when such acts can reasonably be anticipated that the possessor has the duty to take some precautionary measures to protect against such independent acts.
6. **Innkeepers: Alcoholic Liquors: Liability: Negligence.** Although the consumption of intoxicating liquors may excite emotions leading to violent disturbances, the development of which a tavern keeper should be reasonably alert to detect and suppress, it is not necessary that a tavern keeper must possess extraordinary powers of foreseeability greater than a reasonable person in

similar circumstances.

7. **Negligence: Proximate Cause: Words and Phrases.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.
8. _____: _____: _____. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff
9. **Negligence: Alcoholic Liquors.** Neb. Rev. Stat. § 53-180 (Reissue 1988) does not create a duty toward third parties, and, as such, the statute does not fix a standard of care, the violation of which could be proof of negligence in actions by third parties.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

John K. Green, of Nelson & Harding, for appellant.

Dean F. Suing and David A. Castello, of Katskee & Henatsch, for appellees.

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

HASTINGS, C.J.

The plaintiff, the personal representative of the estate of Helen M. Schroer, deceased, brought suit against the defendants for the wrongful death of the decedent. The defendants Frank J. and Rosemary H. Synowiecki are the owners of Dinker's Bar in Omaha, and the defendant John Synowiecki is a bartender at that bar. This is an appeal from an order sustaining the defendants' motion for summary judgment.

Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. *Schatz v. Vidlak*, 229 Neb. 4, 424 N.W.2d 613 (1988).

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 material facts and that the moving party is entitled to judgment as a matter of law. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988).

On an appellate review of a summary judgment, this 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. *Id.*

This action arose out of an automobile accident which occurred in Omaha during the early morning hours of December 29, 1984, when a truck driven at a high rate of speed by David C. Roth struck the rear of an automobile in which decedent was a passenger, causing the car to swerve. The driver of the automobile accelerated and attempted to negotiate a curve at a high rate of speed, and the automobile went up over the curb, plunged down an embankment, and crashed into a tree, causing the death of the decedent. Although not relevant to the action here, Roth was convicted of manslaughter, and the opinion of this court affirming that conviction may be found in *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986).

On the night of December 28, the decedent and her brother, John Swendroski, went to Dinker's Bar. Several other family members joined them there later in the evening. They occupied a table at the front of the bar. Swendroski, according to his testimony and that of the bartender, John Synowiecki, consumed about five beers during the 3 hours they were in the bar.

Also at Dinker's that evening were Roth and his friends John Andrysik and Rodney Kroupa. They occupied a table near the rear of the bar and close to the pool table. The bartender estimated that Roth may have had seven or eight beers during the 2 1/2 to 3 hours that he was in the bar. According to the deposition testimony of Roth, Andrysik had more to drink during the evening than Roth and was really drunk.

During the night at the bar, there were several interactions between the members of the two groups. At about 12:30 a.m.,

Swendroski and a friend, Richard Corum, played pool against Andrysik and Kroupa. During the game, Andrysik was loud and vulgar, and, although Andrysik never grabbed Swendroski or threw anything at him, Swendroski said he felt intimidated and worried about Andrysik. However, Swendroski never made his feelings known to the bartender.

At the beginning of the game, the bartender, clearing a nearby table, heard Andrysik using vulgar language while complaining about the rack. Roth went over to Andrysik to settle him down, telling him to sit down and shut up. The bartender also went over to tell Andrysik to "settle down" and "cool down."

While the pool game was still going on, Emily Swendroski, the decedent's mother, got up to play some polka music on the jukebox. Using vulgar language, Andrysik complained about the music. John Synowiecki, the bartender, heard Andrysik's complaints, but said nothing to Andrysik because he thought he was the only one who heard the remarks and did not think the remarks were directed at a specific person.

Shortly after the pool game ended, the decedent went to the restroom. In order to get there, she had to pass by the table occupied by Roth and his friends. When she returned to her table, she told her mother that Andrysik had said something nasty to her and that she was scared. The decedent never disclosed what Andrysik had said that frightened her, nor did either she or her mother report this incident to the bartender.

At about closing time, Roth, Andrysik, and Kroupa got up to leave. Roth stopped to talk to the decedent's mother. He put his arm around her shoulder, asked her how old she was, complimented her on how well she looked for a woman her age, kissed her hand, and then left the bar. The bartender observed the exchange between Roth and Emily Swendroski and thought it was a friendly interaction. He did say that he was relieved that Roth and his friends were gone and that nothing had happened.

A few minutes later the decedent and her family also left the bar. The bartender went to unlock the back door to allow Emily Swendroski to leave that way because her car was parked closer to the rear of the bar. Emily talked with Synowiecki by the back door for a few minutes before leaving.

Meanwhile, the decedent and the others exited the front door and then stood outside in front of the bar discussing what they were going to do. John Swendroski said that he was not afraid to walk outside the bar, did not think somebody might be waiting for him outside, and did not feel there might be problems outside.

While the decedent and her group stood in front of Dinker's Bar discussing what they were going to do, Roth and his friends were also nearby, standing around Roth's truck, discussing what they would do next.

After decedent's family decided what to do, Corum walked past Roth and his friends on the way to his car and was struck on the side of the head by Kroupa. Roth and Andrysik claimed that Corum broke a beer bottle and was threatening them with it. Decedent and her family, watching Corum walk past Roth and his friends, saw Corum get hit. The decedent yelled, "Leave him alone." Andrysik began advancing on the decedent and her family and made an obscene comment. Meanwhile, Kroupa got a beer keg tapper out of Roth's truck and advanced on Corum again. When Andrysik turned to rejoin his friends, Swendroski was able to get his family, including the decedent, into his car. He then drove past the bar looking for Corum and apparently sideswiped Andrysik. Roth and Andrysik then jumped into Roth's truck and took off after the Swendroski car. Roth and Andrysik claimed that they did not know it was Swendroski who sideswiped Andrysik and that they began pursuit of the car in order to get the license plate number.

Synowiecki, the bartender, told by a customer that something was happening outside in front of the bar, observed the confrontations between the two groups from the time Andrysik was advancing on the decedent and her family while Roth and Kroupa were advancing on Corum. The bartender made no attempt to break things up, although he allegedly told a news reporter later on that he heard one of the members of the Roth group say, "They're dead now" after Swendroski sideswiped Andrysik and then drove off. After everyone had driven off, the bartender went back inside the bar and discussed with the customer whether he should call the police. Deciding not to call the police, Synowiecki continued to clean up.

During the ensuing less than 2-mile chase through residential areas, Swendroski and Roth, traveling at speeds between 25 to 70 m.p.h., ran through several stop signs and red lights. The rear end collision previously mentioned and the subsequent accident then occurred, which caused the death of the decedent.

Plaintiff assigns as error, generally, that the trial court erred in sustaining the motion for summary judgment in that tavern owners have a duty to protect their patrons from harm by third persons and to provide a safe departure from the premises. The facts are such, he argues, that it cannot be said as a matter of law that defendants did not breach those duties. In support of this contention, plaintiff advances five separate arguments:

1. A tavern keeper's duty to protect a patron continues even if injury occurs off-premises, if it arises out of events that occurred on-premises.

2. A tavern keeper owes a duty to patrons to provide safe ingress and egress.

3. A tavern keeper's duty to protect a patron continues off-premises if the tavern keeper breached the duty to protect while the patron was on-premises.

4. A tavern keeper has a duty to adequately police his or her premises and to employ sufficient personnel to maintain order and protect patrons.

5. Defendants violated Neb. Rev. Stat. § 53-180 (Reissue 1988) by serving alcohol to Roth and his friends who were already intoxicated, and this was evidence of defendants' negligence.

This court, in *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946), articulated the duty a proprietor of an establishment held open to the public owes to his patrons:

> The modern general rule, summarized in its simplest terms, is that the proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public *while upon the premises for such a purpose* for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to

> be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm. Restatement of the Law, Torts, § 348, p. 953.

(Emphasis supplied.) *Hughes, supra* at 833, 25 N.W.2d at 408. (Proposition now found at Restatement (Second) of Torts § 344 (1965).)

In *Hughes, supra*, the plaintiff was injured when a fight broke out between two customers as he entered defendant's restaurant. In affirming the trial court's sustaining of the defendant's motion to dismiss, this court held that the injury resulted from an altercation which occurred so suddenly and without warning that injury to the plaintiff could not be prevented.

Hughes, supra, and the following cases make it clear that the key to the proprietor's duty is the foreseeability of injury to the patron from a third person: *Welsh v. Zuck*, 192 Neb. 1, 218 N.W.2d 236 (1974) (patron pulled gun from pocket and pointed it into air when another patron grabbed him and, in the struggle, the gun discharged, injuring plaintiff, and court found that the patron with a gun was an intervening actor and the owner could not have foreseen that event); *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982) (plaintiff was in defendant's bar dancing with his ex-wife when the latter's boyfriend entered the bar and immediately went over to the plaintiff and assaulted him; this court held that the defendant owner had no reasonable opportunity to prevent the harm). In *Harvey*, the court went on to state:

> Under the general rule we have earlier cited [from *Hughes*], it is clear that the possessor of the premises is not bound to anticipate the unforeseeable independent acts of third persons, and it is only when such acts can reasonably be anticipated that the possessor has the duty to take some precautionary measures to protect against such independent acts.

Harvey, supra at 617, 319 N.W.2d at 730. See, also, *Vice v. Darm Corp.*, 224 Neb. 1, 395 N.W.2d 524 (1986); *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949).

All of these cases involved on-premises incidents, while the

injury in this case occurred off-premises. Plaintiff argues that the *locus* of injury does not control defendants' liability. Rather, he argues, it is whether the off-premises injury arose out of events that occurred while Schroer was on-premises that controls the liability of the owners.

Plaintiff cites us to *Raybourn v. Gicinto*, 307 S.W.2d 29 (Mo. App. 1957). In that case, the plaintiff was a customer in defendant's bar and was subjected to an unprovoked assault by two other bar patrons. The defendant "threw them [the two assaulters] out" the front door and told them that if they did not quit coming and making trouble, he would keep them out permanently. Plaintiff then started out the front door and said that he saw the two men waiting for him, so he asked the defendant to call the police. The defendant refused. The plaintiff threw a dime on the bar and asked another patron to call the police. The defendant said he did not want the police, so plaintiff started for the telephone to make the call himself, whereupon the defendant seized the plaintiff and threw plaintiff out the door into the arms of the two men, who then continued their assault on the plaintiff.

In affirming a verdict for the plaintiff, the court said:

> The jury could have believed that defendant might reasonably have anticipated that, if plaintiff walked out of the door, he would promptly be assaulted. The jury could have also believed that he must have known, by that time, that Chaney and his companion posed a danger to plaintiff because defendant had just ejected them because of their assault on him, and because plaintiff was asking that the police be called for his protection. The jury could further have found that, with full knowledge of the imminent danger to plaintiff he, nevertheless, forcibly thrust plaintiff into the waiting hostile arms of the two ejected patrons and that he was struck even as he was being ejected.

Id. at 31-32.

However, we do not agree with plaintiff's characterization of the facts of the case at bar as involving a situation where Roth and his friends "lay in wait" off-premises for decedent and her family because of the on-premises confrontations over the pool

game and the polka music.

In any event, there is no evidence that hard feelings over the pool game continued after the game ended. Although John Swendroski claims he felt intimidated and worried about Andrysik, there is no evidence in the record that the bartender was aware of those feelings. Furthermore, approximately 15 minutes elapsed between the end of the pool game and the departure of Roth and his friends.

Plaintiff characterizes the polka music incident as "an argument." There appears to have been no direct confrontation between anyone about the playing of polka music. The bartender heard Andrysik's complaints about the music, but did not feel that the complaints were directed at any one person. Emily Swendroski herself stated in her deposition that although she heard some kind of remark made by Andrysik, she thought it was about the pool game and not the music.

Although we must accept as true the fact that Andrysik said something that scared the decedent, we do not know what was said, but we do know from the record that the bartender was unaware of the decedent's fear of Andrysik.

Finally, Roth's exchange with Emily Swendroski as he was leaving appeared to be friendly. The bartender observed the incident and could reasonably have concluded that Roth's action was meant to indicate that there were no hard feelings toward anyone.

Although shortly after Roth and his friends left the bar, Synowiecki did announce that it was closing time and encouraged the stragglers to move on, he was as unaware as Swendroski that Roth and his group were still outside. Certainly, he did not "throw" decedent and her family out into the arms of the "villains" who were "lying in wait" for them, as was the case in *Raybourn v. Gicinto*, 307 S.W.2d 29 (Mo. App. 1957). As a matter of fact, decedent and her family stood in front of Dinker's Bar conversing among themselves for a minute or so before any trouble began between the groups.

If decedent's brother, Swendroski, who had more information available to him to cause any concern than was available to the bartender, could not foresee a problem, it is difficult to conclude that the bartender should have foreseen

what occurred. As noted by the court in *Pierce v. Lopez*, 16 Ariz. App. 54, 59, 490 P.2d 1182, 1187 (1971):

> [I]t is common knowledge that consumption of intoxicating liquors may excite emotions leading to violent disturbances the development of which a tavern keeper should be reasonably alert to detect and suppress. . . . We do not, however, find this to mean that a tavern keeper must possess extraordinary powers of foreseeability greater than a reasonable person in similar circumstances.

Apparently, the only Nebraska case dealing with an off-premises injury is that of *Crane v. Whitcomb*, 160 Neb. 527, 70 N.W.2d 496 (1955). In that case, the defendant tavern owner's husband was involved in a disturbance in the bar, and the plaintiff, a good friend of the defendant, intervened and tried to calm down the husband. In the process, the husband threatened to get a gun, and the plaintiff left the tavern. The husband went out into the street, saw the plaintiff in his truck, and called him over. The plaintiff parked his truck and, as he was getting out, saw the husband pull a gun out of his pocket. The plaintiff lunged for the gun; it went off; and the bullet hit the plaintiff.

Although, clearly, plaintiff's off-premises injury arose out of events that occurred on-premises, this court reversed the action of the trial court in overruling defendant's motions for a directed verdict and for judgment notwithstanding the jury verdict. In doing so, the court said:

> [D]efendant was not guilty of any negligence proximately causing plaintiff's injuries, and if she were, plaintiff had ample warning of danger which enabled him to be in a place of safety and to have avoided harm had he driven his truck away from the premises instead of parking it at the curb again. Further, under the evidence in this record, defendant owed plaintiff no duty where his injuries occurred off the premises in the street, when he voluntarily so returned for his own purposes and not for any business purpose in or with the tavern. In so doing, we conclude that he was guilty of negligence more than slight as a matter of law, which barred any recovery from defendant
>
> . . . .

Id. at 537, 70 N.W.2d at 502. See, also, *Radke v. Carpenter*, 281 Or. 671, 576 P.2d 365 (1978).

In *Radke, supra*, the plaintiff suffered injury off-premises. He had been ejected from the defendant's tavern for fighting with two other men. Outside, and some distance from the tavern, he got into another fight with the same men. The Oregon Supreme Court affirmed the directed verdict for the defendant, finding that the plaintiff voluntarily confronted the two men. According to the Oregon court, the plaintiff's injury was caused by his decision to accost the men over another incident, conduct the defendant could not reasonably foresee.

Whether the bartender saw the activities outside in time to call the police or otherwise render aid, the fact remains that Swendroski had ample warning of whatever the danger was from Roth and his friends. Once he and his family were in his automobile, he was in a place of safety and could have avoided harm had he driven away from the bar. Laudable as his motives might have been in driving past the bar in an attempt to see if his friend was all right, the fact remains that he voluntarily returned for his own purposes and not for any business purpose in or with Dinker's Bar. Even if it could be said that defendants, including the bartender, breached a duty owed to the decedent, their negligence would not be the proximate cause of the chase between Roth and Swendroski and of the resulting accident.

> Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.

Weichel v. Lojka, 185 Neb. 819, 824, 179 N.W.2d 112, 115-16, (1970).

Swendroski, by his independent actions in driving past the bar and sideswiping Andrysik, became an intervening force, and, therefore, the bartender could not have foreseen the events

that occurred and could not possibly have prevented what happened.

> "An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Coyle v. Stopak, supra.* In *Coyle, supra* at 606-07, 86 N.W.2d at 768, we further said: ' "The causal connection is broken if between the defendant's negligent act and the plaintiff's injury 'there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.' " ' "

London v. Stewart, 221 Neb. 265, 267, 376 N.W.2d 553, 555 (1985), quoting *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982). See, also, *Stodola v. Grunwald Mechanical Contractors*, 228 Neb. 301, 422 N.W.2d 341 (1988).

There remains to be discussed plaintiff's argument as to the applicability of § 53-180. We believe this was adequately discussed and disposed of contrary to the position of the plaintiff in *Holmes v. Circo*, 196 Neb. 496, 504, 244 N.W.2d 65, 70 (1976), wherein this court said:

> [W]e conclude that section 53-180, R.R.S. 1943, does not create a duty toward third parties, and, as such, the statute does not fix a standard of care, the violation of which could be proof of negligence in actions by third parties. To rule otherwise would thwart the intention of the Legislature.

The judgment of the district court is affirmed.

AFFIRMED.

GRANT, J., concurring in the result.

I believe that fact questions were presented as to whether defendants were negligent in the operation of their bar business and as to whether those acts of commission or omission resulted in plaintiff's damages, whether those damages occurred inside or just outside the bar itself. I agree, however, that the actions of the decedent's party in returning to the bar area and endangering Andrysik constituted an intervening cause, which could not reasonably be foreseen by defendants, and that,

therefore, defendants' actions or failure to act was not the proximate cause of the damages. I would affirm on that ground.

ALICE SCHONEWEIS, APPELLANT AND CROSS-APPELLEE, V. JOHN DANDO AND FIRST NATIONAL BANK OF BEATRICE, NEBRASKA, APPELLEES AND CROSS-APPELLANTS.

435 N.W.2d 666

Filed February 17, 1989. No. 87-372.

1. **Judgments: Final Orders.** Conditional orders purporting to automatically dismiss an action upon a party's failure to act within a set time are void as not performing in praesenti, and thus have no force or effect.
2. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one the right to judicial relief.
3. **Demurrer: Pleadings.** When considering a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
4. _____: _____. In ruling on a demurrer challenging the sufficiency of the allegations to state a cause of action, a court is required to accept the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept the conclusions of the pleader.
5. **Invasion of Privacy: Words and Phrases.** The gravamen of the conduct made actionable by Neb. Rev. Stat. § 20-204 (Reissue 1987) is the dissemination of offending material to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.
6. **Invasion of Privacy: Words and Phrases: Liability.** For purposes of liability based on invasion of privacy, a distinction is drawn between "pure opinion" and "mixed opinion." Pure opinion may be of two types. In one, the declarant states the facts on which the opinion is based and expresses comment as to the subject's conduct, qualifications, or character. In the other, the declarant states the opinion without stating the alleged facts on which it is based, but the parties to the communication know the facts or assume their existence, and the comment is clearly based on those facts. The mixed opinion, on the other hand, is based on facts concerning the subject or the subject's conduct, which have neither been stated by the declarant nor assumed by the parties to the communication, but the nature of the publication is such as to give rise to the inference that the declarant knows the undisclosed facts which justify formation of the opinion.
7. **Invasion of Privacy: Liability.** Liability based on invasion of privacy may not be predicated on the expression of pure opinion.

8. **Banks and Banking: Invasion of Privacy: Debtors and Creditors.** A bank has no obligation to refrain from disclosing its borrower's failure to repay her or his loan.

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

David H. Hahn for appellant.

Gregory H. Perry, of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellees.

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

CAPORALE, J.

By her amended petition, plaintiff-appellant, Alice Schoneweis, asserts, so far as is relevant to this appeal, that the defendant-appellee John Dando and his employer, defendant-appellee First National Bank of Beatrice, a national banking association, invaded her privacy and wrongfully revealed her financial condition to others. Each of the defendants demurred under the provisions of Neb. Rev. Stat. § 25-806 (Reissue 1985) on the grounds Schoneweis' amended petition both misjoined causes of action and failed to state facts constituting any cause of action. The district court sustained the demurrers and dismissed Schoneweis' suit. She appeals, assigning error to the dismissal of her amended petition. Defendants cross-appeal, contending Schoneweis' failure to amend her original petition within the time set by the district court deprives this court of jurisdiction to entertain her appeal. For the reasons discussed hereinafter, this court has jurisdiction, and we affirm the judgment of the district court.

I. JURISDICTION

Defendants' jurisdictional attack stems from the district court's order of November 5, 1986, which sustained their demurrers to Schoneweis' original petition and provided that if Schoneweis should fail to file an amended petition within 2 weeks, her suit would stand dismissed at her costs. Schoneweis did not file her amended petition until November 21, 1986, 2 days after the November 19, 1986, deadline purportedly imposed by the November 5 order. Defendants contend that in

granting Schoneweis leave to file her amended petition out of time, the district court abused its discretion, as the suit had been dismissed by operation of the earlier order, and the district court thus had nothing before it on which it could act.

However, as defendants recognized at oral argument before the division to which this case was originally assigned, this court has declared that conditional orders purporting to automatically dismiss an action upon a party's failure to act within a set time are void as not performing in praesenti, and thus have no force or effect. *Snell v. Snell*, 230 Neb. 764, 433 N.W.2d 200 (1988); *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988); *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987); *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987). Consequently, as the case was not dismissed pursuant to the court's conditional order and thus was pending before the district court when it extended the time for filing the amended petition, it did not abuse its discretion in permitting Schoneweis to do so. There is, therefore, no merit to defendants' resistance to this court's review of the district court's dismissal of Schoneweis' amended suit.

II. ALLEGATIONS OF PETITION

Hence, we turn our attention to the relevant allegations of Schoneweis' amended petition. That document, in summary, asserts that Schoneweis had done business with First National for a number of years prior to 1985, both borrowing money from it to operate a farm with her husband and maintaining with it a depository account; that on February 21, 1985, she, pursuant to Dando's request, as he at all times acted as an agent of and on behalf of First National, signed a promissory note renewing a preexisting loan for which only her husband had been liable; that following the death of her husband shortly thereafter, Dando again asked Schoneweis to sign "new notes in order to keep the farm and the cattle" and that she, on or about April 16, 1985, signed notes which became due June 1, 1985; that although she had no discussion with Dando or other agents of First National concerning satisfaction of these notes, Dando, during the latter part of August and September of

1985, revealed the condition of Schoneweis' loans and depository account to her father, mother-in-law, and brother-in-law, falsely and recklessly indicating that the Schoneweis "farm was in trouble" and that Schoneweis "would loose [sic] everything"; that such was done in an effort to coerce Schoneweis into conveying to First National assets that it could not otherwise reach; and that as a result she was damaged in that her reputation was injured and she suffered emotional disturbance and a loss of earning capacity by (1) being placed "in a false light with her friends and family" and (2) First National's breach of its separate "duty not to disclose personal financial information" about her to third parties.

III. DEMURRERS

We first consider whether, as claimed by the defendants' separate demurrers, Schoneweis' amended petition improperly joins causes of action contrary to the prohibition of § 25-806(5). We have characterized a cause of action as the " '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, 544, 391 N.W.2d 557, 560 (1986). Accord *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988). We have also said that in a general sense, a cause of action is the claim or subject matter upon which suit may be maintained. In short, a cause of action consists of the fact or facts which give one the right to judicial relief. *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). See, also, *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988), which states that with respect to a demurrer, a statement of " 'facts sufficient to constitute a cause of action,' " as contemplated by § 25-806(6), means " 'a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.' " 228 Neb. at 593, 423 N.W.2d at 468. Schoneweis' claims to judicial relief rest on but one body of facts, the essential feature of which is the alleged disclosure of her financial posture with First National to third persons. Thus, she seeks to recover under two legal theories which rest on that single body of facts: (1) the claimed invasion of her privacy by

the disclosure and (2) First National's breach of its claimed separate duty not to make such disclosure. Since both theories of recovery rest upon the same body of facts, Schoneweis has not misjoined causes of action.

This leaves for consideration the question of whether the facts Schoneweis has alleged constitute a cause of action at all; phrased another way, the question is whether Schoneweis has alleged the violation of at least one judicially protected right or interest. In making the analyses required to answer that question with respect to each of her theories of recovery, we are bound by the rule that when considering a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988); *Schuyler State Bank v. Cech, supra*; *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987). See, also, *First Nat. Bank of Omaha v. State, supra*. In addition, in ruling on a demurrer challenging the sufficiency of the allegations to state a cause of action, a court is required to accept the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept the conclusions of the pleader. *Weiner v. Hazer*, 230 Neb. 53, 430 N.W.2d 269 (1988); *Hebard v. AT&T, supra*; *Schuyler State Bank v. Cech, supra*. See, also, *First Nat. Bank of Omaha v. State, supra*.

IV. PRIVACY THEORY

1. Nature of Statutory Right

In *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955), this court held that there existed no common-law or statutory right of action for invasion of privacy in this state. More than two decades later, the Legislature saw fit to modify the law by enacting the rights of privacy law, Neb. Rev. Stat. §§ 20-201 through 20-211 (Reissue 1987) and 25-840.01 (Reissue 1985), which defines limited rights to privacy. Section 20-204 provides:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy, if:
>
> (1) The false light in which the other was placed would

be highly offensive to a reasonable person; and

(2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Thus, the gravamen of the conduct made actionable by the foregoing statute is the giving of publicity.

In construing the almost identical Restatement provision adopted in an earlier case by the Oklahoma Supreme Court, the U.S. Court of Appeals in *Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204 (10th Cir. 1985), concluded that the circulation of the Polins' credit report to 17 subscribers of the credit reporting service for their exclusive use was not sufficient publicity to give the Polins "a claim for false light invasion of privacy." *Id.* at 1207. In so ruling, the court relied upon the requirement of Restatement (Second) of Torts § 652D, comment *a.* (1977), that the matter be communicated " 'to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.' " 768 F.2d at 1206. The court in *Moore v. Big Picture Co.*, 828 F.2d 270 (5th Cir. 1987), agreed that widespread publicity was necessary to sustain an action for a false light invasion of privacy and noted that courts which have addressed the issue "have almost universally adopted the definition of 'publicity' contained in § 652D, Comment a of the *Restatement*." 828 F.2d at 273. The *Moore* court thus concluded that as only one or two government employees were told that the plaintiff was the source of defendant's inside information, there was not sufficient publicity to sustain a false light invasion of privacy action. Furthermore, since the communications to the government employees could be released only under the Freedom of Information Act, 5 U.S.C. § 552(a)(3) (1982), the matter was not substantially certain to become one of public knowledge. See, also, cases cited by the *Moore* court: *Krochalis v. Insurance Co. of North America*, 629 F. Supp. 1360 (E.D. Pa. 1985); *Bromhall v. Rorvik*, 478 F. Supp. 361 (E.D. Pa. 1979); *Brauer v. Globe Newspaper Co.*, 351 Mass. 53, 217 N.E.2d 736 (1966); and *LaMon v. Westport*, 44 Wash. App. 664, 723 P.2d 470 (1986).

Additionally, it is essential to a false light invasion of privacy

claim that the publicized matter be false. See, *Machleder v. Diaz*, 801 F.2d 46 (2d Cir. 1986), *cert. denied*, *Machleder v. CBS, Inc.*, 479 U.S. 1088, 107 S. Ct. 1294, 94 L. Ed. 2d 150 (1987); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983) ("Thus, in a false light privacy action, as in a defamation action, truth is an absolute defense"); *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761 (D.N.J. 1981); *Bisbee v. John C. Conover Agency*, 186 N.J. Super. 335, 341-42, 452 A.2d 689, 692 (1982) ("This tort form of invasion of privacy is analagous [sic] to defamation, in that the statement which gives rise to the cause of action must be untrue"); the Restatement, *supra*, § 652E, comment *a.* at 395 ("[I]t is essential to [establish false light invasion of privacy] that the matter published concerning the plaintiff is not true").

While it is true that at one point in her amended petition Schoneweis asserted that the disclosure was to her father, mother-in-law, and brother-in-law, she also averred that the disclosure placed her in a false light with her "friends and family." Giving the amended petition a liberal construction, as is required, it can be factually inferred that there was a broader publicity than only to the three named relatives. Whether the evidence would support that inference and thereby support a finding of sufficiently broad publicity is, of course, another matter. Nonetheless, the publicity allegations, coupled with the assertion that the disclosure of Schoneweis' financial condition was false and made recklessly and the inference that the false light in which she was placed would be highly offensive to a reasonable person, would be sufficient to state a cause of action under the provisions of § 20-204.

2. First Amendment Considerations

However, statutory analysis does not end our inquiry, for, although not addressed by the parties, it is clear that claims of damages resulting from speech present first amendment considerations. See, *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) (a case involving publication of matters of public interest, wherein the U.S. Supreme Court incorporated the first amendment malice requirement from the law of defamation, i.e., knowledge that statements are false or in reckless disregard of the truth, into New York privacy law);

Cantrell v. Forest City Publishing Co., 419 U.S. 245, 95 S. Ct. 465, 42 L. Ed. 2d 419 (1974) (applying first amendment malice requirement in false light invasion of privacy case to hold that newspaper company could constitutionally be held vicariously liable for the conduct of its agents in knowingly placing the plaintiff in a false light under state law); *Braun v. Flynt*, 726 F.2d 245, 249 (5th Cir. 1984), *reh'g denied* 731 F.2d 1205, *cert. denied, Chic Magazine, Inc. v. Braun*, 469 U.S. 883, 105 S. Ct. 252, 83 L. Ed. 2d 189 ("It is clear that publications alleged to constitute invasions of privacy merit the same constitutional protections as do publications alleged to be defamatory"); *Rinsley v. Brandt, supra*; *Machleder v. Diaz, supra*.

In *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987), a defamation action, we observed that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), a case involving a magazine article about a private attorney, has been interpreted to hold that the protection which the first amendment accords to speech prevents defamation actions based on pure opinion, even when a nonmedia defendant is involved, however dishonest the publisher might be in expressing that opinion. See, also, *Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974); *J.Q. Office Equip. v. Sullivan*, 230 Neb. 397, 432 N.W.2d 211 (1988).

Following the suggestion of Restatement (Second) of Torts § 566, comment *b*. (1977), *Turner* drew a distinction between "pure opinion" and "mixed opinion." *Turner*, as does the Restatement, further noted that a pure opinion may be of two types. In one, the declarant states the facts on which the opinion is based and expresses comment as to the subject's conduct, qualifications, or character. In the other, the declarant states the opinion without stating the alleged facts on which it is based, but the parties to the communication know the facts or assume their existence, and the comment is clearly based on those facts. The mixed opinion, on the other hand, is based on facts concerning the subject or the subject's conduct, which have neither been stated by the declarant nor assumed by the parties to the communication, but the nature of the publication is such as to give rise to the inference that the declarant knows the

undisclosed facts which justify formation of the opinion. While *Turner* held that the offending statement in question in that case was true and therefore not actionable, it nonetheless observed that a pure opinion would in any event be protected by the first amendment. In *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983), the 10th Circuit Court of Appeals affirmed the granting of summary judgment to the defendants in a false light privacy action brought by a psychiatrist against several defendants, including the author of a book in part criticizing the psychiatrist's treatment methods, and held that under *Gertz, supra*, "the defense available in a defamation action that the allegedly defamatory statements are opinions, not assertions of fact, is also available in a false light privacy action." *Rinsley* at 1307.

Thus, the dispositive question as to Schoneweis' privacy theory is whether the offending statements Schoneweis attributes to defendants constitute expressions of fact or of opinion, and if the latter, whether the statements fall in the category of pure opinion or in the category of mixed opinion. Whether a statement is of fact or opinion is a question of law for the court to resolve. *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied* 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985); *Rinsley v. Brandt, supra*. The declarations that one's farm is in trouble and that one would lose everything are expressions of pure opinion protected by the first amendment and, therefore, are not actionable under § 20-204. See *Turner v. Welliver, supra*.

V. DISCLOSURE THEORY

Left for consideration, then, is whether First National had a separate duty not to disclose Schoneweis' financial position with it to third persons.

The only legislative pronouncement on the matter is an interesting statutory provision found in Neb. Rev. Stat. § 8-1401 (Reissue 1987), under which, absent a court order to the contrary and subject to certain exceptions not relevant to the inquiry before us, a bank may refuse to disclose information it considers to be confidential. That statute obviously does not address the situation at hand.

Although at least one court refused to find liability on the

part of a bank which disclosed its depositor's financial condition to another bank, *Irby et ux. v. Citizens Natl. Bk.*, 239 Miss. 64, 121 So. 2d 118 (1960), at least two other courts have recognized an implied contractual duty of banks not to disclose financial information concerning their customers.

In *Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961), the bank, without its depositor's consent, disclosed the depositor's financial condition to his employer. Finding that the relationship between a bank and its depositor is one between principal and agent, the Idaho Supreme Court held:

> It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract.

Id. at 588, 367 P.2d at 290. The court also declared: "It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors." *Id.*

Suburban Trust Co. v. Waller, 44 Md. App. 335, 408 A.2d 758 (1979), found liability on a warranty theory. Therein, a depositor who had been given sequentially numbered $50 and $100 bills when cashing an $800 check elsewhere deposited them in a new account at the defendant bank. Considering the deposit suspicious, the bank called the police, who arrested the depositor, thinking him to have been involved in a robbery. The court of appeals concluded that a bank depositor has a right to expect that a bank "will, to the extent permitted by law, treat as confidential, all information regarding his account and any transaction relating thereto." *Id.* at 344, 408 A.2d at 764. Accordingly, the court held that "absent compulsion by law, a bank may not make any disclosures concerning a depositor's account without the express or implied consent of the depositor." *Id.*

At least three other cases have imposed liability on a tort or other theory. In *Djowharzadeh v. City Nat. Bank & Trust Co.*, 646 P.2d 616 (Okla. App. 1982), the plaintiff borrower alleged that he lost a valuable real estate investment opportunity because the bank's loan officer disclosed confidential investment information plaintiff had revealed, in applying for a loan, to the bank president's wife and the wife of the chairman of the bank's board of directors. In holding the plaintiff stated a cause of action, the court reasoned that although the relationship between the bank and its borrowers is not contractual or fiducial because a borrower is compelled to disclose information to the bank, "[t]he precarious position of the borrower and the relatively superior position of the bank mandates there be a counterbalancing special duty imposed on the part of the bank." *Id.* at 619.

In *Milohnich v. First National Bank of Miami Springs*, 224 So. 2d 759 (Fla. App. 1969), the plaintiff alleged that "the defendant bank negligently and intentionally divulged information concerning its accounts to third parties . . . and that as a result, the third parties, on three separate occasions, sued the plaintiffs and enjoined the defendant bank from distributing any of its monies on deposit in the bank . . . ." *Id.* at 760. The district court of appeal held that the "complaint alleged a cause of action for violation of an implied duty on the part of a national bank not to disclose information negligently, wilfully or maliciously or intentionally to third parties, concerning the depositor's account." *Id.* at 762. That decision was later qualified in *Barnett Bank of West Florida v. Hooper*, 498 So. 2d 923 (Fla. 1986), wherein the Supreme Court of Florida held that when the bank defends its breach of duty to disclose facts material to a transaction with a customer on the ground that it owes a conflicting duty of confidentiality to a second customer, the jury is entitled to weigh the one duty against the other.

Finally, *Graney Development Corp. v. Taksen*, 92 Misc. 2d. 764, 400 N.Y.S.2d 717 (1978), *judgment aff'd* 66 A.D.2d 1008, 411 N.Y.S.2d 756, refused to imply an agreement of confidentiality as between a borrower and his bank by noting that while a depositor may have a cause of action against his

bank for disclosure of his confidential financial information, a borrower did not. The plaintiff there alleged that the defendant told officers of another bank and an owner who intended to sell property on credit to the plaintiff that the plaintiff failed to repay a loan when due. The court held:

> As to [the] loan, the relation between the bank and the plaintiff was solely that of creditor and debtor. The information the bank imparted about the state of plaintiff's loan was not information it received in its capacity as agent for a depositor; it was information it obtained as a party to the loan agreement. It was not information that the borrower would normally expect would be kept confidential. One who defaults on his debts owed to a merchant cannot expect that his default will be kept a secret. . . . I see no basis, therefore, for implying an agreement of confidentiality to the relations of a bank with its borrowers.

Graney, supra, 400 N.Y.S.2d at 720.

Schoneweis' allegation that the offending statements were made in an effort to enhance First National's position as her creditor compels the conclusion that the statements related solely to that debtor-creditor relationship. We are not persuaded that under such circumstances First National owed Schoneweis any duty of confidentiality.

AFFIRMED.

JOHN DECAMP, APPELLANT, V. JAMES E.S. LEWIS, D.D.S., APPELLEE.

435 N.W.2d 883

Filed February 17, 1989. No. 87-379.

1. **Summary Judgment: Affidavits.** The purpose of Neb. Rev. Stat. § 25-1335 (Reissue 1985) is to provide an additional safeguard against an improvident or premature grant of summary judgment. A § 25-1335 affidavit need not contain evidence going to the merits of the case; rather, a § 25-1335 affidavit must contain a reasonable excuse or good cause, explaining why a party is presently

unable to offer evidence essential to justify opposition to the motion for summary judgment.

2. **Summary Judgment: Motions for Continuance: Appeal and Error.** A continuance and other judicial action authorized by § 25-1335 are within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Summary Judgment.** Section 25-1335 does not provide relief to a party who has been dilatory.
4. **Summary Judgment: Motions for Continuance: Affidavits.** Section 25-1335 prescribes a prerequisite for a continuance, or additional time or other relief under the statute, namely, an affidavit stating a reasonable excuse or good cause for a party's inability to oppose a summary judgment motion.
5. **Summary Judgment: Affidavits: Motions for Continuance: Pretrial Procedure.** Without the appropriate affidavit required by § 25-1335, a party is not entitled to a continuance or additional time to obtain affidavits or discovery to counteract an opposing party's motion for summary judgment.
6. **Summary Judgment: Affidavits: Motions for Continuance.** If the affidavit offered in support of a request for a continuance or additional time does not state a reasonable excuse or good cause for a continuance or additional time, a court may deny relief authorized by § 25-1335 and thereafter grant summary judgment if there has been compliance with the other requirements for a summary judgment.
7. **Summary Judgment: Motions for Continuance: Pretrial Procedure.** In ruling on a request for a continuance or additional time authorized by § 25-1335, a court may consider the complexity of the lawsuit, complications encountered in the litigation, and availability of evidence justifying opposition to a summary judgment motion, provided that a party has not been dilatory in the litigation and has not had adequate time to undertake and complete discovery or otherwise diligently prepare the case for trial.
8. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted.
9. _____: _____. After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
10. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court. In the absence of an abuse of discretion, a trial court's disposition of a motion for new trial will be upheld on appeal.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Albert M. Engles and Allen J. Potts, of Hansen, Engles & Locher, P.C., for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

SHANAHAN, J.

In his petition filed on June 28, 1985, John DeCamp alleged that James E.S. Lewis, a doctor of dental surgery, had negligently treated DeCamp. On July 29, Lewis answered and generally denied any negligence. From a summary judgment for Lewis and dismissal of the lawsuit, DeCamp appeals. We affirm.

In March of 1983, Lewis commenced treatment of DeCamp's condition, namely, a pain in the jaw resulting from DeCamp's auto accident 18 months earlier. Lewis' clinical examination disclosed that DeCamp had sustained a "Class II dental occlusion or retrognathia or posteriorly displaced lower jaw with associated posterior displacement of the lower teeth in relationship to the upper teeth." X rays at Lewis' office showed "an abnormally increased range of movement of the lower jaw to the point of dislocation and also indicated that the ligaments surrounding the joint were unduly stretched." In Lewis' opinion, the best form of treatment at that time was "self imposed restriction of jaw movement," with surgery as the alternative.

Later, DeCamp contacted Lewis' office to schedule an arthrogram to confirm Lewis' initial diagnosis. After receipt of Lewis' full explanation regarding the surgical procedure applicable to his condition, DeCamp was admitted to Lincoln General Hospital on June 29, 1983, where the next day Lewis performed surgery on DeCamp. According to DeCamp's petition, after the surgery he suffered "temporary and permanent paralysis of the facial muscles, severe headaches, mental anguish, inability to eat properly and inability to talk." DeCamp's postoperative condition allegedly required a second surgical procedure to "correct" the surgery by Lewis. DeCamp alleged that Lewis was negligent in improper surgical techniques to explore DeCamp's temporomandibular joint, inordinate exposure of DeCamp's nerves and soft tissue during

surgery, failure to fully advise DeCamp concerning the risks incident to the surgery, and failure to obtain DeCamp's informed consent to the surgery.

On October 15, 1986, more than 15 months after DeCamp had filed the suit, Lewis filed a motion for summary judgment, contending that "no competent evidence exists to affirm the Plaintiff's claim against the Defendant, and further, the evidence indicates that there is no genuine issue as to any material fact in regard to Plaintiff's claim, and that Defendant is entitled to judgment . . . as a matter of law." To support his motion, Lewis submitted his own multipage affidavit, extensively detailing his treatment of DeCamp and concluding that Lewis "exercised the care, skill and diligence that dentists in good standing in Lincoln . . . would ordinarily exercise for the benefit of their patients under similar circumstances . . . ." Lewis also offered DeCamp's answers to interrogatories indicating that, at January 28, 1986, approximately 10 months before the summary judgment motion, DeCamp had not yet "employed an expert to act on his behalf."

At the November 19, 1986, hearing on Lewis' motion for summary judgment, DeCamp's counsel acknowledged "we are not in a position to respond to the merits of the motion for summary judgment" and relied on Neb. Rev. Stat. § 25-1335 (Reissue 1985):

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

DeCamp's counsel then offered his own affidavit, signed on November 18, 1986, which stated that DeCamp's legislative duties as a state senator and his campaign for reelection to the Nebraska Unicameral had "hampered" efforts to locate and retain medical experts who would offer an opinion that Lewis' treatment of DeCamp was negligent. The attorney's affidavit further stated that DeCamp's counsel had learned from unidentified sources without specified expertise that "the

surgical procedure utilized by the defendant in this case, is a controversial one, and subject to diverse and varied opinions, and plaintiff has not been able to obtain the services of a qualified expert who is willing to testify in support of plaintiff's claim."

The district court received into evidence the affidavit by DeCamp's lawyer and also received Lewis' answers to DeCamp's interrogatories, which ostensibly contain nothing indicating Lewis' negligence in his treatment of DeCamp. The court took the summary judgment motion under advisement and, on December 1, 1986, sustained the motion and dismissed DeCamp's lawsuit. On December 11, 1986, DeCamp filed a motion for "new trial or reconsideration." At the February 20, 1987, hearing on DeCamp's motion, DeCamp offered the affidavit of Herbert J. Bloom, a Michigan oral surgeon. Bloom's affidavit, dated February 18, 1987, stated that "the care rendered to Mr. John DeCamp by Dr. James E. S. Lewis failed to adhere to the accepted standards of practice for the specialty, and, as a consequence Mr. DeCamp sustained considerable, probably long-range, injury." The court sustained Lewis' objection to Bloom's affidavit and overruled DeCamp's motion for a new trial.

DeCamp claims that the district court erred in (1) failing to grant a continuance or additional time authorized by § 25-1335; (2) sustaining Lewis' motion for summary judgment; (3) excluding Bloom's affidavit in conjunction with DeCamp's motion for a new trial; and (4) overruling DeCamp's motion for new trial.

REQUEST FOR ADDITIONAL TIME

DeCamp argues that the district court should have granted additional time so that DeCamp could secure affidavits of expert witnesses, and relies on § 25-1335, which, as noted in *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988), is a verbatim counterpart to Fed. R. Civ. P. 56(f). In commenting on the necessary showing to obtain relief under § 25-1335, we stated in *Wachtel*:

> The purpose of § 25-1335 is to provide an additional safeguard against an improvident or premature grant of summary judgment. A § 25-1335 affidavit need not

> contain evidence going to the merits of the case; rather, a § 25-1335 affidavit must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment. Section 25-1335 should be applied with the spirit of liberality.
>
> . . . .
>
> A continuance and other judicial action authorized by § 25-1335 are within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.

Wachtel v. Beer, supra at 401-02, 427 N.W.2d at 63.

Therefore, DeCamp's claim, based on § 25-1335, succeeds only if we conclude that the district court abused its discretion in ruling that the affidavit by DeCamp's lawyer was an insufficient showing for relief in accordance with § 25-1335. While § 25-1335 provides that a party seeking relief under the statute need only present "reasons" to excuse the failure to present facts in opposition to a summary judgment motion, *Wachtel* is clear that the affidavit of the party opposing a summary judgment "must contain a *reasonable excuse or good cause*, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment." (Emphasis supplied.) 229 Neb. at 402, 427 N.W.2d at 63. Section 25-1335 does not provide relief to a party who has been dilatory. See, 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2741 (2d ed. 1983); *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369 (9th Cir. 1985).

DeCamp contends that § 25-1335 does not authorize a court to deny a continuance and enter summary judgment notwithstanding an affidavit filed by a party opposing a summary judgment motion, that is, a court faced with a § 25-1335 affidavit may only refuse summary judgment or grant a continuance. This argument is without merit. Section 25-1335 prescribes a prerequisite for a continuance, or additional time or other relief under the statute, namely, an affidavit stating a reasonable excuse or good cause for a party's inability to oppose a summary judgment motion. Without the

appropriate affidavit required by § 25-1335, a party is not entitled to a continuance or additional time to obtain affidavits or discovery to counteract an opposing party's motion for summary judgment. If the affidavit offered in support of a request for a continuance or additional time does not state a reasonable excuse or good cause for a continuance or additional time, a court may deny relief authorized by § 25-1335 and thereafter grant summary judgment if there has been compliance with the other requirements for a summary judgment. Therefore, the essential inquiry in this case is whether the affidavit by DeCamp's lawyer showed a reasonable excuse or good cause for inability to respond to the merits of Lewis' summary judgment motion.

In DeCamp's case, the motion for summary judgment was filed more than 3 years after Lewis' operation on DeCamp and over 15 months after DeCamp had filed his lawsuit. In ruling on a request for a continuance or additional time authorized by § 25-1335, a court may consider the complexity of the lawsuit, complications encountered in the litigation, and availability of evidence justifying opposition to a summary judgment motion, provided that a party has not been dilatory in the litigation and has not had adequate time to undertake and complete discovery or otherwise diligently prepare the case for trial. See, *First Nat. Bank v. Cities Service*, 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); *Timberlane Lbr. Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976); *Umdenstock v. American Mtge. & Inv. Co. of Oklahoma City*, 495 F.2d 589 (10th Cir. 1974).

DeCamp's case is clearly distinguishable from *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988), an action for medical malpractice, in which the defendants filed their summary judgment motions within a year after commencement of the action. Wachtel's lawyer, in an affidavit relative to § 25-1335, stated that he had contacted a medical expert witness who concluded that " 'there is evidence that the defendants . . . did not meet the appropriate standard of care . . .' " in treating the plaintiff, and further stated that still another expert witness had not had sufficient time to prepare a formal report on the question of the defendant's malpractice. 229 Neb. at 394, 427

N.W.2d at 59. At a hearing related to the defendant's motion for summary judgment, Wachtel's counsel informed that court that, although a medical expert witness had been retained for Wachtel, the defendants' depositions had not as yet been obtained, delaying rendition of an opinion by Wachtel's medical expert. Wachtel subsequently presented her expert witness' affidavit, which contained the medical opinion that " 'each of the defendants . . . deviated from the standard of care' " applicable regarding plaintiff's claim. 229 Neb. at 398, 427 N.W.2d at 61. Nevertheless, the court granted summary judgment to the defendants. In substance, Wachtel informed the court that she had a medical expert witness and needed time for the expert to review medical data preparatory to rendering an opinion in an affidavit to oppose the defendants' summary judgment motions. Under the circumstances in *Wachtel*, we held that the district court abused its discretion in refusing to allow Wachtel additional time to respond to the defendants' motions for summary judgment.

In contrast with *Wachtel*, DeCamp made no showing whatsoever that any expert witness had been retained, or, for that matter, even contacted, to assess the negligence alleged in DeCamp's claim. The first indication that DeCamp had actually contacted an expert was Bloom's affidavit of February 18, 1987, which was filed after expiration of the 18-month deadline for trial in a civil case. See Neb. Ct. R. on Case Progression Standards (rev. 1986). The only reason tendered for DeCamp's inability to present evidence in opposition to Lewis' motion was DeCamp's busy schedule and unavailability for examination by any prospective expert witness. Under the circumstances, sufficient time had elapsed for DeCamp to enlist the aid of an expert witness for the litigation, including a § 25-1335 affidavit, and obtain discovery regarding an expert witness for DeCamp. Without a satisfactory explanation for the absence of an expert witness or discovery, DeCamp's failure to obtain an expert witness relative to discovery or a § 25-1335 affidavit is fairly characterized as dilatory. Lewis was not obliged to endure protracted litigation merely because DeCamp was too busy to assist in preparation of his case against Lewis. The affidavit offered by DeCamp under § 25-1335 fails to show

any "reasonable excuse or good cause" to justify a continuance or allowance of additional time for DeCamp. See *Wachtel v. Beer, supra*. We conclude that the district court did not abuse its discretion in refusing to grant DeCamp additional time in accordance with § 25-1335.

THE SUMMARY JUDGMENT

> A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] 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.

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 162-63, 425 N.W.2d 872, 875 (1988).

"The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted." *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 819, 428 N.W.2d 914, 917 (1988).

"After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party." *Id.* We need not recount the contents of Lewis' affidavit which sufficiently showed that Lewis was entitled to summary judgment in the absence of an adequate countershowing by DeCamp.

In response to Lewis' showing in support of the summary judgment motion, DeCamp had to counter with a showing which either disputed the relevant facts alleged by Lewis, resulting in a genuine issue of material fact to be resolved, or which presented an appropriate opinion by an expert,

controverting Lewis' adherence to the applicable standard of care in the treatment of DeCamp. See *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987). When DeCamp failed to present any expert's evaluation of Lewis' treatment of DeCamp and also failed to make a countershowing to Lewis' factual allegations, DeCamp failed to meet his burden for successful opposition to Lewis' motion for summary judgment. The district court correctly granted summary judgment to Lewis.

MOTION FOR NEW TRIAL

Finally, DeCamp claims that the district court erred in ruling on his motion for new trial, which alleged that the court's granting summary judgment to Lewis was "contrary to law as applied to the facts in this case." See Neb. Rev. Stat. § 25-1142 (Reissue 1985).

A motion for new trial is addressed to the discretion of the trial court. In the absence of an abuse of discretion, a trial court's disposition of a motion for new trial will be upheld on appeal. See *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989).

DeCamp contends that the district court improperly excluded Bloom's affidavit, which was offered in support of DeCamp's motion for new trial. We note, however, that DeCamp's motion was based on the district court's allegedly erroneous application of law to the facts of DeCamp's case, not on the discovery of new evidence. Bloom's affidavit contained a substantive evaluation of Lewis' treatment of DeCamp and was not relevant to the district court's interpretation and application of law. The trial court, therefore, correctly excluded Bloom's affidavit. Moreover, even if DeCamp had alleged discovery of new evidence as a ground for a new trial, Bloom's affidavit was insufficient to warrant the granting of a new trial because DeCamp's failure to show the reason for not discovering the information in Bloom's affidavit leaves only the conclusion that DeCamp failed to exercise due diligence in discovering the information before Lewis filed his summary judgment motion. See *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982). The district court did not abuse its discretion in overruling DeCamp's motion for new trial.

AFFIRMED.

CARLSON, D.J., dissenting.

I respectfully dissent.

Neb. Rev. Stat. § 25-1335 (Reissue 1985) presents the trial court with three options: (1) "refuse the application for judgment"; (2) "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had"; or (3) "make such other order as is just." None of these options were exercised by the court, and the motion for summary judgment was summarily sustained.

Although discretionary, I do not believe the decision by the trial court or the majority is in the "spirit of liberality" prescribed in *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988). Except as a last resort, lawsuits should not be decided by the defendant's self-serving affidavit. The trial court's failure to first utilize one of the statutory options was an abuse of discretion.

I am mindful that *Wachtel* requires the party opposing the summary judgment to provide an affidavit containing "a reasonable excuse or good cause." See *Wachtel v. Beer, supra* at 402, 427 N.W.2d at 63. I find that plaintiff's initial affidavit did just that, and it was unreasonable and unjust to precipitously terminate this case. In regard to plaintiff's submitted affidavit, the trial court reluctantly received same into evidence by stating that "I'm not going to give any weight to it."

There must be an end to litigation, but even an arguably dilatory party should have one chance to correct the error of his ways. This is especially true when the statutes grant this chance.

Sustaining the motion for summary judgment was improper, and I would reverse and remand for further proceedings.

STATE OF NEBRASKA, APPELLEE, V. DON D. RICE, APPELLANT.
435 N.W.2d 889

Filed February 17, 1989. No. 87-1095.

1. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
2. **Trial: Jurors: Presumptions.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. Retention or rejection of a juror is a matter within the discretion of the trial court.
3. **Lesser-Included Offenses: Words and Phrases.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
4. **Constitutional Law: Double Jeopardy.** The constitutional prohibition against double jeopardy has no application where two separate and distinct crimes are committed as the result of one act, because the constitutional proscription is directed to the identity of the offense and not to the act.
5. **Trial: Property: Valuation: Witnesses.** An owner of personal property is qualified by reason of the ownership relation to testify as to the value of the property.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Thomas R. Lamb and, on brief, Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

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

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

BOSLAUGH, J.

After trial to a jury, the defendant, Don D. Rice, was convicted of attempted burglary and of criminal mischief causing a pecuniary loss in excess of $300. He was sentenced to imprisonment for 1 to 2 years on each count, the sentences to run concurrently. He has appealed and contends that the trial court erred in overruling his challenge to the array, in allowing him to be prosecuted on both counts, and in overruling his objections to testimony concerning the amount of the pecuniary loss.

The record shows that on March 2, 1987, the defendant proposed to Eugene Sell, an accomplice, that they burglarize the Curtis Mathes store in Lincoln, Nebraska. The defendant's plan was to go to the store in the defendant's van, break a window, return to the van, and then leave the premises. They would return later to see if anyone had discovered the break-in, and, if not, they would then enter the store and steal VCRs. Sell agreed to the plan, and the defendant drove to the store. Upon their arrival, the defendant handed a tire iron to Sell, who proceeded to throw it through a glass door of the store. After breaking the glass door, the men left the premises as planned. All of this was witnessed by Richard Aksamit, the owner and manager of a security company, who was driving an unmarked company car and patrolling for his company. Aksamit had seen the defendant's van pull into the Curtis Mathes parking lot and head toward the back of the building.

When the van left, Aksamit followed the van south on 48th Street and obtained the license number and a description of the vehicle. Aksamit then called the Lincoln police, who asked him to return to the Curtis Mathes store and wait in the parking lot. While waiting for the officers to arrive, Aksamit saw the defendant's van return and drive slowly past the business twice. Aksamit gave the police a description of the defendant's van, which was then stopped by other officers. When the van was stopped by police, Sell was in the passenger seat and the defendant was driving the van. Aksamit went to the place where the van had been stopped and identified the van and Sell as the person who had thrown the object through the door of the Curtis Mathes store. Police officers identified the defendant as the driver of the van.

The store manager, Joseph Turner, was notified of the break-in, and he came to the store. Turner saw that the glass door had been broken and found the tire iron which had been thrown through the door. Turner remained at the store and contacted Glass Contractors to replace the broken door. Carl Jarl Security Systems was contacted to reinstall the alarm which had been on the door prior to its being broken. As the manager of the Curtis Mathes store, Turner authorized payment of $246.32 to Glass Contractors for the repair of the door and

$122.84 to Carl Jarl Security Systems for reinstallation of the alarm system. Turner testified that both amounts were reasonable and that the pecuniary loss exceeded $300.

Before the defendant's trial began, there was an arraignment hearing for Sell in the same courtroom. Some of the prospective jurors arrived early and were present in the courtroom when Sell entered a plea of guilty to attempted burglary. Six of the persons who had been present during the arraignment of Sell were examined individually concerning their ability to serve on the jury. One of the persons examined was David Tilly, who served on the jury. After his examination was completed, he was passed for cause by defense counsel.

After the special voir dire examination had been completed, and just before the trial began, defense counsel made an oral motion to challenge the array. Apparently, the basis for the motion was the possibility that some member of the jury, during the trial, might recall something that he had heard or seen during the Sell arraignment which would prevent him from being a fair and impartial juror. This motion was overruled.

After the voir dire examination had been completed, defense counsel challenged Tilly and two other persons that he had passed for cause, stating that he was withdrawing his previous passes for cause. No further examination was conducted, and the effect of the challenge was to contend that the three persons challenged were incapable of serving on the jury as a matter of law. The challenges were overruled, and peremptory challenges were then exercised.

The record fails to show any error in overruling the challenges to the array or the challenge of Tilly for cause. The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. Retention or rejection of a juror is a matter within the discretion of the trial court. *State v. Coffman*, 227 Neb. 149, 416 N.W.2d

243 (1987). See, also, *State v. Beasley*, 183 Neb. 681, 163 N.W.2d 783 (1969); *Medley v. State*, 156 Neb. 25, 54 N.W.2d 233 (1952).

At the special voir dire examination, Tilly stated that he could refrain from telling other jurors anything about what he had seen and heard in the courtroom; that he could set aside what he had heard and decide the case on the evidence presented at trial; that the fact the defendant's accomplice had pleaded guilty would not lead him to the conclusion that the defendant was also guilty; and that he could afford the defendant the presumption of innocence despite what he had heard. Furthermore, Sell testified in detail at the trial as to his involvement with the defendant and to his conviction of attempted burglary. The record fails to show that anyone present at the Sell arraignment heard anything that was not presented later at the trial through the testimony of Sell. The defendant's first assignment of error is without merit.

The defendant's second assignment of error is based on his contention that the defendant could not be prosecuted for both crimes since they involved but a single act, the breaking of the door. The defendant's argument that the second offense, criminal mischief, was a lesser-included offense of attempted burglary is incorrect.

To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Arthaloney*, 230 Neb. 819, 433 N.W.2d 545 (1989).

The criminal mischief offense was complete once the door had been broken. The burglary charge involved an intent to enter and steal property of value. It was complete when the defendant returned to the scene but did not enter because the police had been notified and Aksamit was at the scene of the crime waiting for the police. Since the two crimes involved different elements, it was possible to commit burglary without committing criminal mischief, and the latter was not a lesser-included offense.

There was no double jeopardy, although the breaking of the door was a part of the plan for the burglary. In *State v. Stewart*, 219 Neb. 347, 353, 363 N.W.2d 368, 372 (1985), we stated:

> The constitutional prohibition against double jeopardy has no application where two separate and distinct crimes are committed as the result of one and the same act, because the constitutional proscription is directed to the identity of the offense and not to the act. Consequently, multiple punishments can be imposed for the same act without violating the double jeopardy provisions of the Constitutions, state and federal, where imposition of the multiple punishments is specifically authorized by state statute.

See, also, *State v. Cole*, 218 Neb. 1, 352 N.W.2d 154 (1984); *State v. Jackson*, 217 Neb. 332, 348 N.W.2d 866 (1984).

The third assignment of error relates to the testimony of Turner concerning the pecuniary loss resulting from the breaking of the door. Turner, as manager of the Curtis Mathes store, was competent to testify as to the actual cost of repairing the damage to the door. He further testified without objection that the cost of the repairs was reasonable.

The defendant contends that Turner's testimony was not admissible because he was not qualified as an expert witness.

Turner testified that, as the manager of the store, it was his responsibility to have the door repaired and he was authorized to incur that expense on behalf of the company. Thus, so far as the damage to the door was concerned, Turner was in the position of an owner and competent to testify as to the actual cost of repairs, which was the pecuniary loss sustained as the result of the breaking of the door. An owner of personal property is qualified by reason of the ownership relation to testify as to the value of the property. *Dawson v. City of Lincoln*, 176 Neb. 311, 125 N.W.2d 908 (1964); *Johnson's Apco Oil Co. v. City of Lincoln*, 204 Neb. 397, 282 N.W.2d 592 (1979).

Although not assigned as error, we have considered the sentences imposed by the trial court and find no abuse of discretion.

The judgment is affirmed.

AFFIRMED.

FAHRNBRUCH, J., concurs.

STATE OF NEBRASKA, APPELLEE, V. DOROTHY M. JACKSON, APPELLANT.

435 N.W.2d 893

Filed February 17, 1989. No. 88-168.

1. **Motions for Mistrial.** The determination of whether to grant a motion for a mistrial lies within the discretion of the trial court. A mistrial is properly granted when an event occurs during the course of the trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial.
2. **Motions to Strike: Appeal and Error.** When the trial court grants a motion to strike testimony and the jury is admonished to disregard it, ordinarily, any error is thereby considered cured.

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

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and James H. Spears for appellee.

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

GRANT, J.

Defendant-appellant, Dorothy M. Jackson, was charged by information in the district court for Douglas County with murder in the second degree and the use of a knife to commit a felony. After a jury trial, defendant was found guilty on both counts. Defendant was sentenced to 35 years in the Nebraska Center for Women at York on the murder charge and to a consecutive term of 6 2/3 to 20 years on the knife charge. Defendant timely appealed to this court and assigns two errors, alleging that the trial court erred (1) in overruling the defendant's motion for a mistrial and (2) in overruling the defendant's motion to have the State's expert witness sequestered. We affirm.

The record, reviewed in the light most favorable to the State, *State v. Jones*, 230 Neb. 968, 434 N.W.2d 333 (1989), shows the following. At about 4:30 on the afternoon of May 16, 1987, an Omaha police officer responded to a radio call concerning a

stabbing at 16th and Binney Streets in Omaha. This officer was directed to the rear of 1617 Binney Street, where he observed the victim, John I. Williams, stabbed in the chest, sitting unconscious in a chair in the garage behind the residence. The officer also saw the defendant standing about 40 feet from the victim, holding a knife.

The defendant was placed in custody and taken to Omaha police headquarters. Although the defendant was not questioned by officers during her transportation, she continually mumbled about the stabbing and indicated that "she had did it before she knew what had happened." Once at police headquarters the defendant was informed of her rights under the *Miranda* decision. After being so informed, and waiving her rights, the defendant gave an inculpatory statement. The following morning, the victim died from the stab wound.

The victim was 68 years old and had Parkinson's disease. He had some difficulty walking at all times. After drinking, he would either have to crawl, hang onto things, or receive assistance in order to get around. Defendant was 44 years old. She was not married to the victim, but had lived with him for 4 years before the murder. Defendant and the victim were drinking throughout the day on May 16, 1987, in the garage behind their residence. A 9-year-old neighbor testified that he had heard defendant "cussing" the victim and saw the defendant go into the residence, return with a knife, and stab the victim, who was seated in a chair. A 75-year-old neighbor woman testified that the defendant had gone to her home immediately after the stabbing and that while at her home the defendant said, "Miss Rose . . . I did it, I did it, I did it." Defendant testified that she had stabbed the victim, but claimed she acted in self-defense, in that the "battered wife" syndrome prevented her from correctly assessing the situation she was in.

With regard to defendant's first assignment of error, insofar as she contends that the court erred in permitting the prosecutor to cross-examine defendant "extensively on a collateral matter, severely prejudicing the Defendant before the jury," we need only say that error, if any at all, was adequately corrected by the court's instruction to the jury to ignore such evidence. The

question stems from the defendant's position that she, because of a "battered wife" syndrome, had the perception that, under the Nebraska law of justification or self-defense (NJI 14.33), she could not retreat from the situation before her and that she was in imminent danger. Defendant's counsel admitted, and later the court instructed the jury, that defendant did not contest the facts that she was not in imminent danger and that she could have retreated.

The issue of the appropriateness of the "battered wife" syndrome evidence is not before this court because the issue was submitted to the jury in the manner desired by the defendant, and no party raises any issue in this court on that issue. What is before the court is the propriety of the way in which certain evidence, brought forward by the State in its cross-examination of defendant, was handled.

Apparently, in order to provide a basis for the application of the "battered wife" syndrome, defendant adduced testimony that she had been victimized by men during a substantial portion of her life.

The defendant testified that she had been sexually abused by her uncle on repeated occasions beginning when she was 8 years old and that when she was 13 years old her father began to sexually penetrate her, resulting in a pregnancy. The father was eventually sentenced to serve a 10-year prison term for incest.

The defendant also testified that she had been married for 10 years to a man with whom she had two children. The defendant testified that this man physically abused her during the entire course of their marriage.

During the last 2 years of the defendant's relationship with the victim, the defendant testified, the victim began to physically and emotionally abuse her. The couple drank heavily, particularly on weekends, and would have heated arguments. During the course of these arguments the defendant alleged she received bloody noses and black eyes and, on one occasion, on January 28, 1987, was taken to a hospital after she sustained cracked ribs when the victim struck her with a gin bottle.

The defendant testified that, on that occasion, she had told hospital employees and the police that she had been beaten by unknown parties. She further testified that she had not told the

police that the victim had struck her, in order to protect the victim. The defendant bases her first assignment on the following testimony elicited from her by the State during cross-examination:

Q. Is that the last time you went to the hospital for any type of injury, before John died?

A. Yes, it is.

Q. You're positive about that? I want you to think about this.

A. For an injury?

Q. Uh-hum.

A. The cracked ribs. Yes.

Q. On January 28th?

A. As far as I remember, yes. I've been back to the hospital but it wasn't for that.

Q. How about did you go to the hospital for any type of injury within a couple of weeks before John died?

A. No.

Q. You're absolutely positive about that?

A. No, I'm not positive. I just can't. . .

. . . .

Q. Specifically, I want to call your attention to Sunday, May the 10th, 1987. Do you remember — that's only six days before John died. Do you recall what you did that day?

A. No, I don't.

Q. Did you go to the hospital that day?

A. I could have.

Q. You don't remember?

A. I remember before John died I — before he died, yes, I did go to the hospital.

Q. All right. If you went to the hospital on May the 10th, do you know why you went to the hospital?

A. I was feeling lightheaded and dizzy.

. . . .

Q. Were you physically injured?

A. No.

. . . .

Q. Isn't it a fact, Miss Jackson, that on Sunday, May

the 10th, 1987, you spent all day drinking beer and drinking wine coolers and you fell down and hurt yourself and the police took you to the hospital?

. . . .

Q. Do you remember that happening?

A. No.

At this time, the defendant's counsel objected as to relevancy and on the grounds that the prosecutor had violated the rules of discovery by not disclosing the medical report which indicated that the defendant had been to the hospital on May 10.

The determination of whether to grant a motion for a mistrial lies within the discretion of the trial court. A mistrial is properly granted when an event occurs during the course of the trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial. *State v. Fraser*, 230 Neb. 157, 430 N.W.2d 512 (1988); *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).

The trial court overruled the defendant's motion for mistrial, but did instruct the jury to disregard all testimony given by the defendant beyond where she denied any recollection of having gone to the hospital. When the trial court grants a motion to strike testimony and the jury is admonished to disregard it, ordinarily, any error is thereby considered cured. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984).

Defendant cites this court to *State v. Zobel*, 192 Neb. 480, 484, 222 N.W.2d 570, 572 (1974), where we held: "If a witness is cross-examined on a matter collateral to the issues, his answer cannot be subsequently contradicted by the party conducting the examination."

Defendant also relied on *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988), where we held that a witness cannot be impeached as to collateral or immaterial matters brought out on cross-examination.

While these cases correctly state the law in this area, they have no application to the case at bar, since the prosecutor's cross-examination of the defendant on whether she had been hospitalized was not a collateral issue to the defense presented. The defendant confessed to stabbing the victim and causing the

injury which resulted in the victim's death. The defendant defended solely on her allegation that she suffered from "battered wife" syndrome, and it was not improper for the prosecutor to ask the defendant whether she had been hospitalized on any other occasion on account of injuries not caused by the victim. We cannot say under the circumstances that the prosecutor's conduct in impeaching the defendant on this issue was improper, since evidence that the defendant had injured herself on at least one occasion went to the heart of her defense. The trial court would not have erred had the court treated defendant's statements as not being on a collateral issue. In any event, as stated above, the court instructed the jury to disregard the testimony. There was no error in the actions of the trial court on this issue.

The defendant's argument that the court erred by not granting a mistrial because the prosecutor had failed to disclose the hospital report prior to the trial also fails. Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a prosecutor may not withhold evidence that is material to a defendant's guilt or innocence. This rule also applies to impeachment evidence, *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), which, if disclosed, may make the difference between conviction and acquittal. However, in *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), the U.S. Supreme Court held that such evidence is only material where there is a "reasonable probability that, had the evidence been disclosed . . . the result of the proceeding would have been different." We are not convinced, from our review of the record, that the results of the trial would have been different had the prosecutor not been allowed to impeach the defendant. The trial court properly denied the defendant's motion for a mistrial.

The defendant also assigns as error the trial court's actions in overruling defendant's motion to have the State's expert witness sequestered. The court ruled on defendant's motion as follows:

> [Y]our motion to sequester the normal, everyday witnesses, that's granted . . . .
>
> So far as the presence of [the State's expert witness] is concerned at the time the defendant [and the defendant's

expert testify].

. . . .

. . . [The State's expert witness] may be present in the courtroom.

The law is clear in this area:

> At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order on his own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Neb. Rev. Stat. § 27-615 (Reissue 1985).

The prosecutor informed the court as to why the presence of the State's expert witness was essential to the State's case:

> Further, your Honor, Dr. Kenney has no opportunity under the law, unless the defense allows me to, to examine the defendant at all, other than to be present in court when she testifies. Further, the State should be allowed the assistance of Dr. Kenney to be present with the State at the time the expert of the defense testifies for several reasons, one of which is that no medical report has ever been provided to me by the defense from Dr. Mary Kenning. . . . [Dr. Kenney] will be able to . . . assist the State in how to proceed with Dr. Mary Kenning where I would not be able to do so.

In addition, the prosecutor designated Dr. Kenney as the State's representative during the testimony of defendant's witness Dr. Kenning.

The trial court did not abuse its discretion by allowing the State's expert witness to be present in the courtroom in the circumstances of this case, nor did the trial court err in the other areas suggested by defendant. The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN M. OLSAN, APPELLANT.

436 N.W.2d 128

Filed February 17, 1989. No. 88-210.

1. **Lesser-Included Offenses: Words and Phrases.** A lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without simultaneously committing the lesser offense.
2. **Constitutional Law: Double Jeopardy.** The constitutional prohibition against double jeopardy not only protects against a second prosecution for the same offense after acquittal or conviction, but also protects against multiple punishments for the same offense.
3. **Lesser-Included Offenses: Convictions.** When a defendant is convicted of both a greater and lesser-included offense, the conviction and sentence on the lesser charge must be vacated.
4. **Constitutional Law: Criminal Law.** If, in one transaction, a defendant commits crimes against separate individuals, the defendant may be constitutionally charged with and convicted of the separate offenses against each of the victims.
5. **Trial: Evidence: Appeal and Error.** Admission or exclusion of evidence is a matter for the discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion.
6. **Prosecuting Attorneys: Trial.** Public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial.
7. **Criminal Law: Trial: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
8. **Criminal Law: Trial: Juries: Appeal and Error.** If there is some incorrect conduct in a jury trial which, on a review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the appellant, the error is harmless.
9. **Rules of Evidence: Impeachment: Prior Convictions: Time.** For proper impeachment based on Neb. Evid. R. 609 (Neb. Rev. Stat. § 27-609 (Reissue 1985)), although the State may elicit information concerning the number of a defendant's convictions within the last 10 years, the State is prohibited from naming or identifying the crime underlying the defendant's conviction and from inquiring into or referring to details surrounding the crime or conviction.
10. _____: _____: _____: _____. Neb. Evid. R. 609(2) contains a time restriction for the admissibility of a conviction to impeach a witness, namely, a conviction characterized in Neb. Evid. R. 609(1) is inadmissible for impeachment of a witness' credibility if more than 10 years have elapsed since the date of the witness' conviction or since the date on which the witness was released from confinement on account of the conviction, whichever is later.

11. _____: _____: _____: _____. In Neb. Evid. R. 609(2), the 10-year restriction for admissibility of a prior conviction is recognition that temporal remoteness nullifies the probative value of a conviction to be used for impeachment. Neb. Evid. R. 609(2) is a policy pronouncement that a conviction older than 10 years lacks probative value concerning a witness' tendency toward truth and veracity and, therefore, is irrelevant to impeach a witness' credibility.
12. **Rules of Evidence: Pretrial Procedure.** As required by Neb. Evid. R. 104(3) (Neb. Rev. Stat. § 27-104(3) (Reissue 1985)), a hearing on preliminary matters concerning admissibility of evidence shall be conducted when the interests of justice require, or when a defendant is a witness, if the defendant so requests.
13. **Rules of Evidence: Prior Convictions: Impeachment: Pretrial Procedure.** Whether a defendant's prior conviction is admissible for the defendant's impeachment pursuant to Neb. Evid. R. 609 is a preliminary question of admissibility to be determined in accordance with Neb. Evid. R. 104(3).

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for a new trial.

James C. Stecker for appellant.

Robert M. Spire, Attorney General, and James H. Spears for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

SHANAHAN, J.

In the district court for Platte County, a jury found John M. Olsan guilty of four felonies—robbery, conspiracy to commit robbery, first degree false imprisonment, and use of a firearm in the commission of a felony (robbery). The district court sentenced Olsan to terms of imprisonment for the convictions. Olsan claims that reversible error exists (1) as the result of insufficient evidence to sustain the verdicts; (2) in allowing Olsan to be found guilty on the charges of robbery and false imprisonment in violation of the double jeopardy clauses of the U.S. and Nebraska Constitutions; (3) in permitting the prosecution, on cross-examination of Olsan, to adduce certain inadmissible evidence concerning Olsan's prior felony convictions for the purpose of impeachment; and (4) by imposition of excessive sentences.

The site of the robbery was Amigo's restaurant, which also provided a fast-food service. On the evening of October 1, 1987, Stacey Torczon and Matthew Wagoner were working at

Amigo's. Torczon took customer orders at a counter and operated the cash register, while Wagoner, manager of the restaurant responsible for supervision of Amigo's employees, was working in the kitchen as a cook. Around 11:35 p.m., a man entered Amigo's, approached Torczon at the area of the counter and cash register, and mulled over the menu until he selected a large order of "Mexi-fries." The male customer was wearing jeans and a tank top or "muscle tee shirt." While the customer's order was being prepared, the man asked Torczon whether she had a boyfriend or husband and what she would be doing after work. Torczon felt that the customer exhibited "overfriendliness." As she was picking up the customer's order of Mexi-fries, Torczon remarked to Wagoner: "I think this guy's really drunk, he's really weird, he's asking a lot of weird questions." From the kitchen, approximately 20 feet from the cash register, Wagoner glanced at the customer and briefly established eye contact with him. After staying in Amigo's for about 5 minutes, the man left the restaurant.

Michael McMillan entered Amigo's near 11:45 p.m. and ordered a burrito. Consequently, only Torczon, Wagoner, and McMillan were in Amigo's when a male and female entered the restaurant. Both entrants wore a nylon stocking over their heads, preventing observation of many facial features on the entrants. What those in Amigo's did observe was the female entrant brandishing a shotgun, while the male carried a .22-caliber revolver in his hand. According to Wagoner, the gunman ordered: "Don't move, put your hands up." As the female with the shotgun went into the kitchen where Wagoner was located, the male went to Torczon at the cash register, pointed the revolver at her head, and demanded of the terrified Torczon: "Give me all the money." Gun in hand, the male robber grabbed the currency which Torczon had removed from the restaurant cash register in response to the holdup man's demand. As the shotgun-toting woman emerged from the kitchen, she told Torczon, Wagoner, and McMillan to lie on the floor. Recalling the clothing and some of the physical features observed when the previous male customer had ordered Mexi-fries a few minutes earlier, both Torczon and Wagoner at that time recognized the gunman as the previous customer who

had ordered Mexi-fries. Nothing indicated that either of the robbers had drunk alcohol. As the holdup pair were leaving Amigo's, the male yelled to those on the restaurant floor: "Don't move for five minutes."

Police were unable to recover the nylon stockings which covered the robbers' faces, or the guns used for the robbery. There were no fingerprints obtained at Amigo's to identify the robbers. No physical evidence linked Olsan to the robbery. However, from a photo array shown to them 4 to 5 days after the robbery, both Torczon and Wagoner identified Olsan as the robber.

At trial, Torczon and Wagoner testified that the male robber was wearing clothing identical to Olsan's when Olsan ordered Mexi-fries just minutes before the robbery. Another Amigo's customer in the restaurant just before the robbery, a Jeff Heesacker, one of Olsan's neighbors and apparently a longtime acquaintance, recognized Olsan as the man who had ordered the Mexi-fries and talked to Torczon. Heesacker noticed that Olsan appeared to be drunk and staggered in the restaurant. Shortly after Olsan left Amigo's, Heesacker also left the restaurant. McMillan, the Amigo's customer at the time of the robbery, testified that he looked closely at the perpetrator's stocking-covered face during the robbery and later identified Olsan as the gunman-robber.

On direct examination during his case in chief, Olsan recounted an evening of drinking beer and tequila at bars on October 1, the night of the robbery. When Olsan and his cronies concluded their drinking around 11:30 p.m., Olsan went to Amigo's, got an order of Mexi-fries, and awaited a ride from his friends. With his friends, Olsan rode a short distance from Amigo's to a bar, where he was seen by two individuals who testified they saw Olsan at the bar around 11:50 p.m. on the night of the robbery. An employee of the bar testified that Olsan slurred his speech ("I couldn't understand him"), staggered inside the bar, and was intoxicated. After Olsan left the bar, he went to a room and fell asleep. Olsan denied involvement in the events which occurred at Amigo's.

Up to this point in the trial, there had been no reference to Olsan's criminal record. Nevertheless, during cross-

examination of Olsan, the prosecutor asked: "Q. Mr. Olsan, have you ever been convicted of the felony crime called escape? A. Yes. Q. How many times?" Defense counsel objected on the ground of relevance. When the court overruled the objection, Olsan answered: "Three."

After instruction from the court, the jury found Olsan guilty of each crime charged.

SUFFICIENCY OF EVIDENCE

Olsan contends that the evidence is insufficient to support the verdicts against him.

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Brown, 225 Neb. 418, 428, 405 N.W.2d 600, 606 (1987).

Without further comment on the obvious, Olsan's contention about insufficient evidence has no merit.

CLAIM OF DOUBLE JEOPARDY

Olsan's second assignment of error relates to constitutional permissibility of his convictions for robbery and first degree false imprisonment concerning the occurrence at Amigo's. Olsan argues that false imprisonment is a lesser-included offense of robbery, and, therefore, his conviction for both those crimes violates the constitutional prohibition against being twice placed in jeopardy for the same offense. See, U.S. Const. amend. V; Neb. Const. art. I, § 12.

The Nebraska Criminal Code includes: "A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever," Neb. Rev. Stat. § 28-324(1) (Reissue 1985); and "[a] person commits false imprisonment in the first degree if he knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury . . . ." Neb. Rev. Stat. § 28-314(1) (Reissue

1985).

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the U.S. Supreme Court adopted a "test of identity" to determine whether crimes separately charged are actually but one offense and stated: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304.

"A lesser included offense is one which is necessarily established by proof of the greater offense." *State v. Colgrove*, 197 Neb. 375, 376, 248 N.W.2d 780, 781 (1977). To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without simultaneously committing the lesser offense. *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982).

The constitutional prohibition against double jeopardy not only protects against a second prosecution for the same offense after acquittal or conviction, but also protects against multiple punishments for the same offense. *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987); *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). See, also, *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977): "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."

When a defendant is convicted of both a greater and lesser-included offense, the conviction and sentence on the lesser charge must be vacated. *United States v. Belt*, 516 F.2d 873 (8th Cir. 1975).

In its information, the State charged that Olsan, in the course of events at the restaurant, robbed Amigo's of its money and contemporaneously committed the false imprisonment of Torczon. Under the circumstances, Olsan's argument that false imprisonment is a lesser-included offense of robbery ignores one crucial point: In the crimes charged against Olsan for which he was convicted, the subject matter of the criminal offenses and victims are not identical. It was Amigo's property (money)

that was forcibly and violently taken and Torczon's personal liberty which was restrained under circumstances which terrorized Torczon or exposed her to risk of serious bodily injury in the face of brandished firearms. Consequently, there were different criminal offenses committed against separate victims. The prosecution of Olsan involves distinctly different crimes, separate victims, and convictions for different crimes. If, in one transaction, a defendant commits crimes against separate individuals, the defendant may be constitutionally charged with and convicted of the separate offenses against each of the victims. See, *State v. Hardin*, 199 Neb. 314, 258 N.W.2d 245 (1977); *Jeppesen v. State*, 154 Neb. 765, 49 N.W.2d 611 (1951). Olsan's double jeopardy claim has no merit.

PREJUDICE FROM IMPROPER IMPEACHMENT

Olsan next contends that he was unfairly prejudiced when the court improperly allowed the State to impeach Olsan on cross-examination by the question concerning the number of times that Olsan had been convicted of felonious escape. Admission or exclusion of evidence is a matter for the discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

Neb. Rev. Stat. § 28-912(1) (Reissue 1985) defines the felony of escape:

> A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail.

Pertinent to Olsan's case, Neb. Evid. R. 609 (Neb. Rev. Stat. § 27-609 (Reissue 1985)) provides in part:

> (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.

Almost 3 decades ago, this court commented in *Pierce v. State*, 173 Neb. 319, 330, 113 N.W.2d 333, 341 (1962): "[P]ublic prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial." Lest prosecutors overlook or ignore their duties for an accused's fair and impartial trial, in *State v. Friend*, 230 Neb. 765, 771, 433 N.W.2d 512, 516-17 (1988), we stated: "[I]nstructions to prosecutors on the proper use of prior felony convictions apparently bear repeating."

As noted in *State v. Daugherty*, 215 Neb. 45, 47, 337 N.W.2d 128, 129 (1983):

> The purpose of Rule 609 is to allow the prosecution to attack the credibility of a testifying defendant, not to retry him for a separate crime or prejudice the jury by allowing unlimited access to the facts of an unrelated crime, as the court in *Vanderpool* stated [citation omitted]: "The right to inquire as to a previous conviction rests on the statute and is for the purpose only of affecting the credibility of the witness. A fair interpretation of the statute seems to permit the question whether the witness has ever been convicted of felony. If the witness answers in the affirmative the inquiry should end there, and thereafter it is improper to inquire into the nature of the crime or the details of the offense." [Quoting *Vanderpool v. State*, 115 Neb. 94, 211 N.W. 605 (1926).]

See, also, *State v. Johnson*, 226 Neb. 618, 621, 413 N.W.2d 897, 898 (1987): "Once having established the conviction, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent

in prison as a result thereof." See, further, *State v. Friend, supra* at 772, 433 N.W.2d at 517:

> There is no question but that a prosecutor's further inquiry as to the nature of the offense after a defendant has admitted his or her conviction of a felony is improper. Once the defendant answers in the affirmative a question as to a prior conviction, further inquiry is not permitted.

Concerning an inquiry into the number of a defendant's felony convictions, this court has stated: "When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received." *State v. Boss*, 195 Neb. 467, 473, 238 N.W.2d 639, 644 (1976), decided after December 31, 1975, the effective date of the Nebraska Evidence Rules; see Neb. Evid. R. 1102 (Neb. Rev. Stat. § 27-1102 (Reissue 1985)). See, also, *State v. Craig*, 192 Neb. 347, 220 N.W.2d 241 (1974) (if a defendant admits the correct number of convictions, the State shall not inquire into the nature of the charge in any conviction). Further, in *Latham v. State*, 152 Neb. 113, 40 N.W.2d 522 (1949), this court discussed the scope of inquiry initiated by the State on cross-examination of a defendant as a witness in the defendant's case. After observing that proper cross-examination directed toward impeachment of a defendant forbids inquiry into the nature of the charge of which the defendant was previously convicted, the details of the conviction, and the sentence imposed, the *Latham* court stated:

> The purpose of the restricted inquiry permitted [on proper cross-examination of a defendant] is for whatever effect the fact of a previous conviction may have on the credibility of the defendant as a witness, and not for the purpose of tending to show that he is prone to engage in criminal actions.

152 Neb. at 116, 40 N.W.2d at 524.

While current construction of Neb. Evid. R. 609 prohibits mention of the name or identity of the crime in the conviction used for impeachment of a witness, by far the greater number of jurisdictions allow reference to the particular criminal offense underlying the conviction offered for a witness'

impeachment in accordance with rules of evidence substantially similar to Neb. Evid. R. 609. See, *United States v. Moore*, 735 F.2d 289 (8th Cir. 1984); *United States v. Beckett*, 706 F.2d 519 (5th Cir. 1983); *United States v. Gaertner*, 705 F.2d 210 (7th Cir. 1983); *Acevedo v. State*, 467 So. 2d 220 (Miss. 1985); *King v. State*, 468 N.E.2d 226 (Ind. 1984); *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984); *Stevens v. State*, 671 S.W.2d 517 (Tex. Crim. App. 1984); *State v. Coe*, 101 Wash. 2d 772, 684 P.2d 668 (1984); *People v. Bennette*, 56 N.Y.2d 142, 436 N.E.2d 1249, 451 N.Y.S.2d 647 (1982); *State v. Williams*, 656 P.2d 450 (Utah 1982); *State v. Connor*, 403 So. 2d 678 (La. 1981); *Bradley v. State*, 635 P.2d 1161 (Wyo. 1981); *People v. McClellan*, 71 Cal. 2d 793, 457 P.2d 871, 80 Cal. Rptr. 31 (1969). A significantly smaller number of jurisdictions follow a rule similar to this court's construction of Neb. Evid. R. 609. See, *State v. Geyer*, 194 Conn. 1, 480 A.2d 489 (1984); *Com. v. Richardson*, 674 S.W.2d 515 (Ky. 1984); *State v. Rutchik*, 116 Wis. 2d 61, 341 N.W.2d 639 (1984); *McAmis v. Commonwealth*, 225 Va. 419, 304 S.E.2d 2 (1983).

Applying long-established Nebraska precedent to the cross-examination of Olsan, we conclude that the prosecutor transgressed the mandatory boundaries of Neb. Evid. R. 609 for impeachment.

The State, conceding the prosecutory transgression, contends that Olsan failed to make a timely objection to that part of the cross-examination in issue and, therefore, waived any objection to admissibility of Olsan's answer relative to his convictions for escape. See *State v. Archbold*, 217 Neb. 345, 352, 350 N.W.2d 500, 505 (1984): "If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error." See, also, *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987). We reject the State's contention regarding an evidential waiver. While there was no objection to the prosecutor's initial question, "[H]ave you ever been convicted of the felony crime called escape?" defense counsel timely objected to the next question, "How many times?" The prosecutor's second question concerning the number of convictions was undeniably directed to the content of the first question and, consequently,

interconnected with Olsan's answer that he had been convicted of escape. While defense counsel could have properly objected to the first question, which specified the felony in Olsan's previous convictions, counsel's failure to object to the initial question did not waive a subsequent objection to the prosecutor's blatantly improper evidential inquiry into the number of escape convictions. Given the state of the record, defense counsel's objection to the prosecutor's inquiry, that is, the number of Olsan's prior escape convictions and the lack of qualification of the convictions regarding the 10-year limitation specified in Neb. Evid. R. 609(2), was valid and should have been sustained.

The State suggests that the trial court's overruling Olsan's valid objection is harmless error. In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988); *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). If there is some incorrect conduct in a jury trial which, on a review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the appellant, the error is harmless. *State v. Watkins, supra.*

Recalling our previous admonitions regarding proper use of Neb. Evid. R. 609 and also keeping in mind our reluctance to apply the doctrine of harmless error to a prosecutor's improper impeachment use of a defendant's prior conviction, see *State v. Friend*, 230 Neb. 765, 433 N.W.2d 512 (1988), we turn our attention to the evidential question whether the trial court's ruling was harmless error or resulted in unfair prejudice to a substantial right of Olsan. See Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)).

While Olsan's credibility was essential to his alibi defense, the prosecutor's improper cross-examination went beyond an attack on Olsan's credibility and introduced the injurious implication of Olsan's extensive criminal background. In a jury trial, adduction of evidence concerning a defendant's prior conviction for escape inherently contains information that the

witness was officially detained on account of criminal activity, with or without subsequent conviction or as the result of incarceration after conviction. Because the criminal activity underlying Olsan's detention necessary for an escape is undisclosed, Olsan's escape from official detention may prompt a jury to surmise that he has been implicated in at least six instances of criminal activity—the three escapes and three occasions of detention related to some criminal activity, whether such criminal activity included felonious conduct or criminal misconduct involving dishonesty or falsehood. In this manner the prosecutor injected the innuendo that Olsan is indelibly branded with an extensive background of criminal misbehavior indicative of a propensity to commit the crimes charged. In such a setting, the jury may have attached some evidential weight to Olsan's escape convictions as proof that he likely committed the crimes presently charged. Courts and counsel are aware of the peril to a defendant's fair trial through inadmissible evidence concerning other crimes, wrongs, or acts which establish a person's character or traits and action in conformity with such character or traits. See Neb. Evid. R. 404(1) (Neb. Rev. Stat. § 27-404(1) (Reissue 1985)). Under the circumstances, prosecutory exploration into the nature of Olsan's prior convictions ravished the rationale of Neb. Evid. R. 404, which is equally applicable to Neb. Evid. R. 609 in view of this court's statements concerning a defendant's impeachment by evidence of a prior conviction. See *Latham v. State*, 152 Neb. 113, 116, 40 N.W.2d 522, 524 (1949): Impeachment by prior conviction is "not for the purpose of tending to show that [the defendant] is prone to engage in criminal actions." At the risk of delving into dicta, were evidence of Olsan's escape convictions relevant, such evidence would be excludable by Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1985)): "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In *State v. Atwater*, 193 Neb. 563, 565-66, 228 N.W.2d 274, 275 (1975):

> The prosecution knew that the commission of other crimes by the defendant was irrelevant, improper, and inadmissible in its case. While the evidence of defendant's guilt herein is conclusive, this is a transgression which cannot be condoned. The evidence against the defendant was more than adequate. Possibly in the past we have been too lenient in excusing these transgressions under the guise of harmless error, and the prosecution has concluded that anything goes. Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one. Harmless error is intended to cover those inadvertent slips, which occasionally creep into a hotly contested trial, which do not severely prejudice the rights of the defendant. Harmless error should never be applied in those instances where the prosecution deliberately, or because of very careless procedures, injects prejudicial error into the proceedings.

Recently, in *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987), we reversed a defendant's conviction because the prosecutor had exceeded the proper scope for cross-examination of the defendant regarding a previous conviction used for impeachment. In *Johnson*, we noted that

> the credibility of the defendant as a witness was the critical issue in this case. The so-called "poison" having been injected into the case by the prosecutor, either deliberately or because of a lack of knowledge of the rules of evidence, it is problematical whether the defendant could have received a fair trial.
>
> It must be impressed upon the State that this court will not continually search for ways to extricate the prosecution from the results of its own misconduct by labeling such action "harmless error."

226 Neb. at 621-22, 413 N.W.2d at 899.

Even more recently, in *State v. Friend, supra*, issued on December 30, 1988, we again deplored prosecutory misuse of a defendant's prior conviction as a means to impeach the defendant.

Whether attributable to ignorance or indifference of the Nebraska Evidence Rules, the conduct in Olsan's case

participates in the persistent parade of prosecutory prejudice to a defendant's right to a fair trial, namely, improper impeachment inquiry into a defendant's convictions. For that reason, regretfully, we must repeat the rule for proper impeachment based on Neb. Evid. R. 609: Although the State may elicit information concerning the number of a defendant's convictions within the last 10 years, the State is prohibited from naming or identifying the crime underlying the witness' conviction and from inquiring into or referring to details surrounding the crime or conviction. Accordingly, we cannot condone or disregard the prosecutor's conduct in cross-examining Olsan. The criteria for a proper impeachment pursuant to Neb. Evid. R. 609 have been clearly stated and repeated by this court and must be respected by prosecutors seeking to impeach a defendant through evidence of the defendant's convictions. We hope that our emphatic and renewed disapproval expressed in this case will stem the steady stream of appeals to this court as the result of prosecutory misunderstanding or misapplication of Neb. Evid. R. 609. The district court committed reversible error in permitting cross-examination of Olsan which exceeded the scope allowed under Neb. Evid. R. 609 for impeachment.

TIME LIMITATION PRESCRIBED BY NEBRASKA EVIDENCE RULE 609(2)

Neb. Evid. R. 609(2) contains a time restriction for the admissibility of a conviction to impeach a witness, namely, a conviction characterized in Neb. Evid. R. 609(1) is inadmissible for impeachment of a witness' credibility if more than 10 years have elapsed since the date of the witness' conviction or since the date on which the witness was released from confinement on account of the conviction, whichever is later. In Neb. Evid. R. 609(2), the 10-year restriction for admissibility of a prior conviction is recognition that temporal remoteness nullifies the probative value of a conviction to be used for impeachment. Consequently, Neb. Evid. R. 609(2) is a policy pronouncement that a conviction older than 10 years lacks probative value concerning a witness' tendency toward truth and veracity and, therefore, is irrelevant to impeach a witness' credibility. Thus, Neb. Evid. R. 609(2) prevents the cumulative effect of old

convictions which shed little light on a witness' credibility.

Previously in this opinion, we have prescribed that a prosecutor may properly inquire whether a defendant's conviction occurred "within the last 10 years." Some might argue that the time limitation or qualification stated in Neb. Evid. R. 609(2) pertains only to admissibility of evidence, a question for the court, and should not be information for a jury's consideration. To buttress that argument, one might contend that the fact of the conviction, not its occurrence within the last 10 years, will have probative value for the jury. Others might argue that the jury should be informed that the defendant's conviction occurred within the last 10 years lest there be some speculation that the prosecutor is foraging into the defendant's distant past which has disclosed only a stale conviction and is, thus, seen as a shabby prosecutory tactic. Whichever argument may be correct, we need not decide, since the 10-year limitation of Neb. Evid. R. 609(2) was not factually presented in Olsan's trial for consideration by judge or jury.

In Olsan's case, the State failed to qualify any conviction regarding the 10-year limitation of Neb. Evid. R. 609(2). Without the temporal qualification required by Neb. Evid. R. 609(2), evidence regarding any conviction of Olsan was irrelevant, and admission of such evidence constituted reversible error.

A PREVENTIVE PROCEDURE

As a condition for admissibility of a defendant's impeaching conviction, the State must satisfy the 10-year prerequisite under Neb. Evid. R. 609(2). However, a problem exists as soon as a prosecutor asks: "Have you, defendant, been convicted of a felony during the last 10 years?" If the defendant responds "no," a jury might wonder whether the defendant was convicted more than 10 years ago. Such speculation by a jury is unnecessary and undesirable. A similar problem is created when a prosecutor inquires: "During the last 10 years, have you been convicted of a crime involving dishonesty or false statement?" What is a crime involving "dishonesty or false statement"? The determination whether a crime involves "dishonesty or false statement" depends on the law of the jurisdiction in which the defendant was convicted. What if the

defendant has been convicted in a jurisdiction other than Nebraska? Requiring a defendant to correctly classify a crime in the context of Neb. Evid. R. 609 necessarily demands a defendant's accurate knowledge of criminal law pertaining to the defendant's conviction, including knowledge of statutory definitions and judicial opinions construing criminal statutes. Also, regarding impeachment, there is the inadmissibility of a conviction which is the subject of a pardon, see Neb. Evid. R. 609(3), or a conviction from which an appeal is pending, see Neb. Evid. R. 609(5). Apart from evidential aspects of Neb. Evid. R. 609, consideration must be given to professional ethics for lawyers as prosecutors. See *State v. Borchardt*, 224 Neb. 47, 57, 395 N.W.2d 551, 558 (1986): " 'In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.' " (Quoting from Canon 7, DR 7-106(C)(1) of the Code of Professional Responsibility.)

> Generally the question of which convictions will be usable to attack credibility should be determined prior to trial. Counsel need to know what the ruling will be on this important matter so that they can make appropriate tactical decisions. For example, the opening of defense counsel or the decision of the defendant to take the stand may be affected.

3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 609[05] at 609-95 to 609-96 (1988).

As expressly required by Neb. Evid. R. 104(3) (Neb. Rev. Stat. § 27-104(3) (Reissue 1985)), a hearing on preliminary matters concerning admissibility of evidence shall be conducted when the interests of justice require, or when a defendant is a witness, if the defendant so requests. Regarding a prosecutor's contemplated use of a known conviction to impeach the defendant, it is preferable that the hearing pursuant to Neb. Evid. R. 104(3) occur before trial at the request of the State or the defendant and provide the court with pretrial information regarding prospective evidence of the defendant's prior conviction. As a source of information quite likely to be prejudicial to a defendant and a source of inadmissible

evidence, the hearing pursuant to Neb. Evid. R. 104 to determine admissibility of a defendant's prior conviction, sought to be used for impeachment in accordance with Neb. Evid. R. 609, is conducted on the record but outside the jury's presence. Thus, whether a defendant's prior conviction is admissible for the defendant's impeachment pursuant to Neb. Evid. R. 609 is a preliminary question of admissibility to be determined in accordance with Neb. Evid. R. 104(3).

If there is no constitutional impediment to using a defendant's prior conviction for impeachment, see *Loper v. Beto*, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972), the trial court, as a result of the suggested hearing under Neb. Evid. R. 104, will be able to ascertain the admissibility of a defendant's prior conviction for impeachment in accordance with Neb. Evid. R. 609. If the court determines that the defendant's conviction is inadmissible under Neb. Evid. R. 609, the State, in the jury's presence, is not permitted to initiate interrogation directed at the defendant's conviction or offer any public record of the defendant's conviction. However, if the court determines that Neb. Evid. R. 609 allows admitting evidence of the defendant's conviction for impeachment, the prosecutor, in the jury's presence, may then inquire whether the defendant has been convicted of a crime particularized in Neb. Evid. R. 609(1), but shall not name or identify the crime in the defendant's conviction and shall not inquire into details surrounding the crime underlying the conviction used for impeachment. The prosecutor may also inquire into the number of times a defendant has been convicted during the last 10 years, provided the convictions have been determined to be admissible under Neb. Evid. R. 609. A defendant's denial of a prior conviction, which the court has determined to be admissible under Neb. Evid. R. 609, may result in the State's introduction of the appropriate public record of the defendant's prior conviction. See, *State v. Caradori*, 199 Neb. 691, 260 N.W.2d 617 (1977); *Latham v. State*, 152 Neb. 113, 40 N.W.2d 522 (1949).

The foregoing procedure for criminal cases should foster recognition of the boundaries for admissibility of a prior conviction to impeach a defendant pursuant to Neb. Evid. R.

609, reduce the opportunity for misuse of a conviction to impeach a defendant, and enable a defendant to make a better informed decision whether to take the stand in the face of potentially impeaching evidence in the form of a prior conviction. Adherence to the suggested procedure is not a prerequisite to admissibility of evidence authorized by Neb. Evid. R. 609. Rather, the suggested procedure appears to be a practicable measure which may be an ounce of prevention at the trial level, obviating a pound of appellate cure and a ton of mistrials and retrials on account of improper impeachment from contravention of Neb. Evid. R. 609.

Because cross-examination of Olsan went beyond the scope of inquiry allowed under Neb. Evid. R. 609, the district court's admitting evidence concerning the number of Olsan's escape convictions prejudiced Olsan's right to a fair trial and, consequently, constituted reversible error, not harmless error. We must, therefore, reverse the convictions of Olsan and remand this matter for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. CECIL M. BYRD, APPELLANT.
435 N.W.2d 898

Filed February 17, 1989. No. 88-221.

1. **Convictions: Appeal and Error.** In reviewing the sufficiency of the evidence to sustain a 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.
2. **Entrapment: Words and Phrases.** Under Nebraska law, a defendant has been entrapped if (1) an agent of the State has induced the defendant to commit the offense charged, and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
3. **Motions for Mistrial.** 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.

4. **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.
5. **Sentences: Appeal and Error.** The issue in reviewing a sentence is whether the defendant in question received an appropriate sentence, not whether some other defendant received a lesser one.
6. **Sentences.** Each defendant is unique; evidence as to each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.
7. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.

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

Clyde F. Starrett for appellant.

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

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

GRANT, J.

This is an appeal from the district court for Red Willow County. The defendant-appellant, Cecil M. Byrd, was charged by information with distributing, delivering, or dispensing marijuana in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985), a Class III felony. Defendant pled not guilty, and the case was tried before a jury. On October 14, 1987, the jury returned a verdict of guilty. Defendant's motion for new trial was overruled, and he was later sentenced to 1 year's imprisonment. Defendant timely appealed. On appeal, defendant assigns as error the trial court's actions in (1) failing to dismiss the complaint for lack of proof by the State, (2) refusing two of defendant's proposed jury instructions regarding entrapment, (3) failing to grant defendant's motion for a mistrial, and (4) imposing an excessive sentence. We affirm.

With regard to defendant's first assignment of error, we have held that in determining the sufficiency of the evidence to

sustain a 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. Marrs*, 230 Neb. 977, 434 N.W.2d 336 (1989).

Taking the view of the evidence most favorable to the State, the record shows that on December 3, 1986, McCook Police Detective Isaac Brown telephoned Tracy Schuppan and asked Schuppan to meet him and Detective Bill Callister at the McCook police station. When Schuppan met with the detectives on December 4, Brown and Callister told Schuppan that they were investigating him for attempted distribution of marijuana and asked Schuppan if he would tell them about people he knew personally to be in the drug trafficking business in the McCook area. Schuppan discussed a number of people he knew to be drug traffickers and agreed to work with the detectives in an undercover capacity. In return, the detectives stated that they would report Schuppan's cooperation to the prosecuting attorney.

Schuppan told Brown and Callister that he felt he could purchase drugs from Kurke Curl. Schuppan telephoned Curl on the morning of December 4 and asked if Curl could sell him a gram of cocaine and half an ounce of marijuana. Schuppan arranged to meet Curl at noon at Curl's place of business in McCook.

At 11 a.m., Schuppan informed Callister about the noon meeting. Schuppan met Callister and Brown at 11:30 at a McCook motel to discuss the drug transaction. Brown then searched Schuppan's vehicle for controlled substances. Schuppan was strip-searched and wired with electronic surveillance equipment. The detectives gave Schuppan $180 to finance the transaction and followed him, at a distance, to Curl's shop. Curl did not show up at noon, so Schuppan and the detectives went back to the motel, where Schuppan returned the $180 and the wire was removed.

Later that day, Schuppan arranged to meet Curl at 5:30 p.m. at Curl's shop. At 5:15 p.m., Schuppan met Callister and

Brown at the motel. Schuppan and his vehicle were again searched, and Schuppan was again wired with the electronic surveillance equipment.

Defendant and Curl were present in Curl's shop when Schuppan entered at 5:30 p.m. Curl told Schuppan that he had not contacted anybody yet, but needed the money up front to pick up the cocaine and marijuana. Schuppan testified that defendant said he was going to pick up his supply of marijuana and meet Schuppan and Curl back at the shop. The three men agreed to meet again at 6 p.m. Schuppan gave Curl the $180 and went back to the motel with Callister to wait until 6 p.m.

Curl was present when Schuppan returned to the shop at 6:05 p.m. Curl went out to his car, returned, and delivered 1 gram of cocaine to Schuppan. Curl then returned $60 to Schuppan. Defendant then entered the shop and apologized for being late. Schuppan asked defendant if he had his marijuana with him. Defendant stated that he did and went out to his car. He returned and sold Schuppan 6.3 grams of marijuana for $40. Defendant said to Schuppan that "everyone else he sold it to liked it and always came back for more." Defendant also told Schuppan that he could get Schuppan a half ounce of cocaine for $1,500. Schuppan's conversations with defendant and Curl were monitored by Callister over the surveillance wire, but the tape was not admitted into evidence.

Schuppan returned to the motel, gave Callister the cocaine and marijuana, and returned the remaining $20. The detectives again searched Schuppan and his vehicle and removed the surveillance equipment.

The jury, in returning a verdict of guilty, resolved any conflicts in the evidence in favor of the State. The evidence, when viewed most favorably to the State, is sufficient to establish beyond a reasonable doubt that defendant intentionally distributed, delivered, or dispensed marijuana to Schuppan on December 4, 1986. Defendant's first assignment of error is without merit.

In his second assignment of error, defendant contends the trial court improperly instructed the jury on the defense of entrapment, in that the trial court refused to give two of the three instructions proposed by defendant. Defendant raised the

affirmative defense of entrapment, and testified at trial that he had gone to Curl's shop on December 4 to get an estimate on some automobile upholstery work. Defendant admitted that he sold marijuana to Schuppan on the date in question, but denied having dealt in drugs or marijuana before. He also denied having used marijuana or drugs and stated that he would not have sold the marijuana if he had not been approached by Schuppan.

Defendant proposed three jury instructions pertaining to entrapment. Proposed instruction No. 1 explained the entrapment defense but did not address the matter of predisposition of the defendant. The trial court properly refused to give this proposed instruction. Proposed instruction No. 2 failed to explain that the jury could consider evidence of the conduct of the defendant and acts of a similar nature in determining whether defendant was predisposed to commit the crime, and was properly refused, particularly in light of defendant's statement as to his prior sales of marijuana, which is relevant to the issue of his predisposition. Defendant's proposed instruction No. 3 was nearly identical to NJI 14.34, which was given by the court, and was submitted by the defendant as an alternative to his proposed instructions Nos. 1 and 2.

Entrapment is governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for commission of a criminal offense. *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984); *State v. Jones, ante* p. 47, 435 N.W.2d 167 (1989). It occurs when the criminal intent or design originates with governmental officials, who implant in the mind of an innocent person the disposition to commit a criminal offense and induce criminal conduct in order to prosecute the criminal offense so induced. *Swenson, supra*. Nebraska has adopted the "origin of intent" test for entrapment. Under this test, a defendant has been entrapped if (1) an agent of the State has induced the defendant to commit the offense charged, and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *Swenson, supra*; *Jones,*

supra. The test focuses on the defendant's predisposition to commit the crime charged. *Swenson, supra*. When a defendant raises the defense of entrapment, the trial court must determine, as a matter of law, whether the defendant has presented sufficient evidence to warrant a jury instruction on entrapment. *Swenson, supra*; *Jones, supra*.

The trial court determined that there was sufficient evidence that the government had induced defendant to commit the crime to warrant an instruction on entrapment. The court gave NJI 14.34, which was proposed by defendant, and which has been specifically approved by this court. *State v. Bocian*, 226 Neb. 613, 413 N.W.2d 893 (1987); *State v. Lampone*, 205 Neb. 325, 287 N.W.2d 442 (1980). The jury was properly instructed on the issue of entrapment. Defendant's proposed instructions which were refused did not add anything not properly covered by the instruction given, and did not fully state the applicable law. Defendant's second assignment of error is without merit.

In his third assignment of error, defendant contends the trial court erred in failing to grant defendant's motion for a mistrial. 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. 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. Fraser*, 230 Neb. 157, 430 N.W.2d 512 (1988).

Defendant's motion for mistrial was based on counsel's misunderstanding of the court's ruling in sustaining the State's objection to certain comments made by defendant's counsel during voir dire examination of prospective jurors. Defendant's counsel did not examine prospective jurors regarding the defense of entrapment because he thought the court had so ruled as to foreclose examination on that point. The voir dire examination itself was not recorded by a court reporter. The court did, however, conduct a hearing on the record outside the jury's presence immediately after voir dire examination with regard to the merits of the State's objection.

During the hearing, the attorneys and the trial judge stated

their recollections as to what happened during voir dire. The record indicates generally that defense counsel discussed the defense of entrapment, referring the prospective jurors to the nationally publicized criminal trial of automobile manufacturer John DeLorean. The prosecutor approached the bench and objected to counsel's comments on the DeLorean prosecution. The objection was sustained. Defense counsel then asked the court at the bench whether it would be improper to ask certain questions regarding entrapment. The court indicated that such questions would be proper, but counsel misunderstood the court to rule that the questions would not be allowed and, consequently, did not ask the questions. During the hearing, defense counsel moved for a mistrial, stating, "I know it would have made some difference to my voir dire because I intended to go into the matter of entrapment. And I thought that your ruling was that I couldn't . . . discuss the reason in the law for entrapment. . . ."

In the absence of a verbatim record on voir dire, we decline to consider defendant's assertion that the trial court erred in sustaining the State's objection to his references to the DeLorean case. While the voir dire proceedings were not recorded, the record before us shows that a hearing was held immediately after the voir dire examination was concluded. Both counsel and the judge stated, on the record, their versions of what had occurred. The versions disagreed as to what defense counsel actually said about the DeLorean matter and as to the substance of the court's ruling regarding the propriety of defendant's questions about entrapment. There also is a conflict in the record as to whether the State's objection to defendant's "DeLorean" remarks was made before or after defendant passed the jury for cause. The trial judge determined what was said during the voir dire, and, based on those determinations, his decision was correct. The record is incomplete and does not permit us to consider this assignment of error further. See *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980).

Although defense counsel did not discuss the issue of entrapment with the jury panel, any possible damaging effect on the jury was removed when the court properly instructed the

jury on the defense of entrapment. Defendant was not prevented from having a fair trial, and the trial court did not abuse its discretion in overruling defendant's motion for mistrial.

Finally, defendant claims he received an excessive sentence and that his sentence was more severe than the sentences imposed on Kurke Curl and Brian Harris, who were convicted of similar offenses in Red Willow County and sentenced to probation. Defendant claims Curl and Harris received sentences of probation because they pled guilty and that he was "penalized for asking for a jury trial." Brief for appellant at 19. An accused should not receive a more severe sentence merely because he exercised his right to a jury trial. *State v. Winsley*, 223 Neb. 788, 393 N.W.2d 723 (1986).

In *State v. Guida*, 230 Neb. 961, 965, 434 N.W.2d 522, 526 (1989), however, we stated:

> "[T]he issue in reviewing a sentence is whether the defendant in question received an appropriate sentence, not whether someone else received a lesser one. . . . Each defendant is unique; evidence as to each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence."

Unlike Curl and Harris, defendant's presentence investigation shows that defendant continued to exhibit behavioral problems even after his conviction for this incident.

In one incident, defendant, while intoxicated, became involved in an altercation with his estranged wife after breaking into her home. After the police arrived, defendant falsely informed them that the wife had drugs in her purse and stated to the officers that he and his wife had "smoked pot together in the house." That same night, defendant became involved in an altercation at a local bar that resulted in defendant's contacting the police department.

The probation officer who conducted defendant's presentence investigation reported that defendant's behavior since being arraigned for this offense "would suggest that he continues to experience difficulty in the use of alcohol and drugs, and that his conduct during any future probationary period would be the same." The probation office was unable to

verify several items concerning defendant's school, employment, and medical records. The trial judge himself described defendant's case as "marginal" and noted that defendant's conduct "would appear to be that of . . . a person who is addicted to drugs, primarily alcohol." Defendant showed no remorse for his actions.

The record shows that the trial court considered defendant's life, character, and previous conduct, and concluded defendant "deserve[d] the shortest sentence that can be given in this case, but [did] not deserve probation." An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988); *State v. Sutton, ante* p. 30, 434 N.W.2d 689 (1989).

The offense for which defendant was convicted is a Class III felony, punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both, and a minimum of 1 year's imprisonment. Defendant received the minimum sentence prescribed by statute, and the trial court did not abuse its discretion in denying probation.

Finally, we find it necessary to draw counsel's attention to Neb. Ct. R. of Prac. 5H (rev. 1988), which provides that "[u]nder no circumstances shall the clerk of the district court send to the Clerk of the Supreme Court contraband, drugs, firearms, or other weapons, unless specifically requested to do so by the Supreme Court." We direct that within 15 days of the release of this opinion, the State, through the office of the Red Willow County attorney, withdraw from the record State's exhibit 3, a baggie of marijuana, which the State offered and the trial court received into evidence.

The judgment of the trial court was correct in all respects and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN L. BURGHARDT, APPELLANT.
435 N.W.2d 673

Filed February 17, 1989. No. 88-222.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Verdicts.** An inadvertently signed verdict form alone is insufficient to show an indefinite or ambiguous verdict of guilty.

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

Anthony S. Troia for appellant.

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

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

FUHRMAN, D.J.

Steven L. Burghardt, convicted by a jury of second degree assault and use of a knife to commit a felony, was sentenced to consecutive sentences of 20 months to 5 years, and 2 to 4 years. Burghardt appeals, claiming the evidence is insufficient to support the conviction and that the jury verdict was ambiguous and indefinite. We affirm.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Wiggins*, 230 Neb. 632, 432 N.W.2d 824 (1988); *State v. Tatara*, 230 Neb. 279, 430 N.W.2d 692 (1988); *State v. Zellner*, 228 Neb. 272, 422 N.W.2d 96 (1988).

Taking the view most favorable to the State, the evidence

reflects that on January 31, 1987, the defendant; his brother, John Burghardt; and several friends went to the Bitter Sweet Lounge in Omaha, Douglas County, Nebraska. While they were at the Bitter Sweet Lounge, the bouncer, Clyde Owens, had to go to the tables occupied by this group on several occasions, as they were blocking an aisle, making it difficult for people to get around them.

Subsequently, the bouncer was informed that some of the group were smoking marijuana. Owens went to the table, told them they could not smoke marijuana in the bar, and asked them three or four times to leave the bar. When he asked the defendant's brother, John Burghardt, to leave, John said that he had a beer he was going to drink there. Owens gave John back the money for his beer and asked him to leave. John started to leave, but before getting out the door, he stopped. The bouncer eventually got John out of the bar, and the defendant went out as well.

The defendant then wanted to reenter the bar but was denied access by Owens. Through the door glass Owens saw that the two brothers had knives in their hands. He then went to the bar, reached behind it to get the revolver that was kept there, and asked that someone call the police.

Owens testified that thereupon John Burghardt opened the front door to the bar and started hollering in. At this point the defendant tried to rush in. Owens reached out and grabbed the defendant, who stabbed Owens in the back. John Burghardt started charging in with his knife, at which time Owens shot him.

The State introduced substantial probative evidence to establish all elements of the crimes charged. The evidence, when viewed most favorably to the State, is sufficient to sustain, beyond a reasonable doubt, the defendant's convictions.

The defendant further claims that because both the guilty and the not-guilty forms for the second degree assault count were returned after having been signed by the jury foreman, with the not-guilty form having the foreman's signature crossed out, the verdict was not certain and free of ambiguity.

It is conjecture as to why the not-guilty verdict form was signed, with the foreman's signature later crossed out.

However, the record is clear that in open court, in the presence of the jury, the defendant, and his counsel, the court accepted the unanimous jury verdicts of guilty on each count. Neither party desired to have the jury polled, and the court adjudged the defendant guilty of each count.

The inadvertently signed verdict form is not indicative that the verdict was indefinite or ambiguous. Rather, it shows only that an error was made and ultimately corrected prior to acceptance and filing of record by the trial judge. We find that an inadvertently signed verdict form alone is insufficient to show an indefinite or ambiguous verdict of guilty.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARET J. PETERS, APPELLANT.
435 N.W.2d 675

Filed February 17, 1989. No. 88-256.

1. **Sentences: Words and Phrases.** The word "concurrent" means operating simultaneously. Concurrent sentences operate simultaneously; that is to say, they run together during the periods they overlap.
2. **Sentences: Appeal and Error.** Sentences imposed within the limits prescribed by the statutes in question will not be disturbed on appeal absent an abuse of discretion.

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

John B. McDermott, of McDermott, Depue & Zitterkopf, for appellant.

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

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

PER CURIAM.

This is an appeal from convictions in the district court for

York County, Nebraska, entered after pleas of guilty to three Class I misdemeanor counts of criminal mischief. On February 23, 1988, the appellant was sentenced to probation for 2 years on the first misdemeanor count, with a condition of probation that he serve 90 days in the York County jail commencing May 25, 1988, and pay restitution. On count II, the appellant was sentenced to a 2-year term of probation, with a condition that he serve 90 days in the York County jail commencing May 25, 1989. These two terms of probation were ordered to be served concurrently. On count III, the appellant was placed on probation for 2 years and ordered to serve 90 days in the York County jail commencing May 25, 1990, this term of probation to be consecutive to the other two probation orders. The appellant contends that the trial court erred both in imposing two consecutive jail terms of 90 days as a condition of probation for concurrent probationary periods of 2 years, in contravention of Neb. Rev. Stat. § 29-2262(1) (Cum. Supp. 1988), and in imposing excessive sentences.

From March 7 to August 4, 1987, a number of incidents of random property damage occurred in York County. As a result of a grand jury investigation, the appellant was indicted on October 26 and December 2 for perjury and criminal mischief. Pursuant to plea negotiations, the defendant pled guilty to three counts of attempted criminal mischief in which the pecuniary loss was in excess of $300.

In his first assignment of error, the appellant contends that because the sentences on counts I and II were ordered to be served concurrently, the sentences should be interpreted to run concurrently in all respects: by serving the first 90-day term beginning in May of 1988, the appellant will also satisfy the 90-day term imposed to commence in May 1989. We believe that this contention is in error.

In *State v. Jones*, 218 Neb. 713, 715, 358 N.W.2d 765, 767 (1984), this court stated: "The word 'concurrent' means operating simultaneously. Webster's Third New International Dictionary, Unabridged 472 (1968). Concurrent sentences operate simultaneously; that is to say, they run together during the periods they overlap."

In the present case, the appellant was ordered to serve a

2-year term of probation on count I, with a condition of that probation to serve 90 days in the county jail beginning in May of 1988. On count II, the appellant was ordered to a 2-year term of probation, with a condition to serve 90 days to commence in May 1989. These two terms overlap only in the 2-year terms of probation. Therefore, an order that the terms be served concurrently means only that they are concurrent for the 2-year term of probation, as they obviously do not overlap for the separate jail terms in 1988 and 1989.

This sentence may, at first, appear unusual. However, it is not particularly unusual for two terms of incarceration to be ordered to be served concurrently even though they are not for identical terms. A sentence to a term of years on one count may be shorter than the sentence to a term of years on a second count. Nonetheless, the trial court may order the second count to be served concurrently with the first. During the period of overlap, the sentences are served at the same time. However, the longer portion of the second sentence must be served after the concurrent portion has been served. As applied in this case, the second term of incarceration must be served in 1989, after the term of incarceration for count I has been served in 1988.

This court recently held that an intermittent sentence is not permitted to be instituted by a court, even if such a sentence is consented to by the defendant. *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989). However, the sentences imposed in the present case are distinguishable from the sentences at issue in *Texel*. *Texel* concerned straight sentences to jail time, while in this instance the appellant was sentenced to probation, with the period of incarceration merely a condition of probation. Because the appellant will be under the jurisdiction of the judicial system for the entire term of his probation, a total of 4 years, requiring him to serve his jail time intermittently throughout those years does not mean the sentences themselves are intermittent ones. Therefore, the reasoning utilized in *Texel* is inapplicable here.

The appellant also assigns as error the sentences imposed by the district court, contending that they are excessive. The appellant was convicted of three counts of attempted criminal mischief for amounts in excess of $300. These are Class I

misdemeanors, each punishable upon conviction by 1 year's imprisonment, a $1,000 fine, or both. (See Neb. Rev. Stat. §§ 28-519 and 28-201(4)(d) (Reissue 1985).) Upon conviction of a first-offense misdemeanor, an offender may be placed on probation for a term not to exceed 2 years. (See Neb. Rev. Stat. § 29-2263(1) (Reissue 1985).) In the present case, upon conviction, the appellant received three terms of probation for 2 years, the second count to be served concurrently with the first, and the third consecutively to counts I and II.

Section 29-2262(2)(b) allows the imposition of a 90-day term of incarceration as a condition of probation. This court has repeatedly held that sentences imposed within the limits prescribed by the statutes in question will not be disturbed on appeal absent an abuse of discretion. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). The sentences being within what is authorized by statute, and no abuse of discretion appearing from the record, this assignment of error is also without merit.

The judgment of the district court is, therefore, affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent. I believe that the sentences imposed by the district court were erroneous for a reason distinct from the imposition of concurrent or consecutive sentences. Although this error in sentencing was not addressed by counsel, I would nonetheless find it to be plain error requiring reversal. Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity and fairness of the judicial process. *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988); *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988).

Subsequent to the filing of the briefs in this case, this court decided *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989). In *Texel*, we held that an intermittent sentence in a criminal case is erroneous, even if consented to by the defendant. The appellant in *Texel* was convicted of seven counts of violating Neb. Rev. Stat. § 28-1102 (Reissue 1985), and one count of violating Neb.

Rev. Stat. § 28-1105 (Cum. Supp. 1986). The appellant was sentenced to pay a fine of $1,000 on each of the eight counts and to consecutive 30-day terms of incarceration on each count, to be served intermittently during 20 days of each of the succeeding 12 months. This court stated that intermittent sentences are not permitted, although in *State v. Jurgens*, 187 Neb. 557, 192 N.W.2d 741 (1971), we had held that if the defendant consented to the intermittent sentence, the sentence could stand. We explicitly rejected that statement in *Texel*. "[A] sentence is not in the nature of a quasi-contract which a defendant is free to accept or reject. A sentence as imposed either is or is not within a court's authority and is either legally correct or erroneous." *Texel, supra* at 814, 433 N.W.2d at 544.

An argument can be made that *Texel* and the present case are distinguishable because this case involves sentences of probation and *Texel* concerned straight jail sentences. However, any distinction is unduly formalistic. It is difficult to imagine a valid reason for distinguishing between jail sentences as conditions of probation and jail sentences in general. The defendant is still in a position of "doing time," and the logic utilized in reaching our decision in *Texel* seems equally applicable here.

> [W]idely varying the method of serving periods of incarceration increases the likelihood of uneven application of the law to various individuals in our society. Not only is a prisoner entitled to pay his debt to society in one stretch, not in bits and pieces, [citation omitted], but society also has the right to expect that once a defendant has been incarcerated, the time will not be served in bits and pieces.

Texel, supra at 814, 433 N.W.2d at 544.

In the present action, as in *Texel*, the appellant was sentenced to terms of imprisonment to be served intermittently. It is apparent from a review of the record that the judge imposed these sentences in an attempt to ensure that the appellant was able to continue his education throughout the year. However, regardless of the intentions of the district judge, these sentences cannot stand.

It has long been settled in this jurisdiction that when a person is convicted of several distinct offenses and a cumulative sentence is imposed, the judgement should not fix the day on which each successive term of imprisonment should commence, but should direct that each successive term begin immediately following cessation of the presiding term, as the prior term of imprisonment may be shortened by the good behavior of the defendant, by executive clemency, or by a reversal of the judgment. *Luke v. State*, 123 Neb. 101, 242 N.W. 265 (1932); *In re Walsh*, 37 Neb. 454, 55 N.W. 1075 (1893).

Because the terms of imprisonment ordered to be served as conditions of probation are intermittent, I would remand the cause to the district court for resentencing in view of our opinion in *State v. Texel, supra*. Therefore, I dissent.

GRANT, J., dissenting.

I join in the dissent of Judge White and write only to add that I think the concern about interrupting this defendant's schooling is unwarranted. The fact is that it appears to me that this defendant needs to have his education interrupted while he matures and shows himself ready to assume an appropriate role in society. Many people have had their education interrupted without any serious effect on their later schooling. I also would remand the cause for resentencing.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS A. SHOCKLEY, APPELLANT.

435 N.W.2d 903

Filed February 17, 1989. No. 88-366.

1. **Sentences: Due Process.** Due process safeguards must be observed when a new charge leading to magnified criminal punishment is made in an enhanced sentence proceeding.
2. **Constitutional Law: Mentally Disordered Sex Offender: Due Process.** Neb. Rev. Stat. §§ 29-2911 et seq. (Reissue 1985), regarding the determination of whether a criminal is a mentally disordered sex offender, afford sufficient procedural protections to survive constitutional attack.
3. **Sentences: Appeal and Error.** Sentences imposed within the limits prescribed by

the statutes in question will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Coleen J. Nielsen for appellant.

Robert M. Spire, Attorney General, and Vanessa R. Jones for appellee.

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

PER CURIAM.

This is an appeal from a criminal conviction returned after a plea of no contest to attempted first degree sexual assault on a child, a Class III felony. After the appellant's conviction, the court ordered a presentence investigation, including a mentally disordered sex offender evaluation.

Two months later, on January 13, 1988, the defendant requested additional evaluations. That request was granted. On March 11, the defendant filed three motions with regard to the mentally disordered sex offender determination. The first was entitled "Motion to Determine Statutes Unconstitutional." In that motion, the appellant asked the court to declare the mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 et seq. (Reissue 1985), void and unenforceable as unconstitutional, asserting that the statutes deprived the defendant of his right to due process of law, confrontation, and compulsory process.

The second defense motion concerned the burden of proof in the determination of whether the defendant was a mentally disordered sex offender. The final motion requested an evidentiary hearing regarding the determination of the mentally disordered sex offender status. All motions were overruled by the court on March 21.

The defendant was sentenced to imprisonment under the jurisdiction of the Department of Correctional Services for a term of not less than 4 nor more than 8 years. The defendant was then committed to the Lincoln Regional Center for

treatment of his mental disorder until such time as he is no longer mentally disordered, or when he has received the maximum benefit of treatment.

The defendant contends that the district court erred in (1) denying the appellant an evidentiary hearing and refusing to find the mentally disordered sex offender act unconstitutional, and (2) imposing an excessive sentence.

The appellant is urging this court to abandon its holding in *State v. Miller*, 221 Neb. 862, 381 N.W.2d 156 (1986), in which we distinguished the Nebraska mentally disordered sex offenders act from the Colorado sex offender statute, which was held unconstitutional by the U.S. Supreme Court in *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967). We decline to do so.

Although in *Miller* we were concerned with a misdemeanor conviction, while in the present case the appellant stands convicted of a felony, the logic of our opinion in *Miller* is equally applicable in this case. In fact, the appellant in the present action is statutorily accorded more due process rights than the appellant in *Miller*, as § 29-2912 states that the procedural protections of §§ 29-2911 to 29-2921 are merely discretionary with the court in cases of misdemeanors. Therefore, we find *Miller* controlling, and affirm the judgment of the district court.

As discussed in *Miller*, *Specht* concerned a challenge to Colorado's sex offenders act. The defendant in *Specht* had been convicted under an indecent liberty statute but was sentenced under the sex offenders act, which allowed for the imposition of an indeterminate term of from 1 day to life. The U.S. Supreme Court held that due process safeguards must be observed when a new charge leading to magnified criminal punishment is made in an enhanced sentence proceeding. We distinguished the statute at issue in *Specht* from § 29-2915, stating:

> The Nebraska statute is distinguishable in that "no sentence to treatment shall exceed the maximum length of such offender's sentence." § 29-2915. The statute does not allow any enhancement of the defendant's sentence because he is a mentally disordered sex offender. Furthermore, the Nebraska statute recognizes that the

> defendant "shall be accorded all the [due process] rights a defendant has in sentencing proceedings."

State v. Miller, supra at 865, 381 N.W.2d at 158. Because we can see no basis for distinguishing the present case from *Miller*, this first assignment of error is without merit.

Next, the appellant challenges the sentence imposed by the district court, contending that it is excessive. The appellant was convicted of attempted first degree sexual assault on a child, a Class III felony. This crime carries a penalty of 1 to 20 years' imprisonment. The sentence imposed of 4 to 8 years is within the limits prescribed by statute. This court has repeatedly held that sentences imposed within the limits prescribed by the statutes in question will not be disturbed on appeal absent an abuse of discretion. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Dillon*, 222 Neb 131, 382 N.W.2d 353 (1986). It does not appear from the record that the trial judge abused his discretion. Therefore, this assignment of error is also without merit.

Because we find both of appellant's assignments of error to be meritless, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent in the present case for the reasons articulated in my dissent in *State v. Miller*, 221 Neb. 862, 381 N.W.2d 156 (1986). In *Miller*, I stated at 866-67, 381 N.W.2d at 159:

> That a person may be confined in the same institution as a sex offender without having the opportunity to examine the basis (if any) of the analyst's conclusion, while the mentally ill patient has had that right, does not seem to me to be consistent with due process or equal protection of the law.

I maintain my belief that such disparate treatment is incompatible with the constitutional guarantees of due process and equal protection, and additionally believe that both the present case and *Miller* are inconsistent with the reasoning of the U.S. Supreme Court in *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980).

In *Vitek*, the Supreme Court affirmed the decision of the federal district court of Nebraska in declaring Neb. Rev. Stat.

§ 83-180 (Reissue 1987) unconstitutional. Section 83-180 provided for the transfer of inmates from a correctional facility into a mental institution, merely on the basis of the recommendation of a physician or psychologist. The statute provided no procedure to ensure compliance with due process guarantees. The district court invalidated the statute on two grounds, and the Supreme Court agreed that both of the grounds were independently sufficient to declare the statute unconstitutional. The first basis relied upon for declaring the statute unconstitutional concerned the statutorily created liberty right contained in the particular statutory scheme. The second ground, however, is equally applicable to proceedings pursuant to Neb. Rev. Stat. §§ 29-2911 et seq. (Reissue 1985), the statutes at issue in this appeal.

As stated by the Supreme Court, "The District Court was also correct in holding that independently of § 83-180(1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections." 445 U.S. at 491. The Court found the procedural protections necessary for a number of reasons. First, the loss of liberty produced by an involuntary commitment is more than the loss of liberty resulting from confinement. Commitment to a mental hospital can engender adverse social consequences to the individual. As stated by the district court, and quoted with favor by the Supreme Court:

> "[T]he fact of greater limitations on freedom of action at the Lincoln Regional Center, the fact that a transfer to the Lincoln Regional Center has some stigmatizing consequences, and the fact that additional mandatory behavior modification systems are used at the Lincoln Regional Center combine to make the transfer a 'major change in the conditions of confinement' amounting to a 'grievous loss' to the inmate."

Vitek, 445 U.S. at 492. The Court concluded that a convicted felon is entitled to the benefit of procedures before he is found to have a mental disease and transferred to a mental hospital.

Next, the Supreme Court stated that the consequence of commitment is distinct from the consequence of mere confinement.

> None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. [Citations omitted.] A criminal conviction and sentence of imprisonment . . . do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

Vitek v. Jones, 445 U.S. 480, 493-94, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). There is no legitimate basis for distinguishing between a prisoner who is transferred from prison to a mental hospital and a person who is convicted of a crime, subject to a specific statutory sentence, and then found to be a mentally disordered sex offender and ordered to serve his or her sentence, by means of involuntary commitment, in a mental hospital. As stated by the Supreme Court, "A criminal conviction and sentence of imprisonment . . . do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections." *Id.*

The Supreme Court also agreed with the minimum procedures articulated by the district court in order to ensure sufficient protection to the liberty interest of the individual. The Court required the State of Nebraska to observe the following procedures before transferring a prisoner from prison to a mental hospital:

> "A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
>
> "B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer

and at which an opportunity to be heard in person and to present documentary evidence is given;

"C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

"D. An independent decisionmaker;

"E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

"F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

"G. Effective and timely notice of all the foregoing rights."

Vitek, 445 U.S. at 494-95.

The only requirement that did not receive approval by a majority of the Supreme Court was that of availability of legal counsel. Although Justice Powell agreed that qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer, he did not feel that this independent assistance demands the services of a licensed attorney.

As I do not feel that a valid distinction can be made between an inmate who will be transferred to a mental hospital and one who will be involuntarily committed upon conviction, I believe that the "minimum procedures" afford constitutionally adequate protection to the liberty interests of the individual.

SHANAHAN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. EVAN C. JOLITZ, APPELLANT.

435 N.W.2d 907

Filed February 17, 1989. No. 88-372.

1. **Constitutional Law: Search and Seizure.** If a search is a joint endeavor involving a private person and a state or government official, the search is subject to the constitutional safeguard against an unreasonable search, prohibited by the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution.
2. **Motions to Suppress: Appeal and Error.** In reviewing the trial court's ruling on a motion to suppress evidence, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence.
3. _____: _____. The Supreme Court will uphold the trial court's findings of fact on a motion to suppress unless those findings are clearly wrong.
4. **Appeal and Error.** The Nebraska Supreme Court will not consider assignments of error which are not discussed in the appellant's brief.
5. **Motions to Suppress.** On a motion to suppress evidence, the trial 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.
6. **Search Warrants: Affidavits: Probable Cause.** To invalidate a warrant on the ground the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged information was material or necessary to a finding of probable cause.
7. **Search Warrants: Probable Cause.** In determining probable cause for issuance of a search warrant, the issuing magistrate must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
8. _____: _____. Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.
9. **Search Warrants: Probable Cause: Appeal and Error.** Where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

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

Jerry L. Soucie for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

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

CAPORALE, J.

Following a bench trial, defendant-appellant, Evan C. Jolitz, was adjudged guilty of possessing more than 1 pound of marijuana in violation of Neb. Rev. Stat. § 28-416(5) (Reissue 1985), and was sentenced accordingly. He assigns three errors, which claim the evidence used against him was obtained in violation of the 4th and 14th amendments to the U.S. Constitution and of article I, § 7, of the Nebraska Constitution because the warrants authorizing the search and seizure were based on (1) a prior warrantless and unlawful search and seizure and (2) a false affidavit. We affirm.

The evidence adduced at the hearing on defendant's suppression motion establishes that while off duty, Kevin Stukenholtz, a lieutenant of the Nebraska State Patrol not regularly engaged in narcotics work, gave a hitchhiker, Thomas Mark Hart, three rides in Stukenholtz' personal automobile. Neither man knew the other before these encounters, and the rides occurred while Stukenholtz was on personal trips.

The first episode took place in June 1986, at which time Hart asked Stukenholtz to drive him to Swedeburg. Hart indicated that he hitchhiked all over the country and was coming from Oklahoma. While traveling toward Swedeburg, Hart, unaware that Stukenholtz was with the State Patrol, told Stukenholtz that he was going to visit Jolitz. According to Stukenholtz, Hart said Jolitz grew marijuana and stored it, when harvested, in a freezer or bank vault in an "old bank building" owned by Jolitz and located near his residence. Following Hart's directions, Stukenholtz drove Hart to Jolitz' home in Swedeburg, where he, without seeing anyone else, left Hart off and drove away before Hart entered the house. Stukenholtz then contacted the deputy county attorney about acquiring a search warrant, and also contacted an Investigator Hobbs, whom Stukenholtz knew had investigated the growing and sale of marijuana by Jolitz. Hart, however, claimed he only told Stukenholtz that Jolitz grew marijuana and had some greenhouses, but never mentioned the bank building or that Jolitz stored the marijuana in the basement.

The second encounter occurred in September 1986, at which time Stukenholtz once more drove Hart to Jolitz' residence and

again saw no one else at the premises before he left. On this trip, Hart had asked Stukenholtz to come into the house and smoke some marijuana, which offer Stukenholtz declined. Although Stukenholtz still did not know who the hitchhiker was, he considered anew getting a search warrant, and contacted the deputy county attorney, who said that without corroboration of the hitchhiker's information, there was no basis for obtaining a warrant.

The third incident occurred on May 19, 1987. This time Hart was on his way to Montana when his automobile broke down, so he decided to hitchhike to Jolitz' home. By this time, Stukenholtz recognized the hitchhiker and assumed he was going to Jolitz'. Stukenholtz again did not identify himself as a law enforcement officer and, being interested in getting information to assist in acquiring a search warrant, let Hart generate conversation about Jolitz. Hart indicated he was indeed en route to Jolitz' and discussed "scoring some dope" for Stukenholtz. Stukenholtz indicated to Hart that he was familiar with marijuana and smoked it. They talked about different techniques of growing high-grade marijuana, fertilization, and pollination.

According to Stukenholtz, Hart told Stukenholtz about the marijuana Jolitz produced and

> talked about how good it was, high quality, Evan's ability to grow dynamite pot, as he put it. He talked about Evan's schooling, how informed he was in growing marijuana, how impressed he was with his greenhouse and his operation, and how he and Evan were close friends and that for marijuana work, that Evan always gave him free pot and that when he was out of money, that Evan always took care of him in the way of marijuana.

Stukenholtz planned to drop Hart off at Jolitz' and then proceed to Wahoo, as he had done the past two times. However, when they got to Jolitz', Hart said Jolitz was not home, as Jolitz' automobile was not there and it was a little early for Jolitz to be home from work, and said, "I'll run in and get us some pot, if you can give me a ride to Wahoo." Once again, according to Stukenholtz, Hart said he was going to get the marijuana in the bank building. Stukenholtz parked around a

bend, facing east, away from Jolitz' house. Hart got out, went directly west of the vehicle to the bank building, and disappeared from Stukenholtz' sight, going south down along the east side of the building. Stukenholtz remained in his automobile, where his view of the east side was obscured by a cabin adjacent to the east side of the bank building. Hart entered the bank building through a closed but unlocked window on the east side of the bank, the side next to the cabin, and went to the basement freezer where he knew the marijuana was always kept. He found two big garbage sacks full of marijuana buds, still green and wet, appearing to be recently harvested, in the freezer. He took "a lot" of the marijuana out of one of the garbage bags and put it in another bag, which he took with him.

After about 5 minutes, Stukenholtz, watching in the mirror, saw Hart come out from where he had disappeared and approach the automobile. Hart opened the door of the vehicle, placed a large white plastic garbage bag on the floor, got in, and said, "I got us some good dope." Stukenholtz responded, "[O]h, really? Was there any more in there?" Hart answered, "[Y]es, there's another bag about this size." The marijuana was not packaged, rolled, or processed, and was wet and stripped of branches, although not stemless.

Hart opened the bag, showed it to Stukenholtz, stated "it looked like some good marijuana," and also stated that he was going to give Stukenholtz "some for . . . being such a good guy and giving him a ride." Stukenholtz said "fine," and Hart put about 1 ounce, a handful, of loose marijuana in Stukenholtz' gym bag in the back seat.

They did not discuss how Hart got into the building, but, according to Stukenholtz, he asked Hart what Jolitz' attitude would be about Hart taking that much marijuana. Hart said that "they were friends and partners and that [Jolitz] had owed him some money and that [Jolitz] wouldn't care and that he had on numerous occasions gotten marijuana from [Jolitz]. And if [Jolitz] wasn't home, he just left a note that Sparky was there." Hart, on the other hand, denies making any comment about whether Jolitz was home, and also denies mentioning the bank building or any agreement he may have had with Jolitz, but

does admit some kind of agreement existed whereby Jolitz gave Hart permission to enter the bank building through the window when Hart wanted some marijuana.

Stukenholtz took Hart into Wahoo, let him off at a park, and, planning on arresting Hart once he obtained a warrant, made arrangements to pick Hart up later and give him a ride either back to Jolitz' residence or to Lincoln. Hart remained at the park and smoked some marijuana. Later that day, at about 5 p.m., Stukenholtz returned to the park and arrested Hart for possession of marijuana.

Hart testified he had visited Jolitz about twice a year since 1979. He said they had gone to college together, and characterized their relationship as that of friends. Hart also said that over the years he had done odd jobs for Jolitz in exchange for marijuana and that he was willing to travel that distance for the marijuana because it was free, and it was "real good. He does it very scientifically." Hart also described Jolitz' marijuana-growing operation.

After arresting Hart, Stukenholtz obtained a warrant to search Jolitz' premises. The warrant stated that based on Stukenholtz' affidavit, there was probable cause to believe that "dope, contraband, or drug paraphenalia [sic] and/or marijuana" was concealed on Jolitz' premises, and gave officers the authority to seize any such contraband. In his supporting affidavit, Stukenholtz recited the facts surrounding his three encounters with Hart as detailed above, and stated that he, Stukenholtz, believed the substance Hart acquired was marijuana, that Hart offered him some, and that he arrested Hart. The affidavit also reflects that Stukenholtz confirmed through the Wahoo Police Department that Evan C. Jolitz lived at that address, that "said individual was a pathologist and was at one time a professor at the University of Nebraska or an area college, and that Mr. Jolitz at one time was a professional football player." The warrant was executed at about 8 o'clock the evening of May 19.

After that search, a second warrant was obtained to again search Jolitz' premises in order to seize "[r]ecords, computer disks or any documentation which may suggest or be evidence of a delivery network for marijuana . . . ."

In the affidavit attached to his motion to suppress, Jolitz declares that he owns the property which was searched, that he was not present during the searches, that all buildings were locked or otherwise secured, that he had never given Hart permission or authority to enter his property during his absence, and that the last time he had seen Hart was in the spring of 1986.

In connection with the first issue, Jolitz in essence contends that Stukenholtz participated in Hart's unlawful entry and search of Jolitz' property, that Hart's actions were therefore the State's actions, that the warrants which were later issued were obtained as a result of Hart's initial unlawful entry and search, and that as a consequence, the evidence seized pursuant to the warrants was obtained in violation of the previously mentioned constitutional provisions and must therefore be suppressed.

We most recently considered the circumstances under which a search by a private person becomes the search of the State, and thus subject to the federal and state constitutional protections against unreasonable searches and seizures, in *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989). Therein, in holding that the State had participated in the warrantless search because, absent the presence of deputy sheriffs, the private citizens making the search would not have been on the invaded premises, let alone looking for anything, we wrote:

> [A] private person's status as a state or government agent in a search is not restricted to a search ordered, requested, or initiated by the state or government official but may include a search which is a joint endeavor between a private person and a state or government official. We further hold that a search is subject to the constitutional safeguard against an unreasonable search, prohibited by the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, if the search is a joint endeavor involving a private person and a state or government official.

Id. at 941, 434 N.W.2d at 325.

In considering the elements of a joint endeavor between a private citizen and a government official, *Abdouch* cited with approval language from 1 W. LaFave, Search & Seizure, a

Treatise on the Fourth Amendment § 1.8(b) (2d ed. 1987), which observes that the official's direct participation is not necessarily required; it may be sufficient that the official was standing by, giving tacit approval to the entry made by the private person. However, the three cases LaFave cites in support of that observation narrow it considerably. In *Com. v. Borecky*, 277 Pa. Super. 244, 419 A.2d 753 (1980), not only did the officer have prior knowledge that the private citizen informer was going to search defendant's premises and thus searched the informer prior to entry, the informer knew of the officer's law enforcement status. In *State v. Becich*, 13 Or. App. 415, 509 P.2d 1232 (1973), after the suspect told the officer the stolen property was at defendant's house, the officer told the suspect he would drive by there and observe the suspect load the property into the suspect's automobile. And in *Moody v. United States*, 163 A.2d 337 (D.C. 1960), the complaining witness told the officer that defendant had stolen items of personalty, including clothes, belonging to the witness, and as a result of the accusation, the officer arrested the defendant and, at the witness' suggestion, went to defendant's apartment with the witness to verify the crime, during which time defendant remained in the custody of another officer. The witness entered the defendant's apartment, gathered up the articles claimed to be his, and handed them to the officer, who remained in the hallway.

The case before us is distinguishable from those cases and from *Abdouch* as well. The record under consideration establishes that Hart's only motivation for entering the bank building was to acquire some marijuana. Although Stukenholtz was admittedly interested in obtaining enough information to support the issuance of a warrant to search Jolitz' premises, Hart did not know that; in fact, he was not aware that Stukenholtz was a law enforcement officer. Stukenholtz did not himself enter the bank building, nor did he direct Hart to enter the building and look for the marijuana. Indeed, at the time of Hart's entry, Stukenholtz was so positioned that he could not see the means by which Hart entered the building; so far as Stukenholtz knew, Hart could have had a key. Stukenholtz merely did as Hart asked and, as he had done on two previous

occasions, drove Hart to Jolitz' residence.

It is well established that in reviewing the trial court's ruling on a motion to suppress evidence, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence. *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988). Further, the Supreme Court will uphold the trial court's findings of fact on such a motion unless those findings are clearly wrong. *State v. Barnes*, 230 Neb. 949, 434 N.W.2d 516 (1989); *State v. LaMere*, 230 Neb. 629, 432 N.W.2d 822 (1988).

Under the circumstances, it cannot be said the district court erred in concluding that no joint endeavor existed between Hart and Stukenholtz. Hart, without governmental assistance or intervention, entered and obtained marijuana from Jolitz' premises for a purpose of his own, and was in no sense an instrument of the State. Since Hart's entry and search were not subject to the constitutional limitations on searches and seizures, it follows that his actions did not invalidate the warrants which were subsequently issued. See, also, *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985); *State v. Gundlach*, 192 Neb. 692, 224 N.W.2d 167 (1974), *cert. denied* 421 U.S. 933, 95 S. Ct. 1663, 44 L. Ed. 2d 92 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *reh'g denied* 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120; *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921).

In connection with the second issue, Jolitz claims the district court should have excised from Stukenholtz' affidavit information which was "false and made with a reckless disregard for the truth." The first difficulty with this claim is that it is not discussed in his brief; thus, we cannot know what it is that Jolitz claims was false. It is for reasons of that nature that the law and rules of practice provide that this court will not consider assignments of error which are not discussed. *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988); *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987); Neb. Ct. R. of Prac. 9D(1)d (rev. 1988).

Moreover, if the claim of falsity is understood to relate to the fact that Hart denies telling Stukenholtz where Jolitz kept his marijuana or about any agreement between Hart and Jolitz

permitting Hart to enter the premises and take marijuana, as Stukenholtz asserts in his affidavit, the matter is resolved by the rule that on a motion to suppress evidence, the trial 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. Vann*, 230 Neb. 601, 432 N.W.2d 810 (1988). The trial court was in part likely persuaded by the fact that the record offers no explanation as to how Stukenholtz might otherwise have acquired that information.

As we recently reaffirmed in *State v. Cullen, ante* p. 57, 434 N.W.2d 546 (1989), to invalidate a warrant on the ground the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged information was material or necessary to a finding of probable cause. Jolitz has simply failed to meet that burden.

In determining probable cause for issuance of a search warrant, the issuing magistrate must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *reh'g denied* 463 U.S. 1237, 104 S. Ct. 33, 77 L. Ed. 2d 1453. Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause. *State v. Duff, supra*. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *State v. Duff, supra*; *Illinois v. Gates, supra*.

The affidavit includes Hart's statements to Stukenholtz on the three occasions that he picked up Hart; Stukenholtz' recital of the events of May 19, 1987; Stukenholtz' receipt of the marijuana from Hart; a statement that the officer, based on his experience, believed the substance to be marijuana; a statement

that Hart did not have the marijuana when Stukenholtz picked him up and when Hart left the automobile; and the corroborating information that Stukenholtz was able to obtain from the Wahoo Police Department. This information together provides a substantial basis for concluding that probable cause existed to issue a warrant or that a fair probability existed that contraband or evidence of a crime would be found on Jolitz' premises.

Accordingly, the warrants were issued properly; the judgment of the district court is correct, and it is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE W. BRISTER, APPELLANT.

435 N.W.2d 679

Filed February 17, 1989. No. 88-384.

1. **Criminal Law: Proof.** The burden is on the State to prove all essential elements of the crime charged.
2. **Convictions: Appeal and Error.** A judgment of conviction will not be reversed on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.

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

Thomas Blount for appellant.

Robert M. Spire, Attorney General, and Melanie J. Whittamore for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

GRANT, J.

On November 20, 1987, defendant-appellant, George W. Brister, was charged in the county court for Cass County with contributing to the delinquency of a child in violation of Neb.

Rev. Stat. § 28-709(1) (Reissue 1985), a Class I misdemeanor. Following a trial to the court, the county court found defendant guilty as charged and ordered a presentence investigation. Defendant was sentenced to probation, with conditions including 6 days in the Cass County jail and a $250 fine. The district court for Cass County affirmed the judgment of the county court, and defendant appealed to this court, alleging there was insufficient evidence, as a matter of law, to convict him of the crime charged in the complaint. We affirm.

The burden is on the State to prove all essential elements of the crime charged. *State v. George*, 228 Neb. 774, 424 N.W.2d 350 (1988). A judgment of conviction will not be reversed on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law. *Id.*; *State v. Anderson*, 229 Neb. 436, 427 N.W.2d 770 (1988).

The record shows that the conduct complained of occurred on the night of October 3, 1987, in Plattsmouth, Cass County, Nebraska. The complaining witness, the target of defendant's actions and attentions, was a young girl, 15 years old. Defendant was 21 and had a wife and child. The girl and her two younger brothers had gone across the street to defendant's house at 7 p.m. because the girl's parents had gone out for the evening and defendant's wife was going to babysit the two boys.

At approximately 8 p.m., defendant asked the girl if she would go to the grocery store with him to get some orange juice. After purchasing the orange juice, defendant did not go directly home, but drove down past the railroad tracks near the river. Defendant's reckless driving frightened the girl. After defendant returned to his own neighborhood, the girl testified, defendant asked her if she would sit next to him "because it made him feel younger." After she declined to do so, defendant touched her on the leg on the inside of her thigh.

Defendant and the girl then returned to defendant's home. The girl went across the street to her own house to get a deck of cards to play a card game with defendant's wife. At her home, the girl went into her bedroom to telephone her boyfriend. Approximately 10 minutes later, defendant knocked on the door. When the girl let him in the house, defendant put his arm around her and stated that he was sorry for the way he was

acting, and tried to kiss her on the lips. When the girl resisted, defendant tried to lift her shirt up. She pushed his hands down and told him to leave.

After the girl went back to her bedroom to resume her telephone conversation, defendant returned to the house. He sat on the edge of the girl's bed and wrote her a note telling her, as the girl testified, that "he loved me and he cared about me and that he was going to leave his wife and his kid and his career to run away with me."

The girl told defendant to leave. Defendant then told her that his wife could not fill his needs and he knew the girl could. Defendant was rubbing her neck, and pulled his hands down over her chest, touching her breasts. Defendant again left the house at the girl's request.

The girl then went back to defendant's house to get her brothers. Defendant told his wife that he had to talk to the girl in the bedroom about "boyfriend problems." While they were in the bedroom, defendant told her that he loved her. Defendant's wife interrupted this conversation.

The girl took one of her brothers home. At midnight, she looked out the door and saw defendant coming toward the house. She locked the house and reported the incident to her aunt, who called the police. The aunt testified that the girl sounded hysterical over the telephone and that defendant was standing in front of the girl's house when the aunt arrived there. The girl testified that although defendant "never came out and asked [her] to have sex with him," he did ask her to run away with him three or four times on the night of October 3. She told him no because she "didn't feel the same way about him that he said he felt about [her]."

Section 28-709(1) provides:

> Any person who, by any act, encourages, causes, or contributes to the delinquency or need for special supervision of a child under eighteen years of age, so that such child becomes, *or will tend to become*, a delinquent child, or a child in need of special supervision, commits contributing to the delinquency of a child.

(Emphasis supplied.) Section 28-709(2)(b) defines the term "child in need of special supervision" as "any child under the

age of eighteen years . . . who is habitually truant from school or home; or . . . who deports [her]self so as to injure or endanger seriously the morals or health of [her]self or others." A "delinquent child" is "any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." § 28-709(2)(a).

Defendant contends § 28-709 requires that the acts of the defendant actually result in the child's becoming either delinquent or in need of special supervision. He argues, at page 9 of his brief, that because the girl continued to reject defendant's advances,

> There is no evidence nor any reason to believe that [the girl] has or will now, as a result of [defendant's] acts, violate any law of the state or city or village ordinance, become wayward or habitually disobedient, uncontrolled by her parents, habitually truant from school or home, nor deport herself so as to injure or endanger seriously the morals or health of herself or others.

The county court found that the defendant, by asking the girl to run away with him, was encouraging her to become truant from home, and that the defendant's inappropriate touching and sexual advances toward the girl had the effect of encouraging her to deport herself so as to injure or endanger seriously her morals. Such action would tend to make the girl become a delinquent child. That the young girl was able to resist the blandishments of the older defendant is a tribute to her and should not result in the exoneration of defendant for his improper conduct.

Section 28-709 is addressed to the conduct of the person accused of contributing to the delinquency of a child, not the conduct of the child. The statute does not require that the child actually become delinquent or in need of special supervision, but only that the defendant encourage the child to become delinquent or to need special supervision so that the child will "tend to become a delinquent child, or a child in need of special supervision." Defendant's actions were such as to support a finding that he had violated the statute. See *In re Interest of R.J.*, 224 Neb. 842, 401 N.W.2d 691 (1987).

In light of the foregoing, we hold that the evidence was not so

lacking in probative force that it was insufficient as a matter of law to support defendant's conviction.

The decision of the district court, affirming the decision of the county court, is affirmed.

AFFIRMED.

IN RE INTEREST OF C.D.A., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.E.A., APPELLANT, R.A.A., APPELLEE.

435 N.W.2d 681

Filed February 17, 1989. No. 88-468.

1. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or final order in the court from which an appeal is taken, this court acquires no jurisdiction.
2. **Final Orders: Appeal and Error.** A ruling refusing to permit the withdrawal of an answer of no contest filed pursuant to the provisions of Neb. Rev. Stat. § 43-279.01 (Reissue 1988) is not a final, appealable order.

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

Richard Douglas McClain for appellant.

Robert M. Spire, Attorney General, and Melanie J. Whittamore for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

CAPORALE, J.

R.E.A., the father of infant girl C.D.A., purports to appeal from the denial of a new trial on the order of the separate juvenile court overruling his motion to withdraw the answer of no contest he, pursuant to Neb. Rev. Stat. § 43-279.01(2) (Reissue 1988), entered at the adjudication hearing. Lacking jurisdiction, we dismiss.

Following the hearing at which the father entered the aforesaid answer, the juvenile court, on February 22, 1988,

determined the infant to be a child within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and committed temporary legal custody over her to the Department of Social Services. On March 24, 1988, the father moved to withdraw his no-contest answer. That motion was overruled on March 28. On April 6, the father filed a motion for a new trial, which he amended the next day. On May 5, the court below overruled both of those motions. On May 10, the father filed a pleading seeking once again to withdraw his no-contest answer "and/or" a new trial. These requests were denied by the juvenile court on May 16. On May 27, the father filed a notice purporting to appeal from the orders entered March 28, 1988, May 5, 1988, and May 16, 1988.

In the absence of a judgment or final order in the court from which an appeal is taken, this court acquires no jurisdiction. *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); Neb. Rev. Stat. § 25-1911 (Reissue 1985); Neb. Ct. R. of Prac. 4A(1)b (rev. 1988). Without engaging in an analysis of the significance, if any, of the pleading the father filed on May 10, 1988, it is clear he seeks to appeal not from the February 22, 1988, adjudication, which is a final, appealable order, *In re Interest of Z.R.*, 226 Neb. 770, 415 N.W.2d 128 (1987), but from the various orders relating to the withdrawal of his no-contest answer. Because a juvenile court's ruling on a motion to withdraw a no-contest answer does not in and of itself affect a parent's relationship with his or her child, the ruling is interlocutory rather than final, whether it is to be treated as analogous to a ruling on a motion for leave to amend a civil pleading, see *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987), or as analogous to a ruling on a presentence motion to withdraw a plea of no contest in a criminal case, see *State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987).

Because the orders appealed from are not final, this court lacks jurisdiction; accordingly, this purported appeal must be, and hereby is, dismissed.

APPEAL DISMISSED.

GEORGE AND JEANETTE HALL, HUSBAND AND WIFE, APPELLANTS, V. GARY PHILLIPS, APPELLEE.

436 N.W.2d 139

Filed February 24, 1989. No. 86-847.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Nuisances: Property: Words and Phrases.** A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.
4. **Torts: Nuisances: Property: Words and Phrases.** For the tort of private nuisance, an intentional invasion of another's interest in land exists when an actor purposefully causes the invasion, knows that the invasion is resulting from the actor's conduct, or knows that the invasion is substantially certain to result from the actor's conduct.
5. **Torts: Nuisances: Liability: Proximate Cause: Negligence.** In a law action one may be subject to liability for a tortious private nuisance (1) if the defendant's conduct is a proximate cause of an invasion of another's interest in the private use and enjoyment of land and (2) if the invasion is intentional and unreasonable or is otherwise actionable under rules controlling liability for negligence or liability for abnormally dangerous conditions or activities.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Reversed and remanded for further proceedings.

Joy Shiffermiller, of Atkins Ferguson Zimmerman Carney, P.C., for appellants.

James W. Ellison, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee.

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

SHANAHAN, J.

As owners of Morrill County cropland and a damaged bean crop, George and Jeanette Hall filed suit against Gary Phillips

and alleged that Phillips' tortious conduct constituted a private nuisance which interfered with Halls' use and enjoyment of their land. According to Halls, the private nuisance resulted from Phillips' application of the herbicide Atrazine to the corn crop planted on his tract adjacent to Halls' land and windblown soil from Phillips' tract, containing the applied Atrazine, which fell on Halls' land where their bean crop was planted. From a summary judgment and dismissal of their action, Halls appeal.

> A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. [Citations omitted.] 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.

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 162-63, 425 N.W.2d 872, 875 (1988).

On May 10, 1985, Phillips planted a corn crop on his tract adjacent to the Hall land. On May 15, Phillips applied "Atrazine 4L Herbicide" to his corn crop. Among the "Precautionary Statements" contained in the manufacturer's literature supplied for Atrazine, the herbicide, as a "liquefied formulation," may be sprayed on a prospective corn crop as a preemergent control of weeds which might otherwise spring up in the planted corn. The information from the manufacturer warned: "Avoid using Atrazine near adjacent desirable trees, shrubs, or plants, or injury may occur." Also, the manufacturer's data outlined the restricted use of cropland, especially pertaining to rotational crops, after Atrazine application. Atrazine is the "cheapest" or least expensive herbicide for weed control in a corn crop and had been on the market for approximately 20 years before Phillips' application to his crop. Although other herbicides degrade comparatively quickly, Atrazine is neither readily biodegradable nor subject to rapid deterioration and "has quite a long life to it." After an

application of Atrazine, 2 years would elapse before the herbicide leached to a level safe for a bean crop.

Phillips' application of Atrazine was free from negligence and without drift from his tract. At the site of the Phillips and Hall land, a 50-mile-per-hour wind was not unusual during the planting season. On May 30, an extraordinarily high wind occurred with "dirt and soil . . . moving off of the fields."

Halls had planted beans on their land for 20 years and had never applied Atrazine to their cropland. Around June 10, George Hall planted a bean crop and later noticed that the young bean plants had suffered burns from Atrazine, which "stunted their growth" and prevented normal maturation of the plants. An adjuster from Phillips' insurance company said "he was sure that Atrazine had created the problem." A chemical analysis disclosed Atrazine present in the soil sample submitted by Halls. Yield from Halls' land was reduced on account of the Atrazine injury to the bean crop.

In response to Halls' claim based on nuisance, Phillips admitted applying Atrazine to his corn crop, but denied liability to Halls and also asserted that the proximate cause of Halls' damage was the severe wind of May 30, 1985, "an Act of God."

Both Halls and Phillips moved for summary judgment. In contemplation of a summary judgment, the district court concluded that the Restatement (Second) of Torts §§ 821A et seq. (1979) "correctly sets forth the law of nuisance, and defendant's acts do not amount to nuisance under the Restatement." The district court then dismissed Halls' action. Halls claim that the district court improperly granted summary judgment to Phillips and should have granted a summary judgment to them. Phillips contends that summary judgment for him is correctly based on the Restatement, *supra*, § 822 at 108, which contains a characterization or description of the conduct which may result in liability for the tort of private nuisance:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or

> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

PRIVATE NUISANCE UNDER THE RESTATEMENT: INTENTIONAL AND UNREASONABLE INVASIONS

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." The Restatement, *supra*, § 821D at 100.

The Restatement, *supra*, § 822, draws a distinction between intentional and unintentional invasions of another's interest in land, which may be characterized as a private nuisance, and imposes liability only if the invasion is "intentional and unreasonable" or "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities."

What determines the existence of an intentional invasion of another's interest in land?

As noted in Prosser and Keeton on the Law of Torts, *Nuisance* § 87 at 624-25 (5th ed. 1984):

> Occasionally, the defendant may act from a malicious desire to so harm for its own sake; but more often the situation involving a private nuisance is one where the invasion is intentional merely in the sense that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests [is] occurring or [is] substantially certain to follow.

Alternative constituents of an "intentional invasion" of another's interest in land are recognized in the Restatement, *supra*, § 825 at 117:

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
>
> (a) acts for the purpose of causing it, or
>
> (b) knows that it is resulting or is substantially certain to result from his conduct.

As a meaning for "intentional invasion," the Restatement, *supra*, § 825, comments *c.* and *d.* at 180, provides:

> *c. Meaning of "intentional invasion."* To be

> "intentional," an invasion of another's interest in the use and enjoyment of land, or of the public right, need not be inspired by malice or ill will on the actor's part toward the other. An invasion so inspired is intentional, but so is an invasion that the actor knowingly causes in the pursuit of a laudable enterprise without any desire to cause harm. It is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional. It is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing the invasion. He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct....
>
> *d. Continuing or recurrent invasions.* Most of the litigation over private nuisances involves situations in which there are continuing or recurrent invasions resulting from continuing or recurrent conduct; and the same is true of many public nuisances. In these cases the first invasion resulting from the actor's conduct may be either intentional or unintentional; but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional.

To determine whether an intentional invasion exists in reference to a private nuisance, several courts have adopted the characterization embodied in the Restatement, *supra*, § 825; for example, *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573 (Utah 1985); *Padilla v. Lawrence*, 101 N.M. 556, 685 P.2d 964 (1984); *Keiswetter v Petoskey*, 124 Mich. App. 590, 335 N.W.2d 94 (1983); *Hughes v. Emerald Mines Corp.*, 303 Pa. Super. 426, 450 A.2d 1 (1982); *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 628 P.2d 239 (1981). Thus, for the tort of private nuisance, an intentional invasion of another's interest in land exists when an actor purposefully causes the invasion, knows that the invasion is resulting from the actor's conduct, or knows that the invasion is substantially certain to result from the actor's conduct.

Since the Restatement refers to an intentional and

"unreasonable" invasion of another's right to use and enjoy land, the meaning of *unreasonable* is expressed in the Restatement (Second) of Torts § 826 at 119 (1979):

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
>
> (a) the gravity of the harm outweighs the utility of the actor's conduct, or
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

In further explanation of "unreasonableness," required in the tort of private nuisance based on an intentional invasion of another's interest in land, the Restatement, *supra*, § 826, comment *c.* at 120-21, states:

> *The point of view.* The unreasonableness of an intentional invasion is determined from an objective point of view. The question is not whether the plaintiff or the defendant would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Consideration must be given not only to the interests of the person harmed but also for the interests of the actor and to the interests of the community as a whole. Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards.

Thus, according to the Restatement, *supra*, § 826, in deciding whether a defendant is liable for a private nuisance based on an intentional invasion of another's interest in land, the trier of fact must determine whether the gravity of harm outweighs the utility of the defendant's conduct or whether the defendant's conduct causes serious harm, but payment of compensatory damages would render the defendant's continued conduct unfeasible. Even if utility of a defendant's conduct outweighs the gravity of the harm caused by the intentional invasion in a private nuisance, a defendant may still be liable if (1) the defendant's conduct causes severe harm and

(2) the defendant's compensation for the invasion will not prohibit the defendant's utilitarian conduct. *Crest Chevrolet, etc. v. Willemsen*, 129 Wis. 2d 129, 384 N.W.2d 692 (1986); *Padilla v. Lawrence, supra*; *Hughes v. Emerald Mines Corp., supra*.

As expressed in the Restatement, *supra*, § 827 at 124:

> Gravity of Harm—Factors Involved
>
> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) The extent of the harm involved;
>
> (b) the character of the harm involved;
>
> (c) the social value that the law attaches to the type of use or enjoyment invaded;
>
> (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
>
> (e) the burden on the person harmed of avoiding the harm.

The Restatement, *supra*, § 828 at 129, contains:

> Utility of Conduct—Factors Involved
>
> In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) the social value that the law attaches to the primary purpose of the conduct;
>
> (b) the suitability of the conduct to the character of the locality; and
>
> (c) the impracticability of preventing or avoiding the invasion.

Regarding an actionable private nuisance, we note that the Restatement's provisions pertain to an action for damages. Different considerations may exist concerning equitable relief. "[D]enial of relief by way of injunction is not always a precedent for denial of relief by way of damages. Consequently, liability for damages should be treated independently, and this Chapter is primarily concerned with damages." Restatement (Second) of Torts § 822, comment *d.* at 111 (1979).

NEBRASKA NUISANCE LAW

Nebraska cases, enunciating applicable standards to

determine whether an invasion constitutes a private nuisance, primarily involve claims for equitable relief. The Restatement's distinction between intentional and unintentional invasions has never been explicitly recognized in Nebraska. Relatively recent Nebraska cases, however, apply a standard consistent with the Restatement's view regarding intentional and unintentional invasions: "Ordinarily, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation." *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 240-41, 313 N.W.2d 667, 669 (1981); *Flansburgh v. Coffey*, 220 Neb. 381, 370 N.W.2d 127 (1985); *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W.2d 394 (1968).

Before *Cline*, *Flansburgh*, and *City of Syracuse*, this court, in *Vana v. Grain Belt Supply Co.*, 143 Neb. 125, 10 N.W.2d 474 (1943), refused to enjoin or allow damages as the result of a hog-feeding operation conducted near the Omaha stockyards. In so doing, the court announced that "hog-feeding yards are not in themselves a nuisance, and . . . they become such *only when improperly maintained or conducted*." (Emphasis supplied.) *Id.* at 129, 10 N.W.2d at 476. The *Vana* court further noted:

> "[W]here pigs are raised under conditions as clean and sanitary as can reasonably be obtained, considering the characteristics of the animal and the necessity of confinement to close quarters, the fact that odors from those quarters are carried over to the premises of the summer residence of another will not make an actionable nuisance."

Id. at 130, 10 N.W.2d at 477 (quoting from *Clark v. Wambold*, 165 Wis. 70, 160 N.W. 1039 (1917)). Thus, under *Vana*, it seems that a lawful activity or business must be "improperly maintained or conducted" to be an actionable nuisance. *Vana* has never been overruled.

Seven years after *Vana*, this court decided *Sarraillon v. Stevenson*, 153 Neb. 182, 43 N.W.2d 509 (1950), and began developing what eventually has become the current equitable

standard in an action based on private nuisance. In *Sarraillon*, plaintiffs sought to enjoin the operation of a packing plant and stockyard in Nebraska City. Affirming an injunction, the court commented in *Sarraillon*: "A legitimate industry is generally not a nuisance, but it may become a nuisance in fact by reason of the manner of its operation and conditions implicit in and that unavoidably result from its operation . . . ." *Id.* at 189, 43 N.W.2d at 513. The *Sarraillon* court further held that "[t]he exercise of due care by the owner of a business in its operation does not constitute a defense to an action to enjoin its operation as a nuisance . . . ." *Id.* at 190-91, 43 N.W.2d at 514. Thus, while the *Vana* court apparently held that a defendant's activities, conducted with due care, do not constitute a nuisance, the *Sarraillon* court declared that due care was not a defense to a claim based on nuisance.

If there is an inconsistency between *Vana* and *Sarraillon*, Nebraska's equitable precedent has now been resolved in favor of a standard which focuses not on the defendant's conduct alone, as advocated in *Vana*, but, rather, on the conditions implicit in and unavoidably resulting from the defendant's activity or the manner in which the defendant's activities are conducted. See *Cline v. Franklin Pork, Inc., supra.*

Although prior Nebraska cases may not have dealt with a tort claim for damages resulting from a private nuisance, a comparative analysis of current Nebraska standards for an actionable private nuisance and the Restatement's standards is warranted. In a cursory glance, the standard contained in *Cline*, which focuses on the "conditions . . . unavoidably resulting from" a defendant's conduct, seems inconsistent with the Restatement's standard predicated on a defendant's conduct constituting an intentional invasion of another's interest in land. On closer examination, however, the *Cline* standard and the Restatement operate similarly: If a defendant's conduct unavoidably results in an interference with the use and enjoyment of another's property, the interference is "intentional" in the sense that the interference was "substantially certain to follow" from the defendant's conduct. Thus, while the *Cline* standard and the standard expressed in the Restatement have semantical distinctions, in reality the

standards are consistent and essentially pertain to the same type of conduct.

The Restatement's requirement of "unreasonable" has not been an explicit or implicit requirement for equitable relief from a private nuisance in Nebraska. Rather, for a nuisance in the context of an equity action, the invasion of or interference with another's private use and enjoyment of land need only be substantial. See *Karpisek v. Cather & Sons Constr., Inc.*, 174 Neb. 234, 117 N.W.2d 322 (1962). Thus, concerning equitable relief in accordance with *Karpisek*, one may have to endure insubstantial interferences with the use and enjoyment of land, but an invasion or interference which is substantial may result in equitable liability for a private nuisance and consequent damages, regardless of the reasonableness of the interference.

For a law action tried to a jury, where a court may be required to fashion instructions specifying the requirements for an actionable private nuisance and consequent liability, we are persuaded that the Restatement (Second) of Torts § 822 (1979) expresses a suitable standard to determine when one may be subject to liability and provides more guidance to a jury than do the present expressions concerning existence of a private nuisance as currently characterized in Nebraska equity cases. While enhancing the fact finder's task, the Restatement's "intentional and unreasonable" invasion requirement takes into account the various property rights of all parties to a law action based on a tortious private nuisance. Therefore, we hold that in a law action one may be subject to liability for a tortious private nuisance (1) if the defendant's conduct is a proximate cause of an invasion of another's interest in the private use and enjoyment of land and (2) if the invasion is intentional and unreasonable or is otherwise actionable under rules controlling liability for negligence or liability for abnormally dangerous conditions or activities. See the Restatement, *supra*, § 822. Although our holding today provides a standard to determine when a defendant may be subject to liability for a tortious private nuisance and further provides a characterization, definition, or meaning for *intentional* in reference to an invasion of another's interest in land, our discussion concerning other aspects of the tort of private nuisance is merely submitted

for consideration by courts and counsel in framing future questions concerning the tort of private nuisance.

Halls maintained a law action for compensatory damages and utilized existing principles applicable for equitable relief from a private nuisance, whereas we have today enunciated a rule pertaining to the type of conduct which may result in tort liability for a private nuisance. As the district court noted, Halls have not alleged that Phillips was negligent or that his conduct involved abnormally dangerous conditions or activities. Nevertheless, we reverse the summary judgment granted to Phillips because there is a genuine question of material fact in Halls' claim.

In our review of the record, we find a factual question whether Phillips' invasion of Halls' land by windblown soil tainted with Atrazine was intentional, namely, an invasion "substantially certain to follow" from Phillips' application of the herbicide as a preemergent weed control, especially in view of frequent and high winds in Morrill County and the extraordinary wind on May 30, 1985. Further, if Phillips intentionally invaded Halls' interest in the use and enjoyment of their land, factual questions exist concerning the unreasonableness of Phillips' invasion. Given the state of the record, those questions cannot be summarily resolved and must await disposition in further proceedings and perhaps resolution by the trier of fact, which may include a jury. Because these issues are not conclusively resolved by the pleadings, depositions, and affidavits in the record presented to us, a genuine issue of material fact exists in Halls' case. The district court improperly granted summary judgment to Phillips. By the same token, under the state of the record, the factual questions which defeat Phillips' entitlement to a summary judgment also preclude a summary judgment for Halls.

We reverse the summary judgment granted by the district court and remand this matter for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

EUGENE L. MAUSBACH, APPELLANT, V. DEENA L. MAUSBACH, APPELLEE.

435 N.W.2d 914

Filed February 24, 1989. No. 87-150.

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

Jerome J. Ortman for appellant.

David L. Herzog, P.C., for appellee.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

PER CURIAM.

The petitioner, Eugene L. Mausbach, appeals the division of property, alimony order, and allowance of an attorney fee in this dissolution proceeding.

As required in cases of this nature, we have reviewed the record de novo to determine whether the district court abused its discretion in dividing the property, granting an amount of alimony, and allowing an attorney fee. See *Decker v. Decker*, 229 Neb. 347, 426 N.W.2d 533 (1988).

We determine that the trial court did not abuse its discretion in either the division of assets or its award of alimony and attorney fee. Accordingly, the decree of the trial court is affirmed. The request for attorney fees in this court is denied.

AFFIRMED.

VIVIAN OSBORN, APPELLEE, V. VANCE L. OSBORN, APPELLANT.

435 N.W.2d 914

Filed February 24, 1989. No. 87-216.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Michael L. Bacon for appellant.

Nancy S. Freburg for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

PER CURIAM.

The respondent-appellant husband, Vance L. Osborn, assigns as error the district court's failure to modify the alimony payments previously awarded the petitioner-appellee wife, Vivian Osborn.

We, as we are required, have reviewed the trial court's action de novo on the record; we determine therefrom that the trial court did not abuse its discretion in denying the husband's application. Accordingly, the action of the trial court is affirmed.

AFFIRMED.

ARTEX, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. OMAHA EDIBLE OILS, INC., A CORPORATION, APPELLEE AND CROSS-APPELLANT.

436 N.W.2d 146

Filed February 24, 1989. No. 87-238.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. _____. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
3. **Contracts.** The fact that the parties urge opposing interpretations does not necessarily mean that a contract is ambiguous.
4. **Contracts: Presumptions: Intent.** There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.
5. **Contracts: Intent.** Parties are bound by the terms of the contract even though their intent may have been different from that expressed in the agreement.
6. **Contracts.** Words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them.

7. _____. A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction.
8. _____. The construction of a contract, if needed, is a question of law for the court.
9. _____. In construing a contract, the court will apply the general rule that when there is a question as to the meaning of the language of a contract, the contract will be construed against the party preparing it.
10. _____. If the language in a contract drafted by one of the parties is susceptible to more than one meaning, it should be given a construction which the other party would be fairly justified in giving it.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas Blount for appellant.

William Jay Riley and Glenda J. Pierce, of Fitzgerald & Brown, for appellee.

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

HASTINGS, C.J.

This is a breach of contract action in which the plaintiff has appealed from an order of the district court which directed a verdict in favor of the defendant. Defendant cross-appeals from an order of the court directing a verdict in favor of the plaintiff on defendant's counterclaim. Plaintiff assigns as error generally the granting of defendant's motion for a directed verdict, and specifically the determination by the trial court that under the subject contract the defendant had an absolute right to arbitrarily reject any contract negotiated on behalf of the defendant by the plaintiff. Defendant had counterclaimed for the return of its deposit paid at the beginning of negotiations, and has here cross-appealed from the trial court's adverse ruling on that counterclaim. We affirm as to plaintiff's appeal and reverse as to defendant's cross-appeal.

Defendant, Omaha Edible Oils, Inc. (OEO), buys trimmed fat from the packing industry, reduces the fat to oil, then ships the oil to companies that further refine it. OEO primarily ships the oil by rail to five different destinations. Plaintiff, Artex, Inc., is a transportation consultant.

In April of 1985, Robert Gillespie from Artex spoke with Kenneth Krzycki from OEO about the possibility of Artex' doing some work for OEO to reduce the rail rates OEO pays. During the initial meeting between the two, the subject of compensation was also discussed. Gillespie told Krzycki that Artex could be paid in one of two ways: either on an hourly basis or on a percentage of the savings achieved. Krzycki told Gillespie that he was not interested in the hourly basis method of compensation.

On June 26, 1985, Artex sent a letter to James Kruger, the president of OEO. The letter proposed that Artex negotiate on OEO's behalf reduced rates with Union Pacific (UP) and negotiate a contract which would include specific provisions to improve the service provided by UP. In exchange for its services, Artex would receive $500 forthwith and one-third of the savings achieved in the first year after any reduced rates became effective. The initial $500 would be refunded if the savings for the first year did not exceed $500. Artex promised it "would negotiate based on service and rates and [OEO] would have the final say on all work done in [its] behalf." In addition, Artex offered to provide rail rate quotes to OEO at no cost and to arrange for an outside audit of OEO's freight bills for the last 3 years. Any refunds OEO obtained as a result of the audit would be split on a 50-50 basis.

On June 27, 1985, OEO accepted Artex' offer and sent Artex a $500 check.

During July and August of 1985, Artex negotiated with UP and reached an agreement with UP which allegedly would have resulted in a savings of $18,200 per year for OEO. Thereafter, Gillespie of Artex met with Krzycki to report the results. Upon being advised of the deal, Krzycki told Gillespie to negotiate with other railroads to see what kind of numbers he could come up with.

Gillespie made contract proposals on OEO's behalf to four other railroads. Artex alleges that by November 22, 1985, it had obtained firm commitments to enter into rail transportation contracts with OEO which would have resulted in annual savings of $104,260.

On November 26, 1985, Gillespie met with Krzycki to discuss

the proposals. According to Gillespie, Krzycki told him he could not enter into the contracts at that time because OEO was considering selling its product to ConAgra in Omaha. According to Krzycki, he rejected the proposals because they were not what he wanted. In any event, there is no question but that no contract proposal was ever accepted by OEO, and OEO never used any rates negotiated by Artex.

On February 19, 1986, Artex sent OEO a letter demanding payment in the amount of $34,405.80, one-third of the amount of savings Artex alleged OEO would have achieved had it entered into the contracts. OEO refused to pay, and Artex brought this action. As previously mentioned, OEO counterclaimed for a refund of the $500 initially paid to Artex.

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Sundeen v. Lehenbauer*, 229 Neb. 727, 428 N.W.2d 629 (1988).

The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988).

The lone issue necessary to be resolved in this appeal is whether the contract between Artex and OEO contained a satisfaction clause. If there was no satisfaction clause, OEO had an absolute right to reject any proposals made by Artex and the trial court would be right in directing a verdict. If there was a satisfaction clause, there very probably would have been a question of fact as to whether OEO was "honestly dissatisfied" with Artex' proposals, and the trial court would then have been in error in sustaining the motion for a directed verdict.

Artex' basic argument is that the contract does contain a satisfaction clause, and OEO breached the contract when it refused to enter into the contracts Artex had negotiated without honestly being dissatisfied with them. According to Artex, the following language in the June 26, 1985, letter to Kruger constitutes a satisfaction clause:

> Once again, we would negotiate based on service and rates and you would have the final say on all work done in your behalf. We believe we can offer significant savings to your company and at the same time address the service problems you have had in the past.

At trial, the testimony of Gillespie was the only evidence Artex introduced to prove that the foregoing language was meant to be a satisfaction clause. Gillespie testified that during his April meeting with Krzycki, they discussed the compensation Artex would receive for its services. It was Gillespie's understanding that if Artex negotiated rates without any degradation in service, OEO would enter into the contracts.

Gillespie, however, drafted the June 26, 1985, letter to Kruger which contained the language "you would have the final say on all work done in your behalf." He testified that such language was based upon the conversation he had with Krzycki in April. He never discussed what he meant by that provision with Kruger or Krzycki.

At trial, Kruger, the recipient of Artex' letter, testified as to his understanding of what the language at issue meant. As he understood it, OEO had the final say. Although Kruger spoke in terms of "approval" and "satisfaction," the gist of his statement was that he felt he had the final say whether he would accept the contracts.

Artex cites the following cases for propositions of law relating to satisfaction clauses: *Thurman v. City of Omaha*, 64 Neb. 490, 491, 90 N.W. 253 (1902) (" 'subject to our attorney's opinion as to the legality of the issue' "); *Melson v. Turner*, 125 Neb. 603, 604, 251 N.W. 172 (1933) (" 'which well is hereby guaranteed to furnish an inexhaustible supply of water, which shall be of quality that is satisfactory to said Turner' "); *Nebraska Panhandle Community Action Agency, Inc. v. Strange*, 189 Neb. 83, 84, 200 N.W.2d 23, 25 (1972) ("his employment would terminate should his performance not be to the satisfaction of the board of directors, which was to be the sole judge"); and *K & K Pharmacy v. Barta*, 222 Neb. 215, 216, 382 N.W.2d 363, 364 (1986) (" '[i]n the event Buyer is unable to obtain a new lease satisfactory to Buyer, this Agreement shall be null and void' "). These cases are all distinguishable from the

case at bar for the reason that the contract at issue in each of these cases, unlike the contract at issue in this case, expressly conditioned acceptance of the subject matter of the contract upon the satisfaction or approval of the obligor.

The contract at issue in the present case specifies that OEO shall have the final say on the contracts negotiated by Artex. The contract says nothing about OEO's acceptance being conditioned on its satisfaction or approval of such contracts. Artex fails to provide evidence that the contract does indeed contain a satisfaction clause as claimed.

Artex never asserted that the contract language in question is ambiguous. Ambiguity might appear to exist in the language, given the fact that Artex claims that the disputed language does constitute a satisfaction clause and OEO claims it means OEO had the final say whether it would enter into the contracts. However, this court has said that the fact that the parties urge opposing interpretations does not necessarily mean that the contract is ambiguous. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988); *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).

There is a strong presumption that a written instrument correctly expresses the intention of the parties to it. *Bedrosky, supra*; *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988). Parties are bound by the terms of the contract even though their intent may have been different from that expressed in the agreement. *Bedrosky, supra*; *Rumbaugh v. Rumbaugh*, 229 Neb. 652, 428 N.W.2d 500 (1988).

Words used in a contract must be given their plain and ordinary meaning, as ordinary, average, or reasonable persons would understand them. *Bedrosky, supra*; *Rumbaugh, supra*. Read in its clearest and most plain sense, the letter that became the contract between Artex and OEO provided that OEO would have the final say on all work done on its behalf. Read in this manner—that is, taking the language of the contract in its plain and ordinary meaning—the contract placed no condition of satisfaction upon OEO's decision whether to accept contracts negotiated by Artex.

This reading of the disputed language is supported by the fact that the contract between Artex and OEO was not an exclusive contract. At trial, Gillespie admitted that nothing in the contract provided that OEO would only use Artex' services in negotiating rates and railroad contracts. It would be inconsistent to say that OEO could otherwise go out and enter into contracts with the same railroads Artex would be negotiating with on OEO's behalf, yet claim OEO was obligated to enter into whatever contracts Artex negotiated unless OEO was honestly, in fact, dissatisfied with the product of Artex' efforts.

A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction. *Bedrosky, supra*; *Fisbeck, supra*; *Lueder Constr., supra*. The meaning of an unambiguous contract presents questions of law. *Lueder Constr., supra*; *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987). The trial court, therefore, did not err in finding that OEO had an absolute right to arbitrarily refuse to enter into the contracts Artex negotiated.

Even if Artex would have argued that the contract is ambiguous and, therefore, subject to interpretation, it would be to no avail. The construction of a contract, if needed, is a question of law for the court. *Niedbalski v. Board of Ed. of Sch. Dist. No. 24*, 227 Neb. 516, 418 N.W.2d 565 (1988); *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). In construing a contract, the court will apply the general rule that when there is a question as to the meaning of the language of a contract, the contract will be construed against the party preparing it. *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988); *Kreikemeier v. McIntosh*, 223 Neb. 551, 391 N.W.2d 563 (1986); *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985). If the language in a contract drafted by one of the parties is susceptible to more than one meaning, it should be given a construction which the other party would be fairly justified in giving it. *Gard, supra*; *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979). If the disputed language were ambiguous and, thus, in need of

interpretation, construing it against Artex, the drafter, and giving it a construction OEO would be fairly justified in giving it, the language means OEO would only have to enter into the contracts Artex negotiated if it, OEO, wanted to.

The errors assigned by Artex are without merit, and judgment on plaintiff's claim is affirmed.

As to OEO's cross-appeal, to put it in the vernacular, "a deal's a deal," and Artex, having agreed to refund the $500 if savings for the first year did not exceed $500, is obligated to refund that amount, because OEO realized no savings at all. The judgment as to OEO's counterclaim is reversed, and the cause is remanded with directions to the district court to enter judgment accordingly.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

COMMERCE SAVINGS SCOTTSBLUFF, INC., APPELLANT AND CROSS-APPELLEE, V. F.H. SCHAFER ELEVATOR, INC., APPELLEE AND CROSS-APPELLANT.

436 N.W.2d 151

Filed February 24, 1989. No. 87-305.

1. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is not a final order and therefore is not appealable.
2. **Directed Verdict: Appeal and Error.** It is a well-settled rule in this jurisdiction that with regard to the overruling of a motion for directed verdict made at the close of all the evidence, our review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
3. _____: _____. In reviewing a directed verdict, the party against whom a motion for a direction of liability 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 reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
4. **Estoppel.** Estoppel may be urged for the protection of a right, but it can never create a right.

5. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.
6. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to 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. Furthermore, 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 this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result.
7. **Liens: Crops: Time.** Under Neb. Rev. Stat. § 52-1101 (Reissue 1988), a valid fertilizer lien is created at the time products, labor, or machinery is supplied, and Neb. Rev. Stat. § 52-1103 (Reissue 1988) establishes the priority of that lien. A lien must be filed within 60 days of the last delivery, or that lien, though still a valid lien on crops produced within 1 year of the date the product was supplied and on the proceeds for the sale of such crops, will not have priority over subsequent lienholders.
8. **Estoppel: Proof: Evidence.** To succeed on a defense of equitable estoppel, the party asserting estoppel must establish the coexistence of two sets of elements. The party asserting estoppel must first prove that the party to be estopped (1) engaged in conduct which amounted to a false representation or concealment of material facts, or, at least, which was calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which the party to be estopped attempted to assert; (2) had the intention, or at least the expectation, that such conduct would be acted upon by, or influence, the party asserting estoppel; and (3) had knowledge, actual or constructive, of the real facts. The evidence must also show that, at the same time, the party asserting estoppel (4) had a lack of knowledge and of the means of acquiring knowledge of the truth of the facts in question; (5) relied, in good faith, upon the conduct or statements of the party to be estopped; and (6) acted or refrained from acting because of the conduct of the party such as to change its position or status to its injury, detriment, or prejudice.
9. **Estoppel: Proof.** The elements of equitable estoppel must be established by clear and convincing evidence.
10. **Estoppel.** Equitable estoppel will lie where the party asserting estoppel does not have the same knowledge of the facts that the party being estopped has, and does not have the ability to ascertain or is not chargeable with notice of those facts.
11. **Fraud: Proof.** In order to show misrepresentation, the party alleging it must plead and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the

plaintiff suffered damages as a result.

12. **Fraud.** A person is justified in relying upon a representation made as positive statement of fact, when investigation would be required to ascertain its falsity.
13. **Juries: Evidence.** In our judicial system, it is entirely within the province of the jury to weigh the evidence and resolve the resulting conflicts.
14. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury upon which it could find for the successful party.
15. **Motions for New Trial: Verdicts: 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.
16. **Judgments: Verdicts: Appeal and Error.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. A jury verdict will not be disturbed unless it is clearly wrong.

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

David C. Nuttleman, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellant.

John K. Sorensen, of Wright & Sorensen, for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

WHITE, J.

Plaintiff, Commerce Savings Scottsbluff, Inc. (Commerce Savings), appeals from a jury verdict in the district court for Scotts Bluff County in favor of the defendant-appellee, F.H. Schafer Elevator, Inc. (Schafer Elevator). We affirm.

FACTS

This case arose from a dispute between Commerce Savings and Schafer Elevator over the right to the proceeds of crops grown by Henry and Montgomery Specht in 1985. For several years Commerce Savings financed the farming operations of Henry Specht and his son, Montgomery. In 1985, Commerce Savings made an operating loan to the Spechts in the amount of

$99,400, secured in part by a first lien on all proceeds from crops grown by the Spechts. That same year, Schafer Elevator sold fertilizer and chemicals worth $46,164.75 on an open account to the Spechts for use in the production of their crops. Schafer Elevator secured its interest by filing two fertilizer liens. The names of both Commerce Savings and Schafer Elevator were placed on checks representing the proceeds from the sale of corn grown by the Spechts in the 1985 crop season. Unable to resolve their differences regarding distribution of the proceeds, Commerce Savings filed a declaratory judgment action in the district court for Scotts Bluff County.

In the petition, Commerce Savings, citing its security agreement and financing statement covering the Spechts' 1985 crops, claimed a first lien on the proceeds of the corn crop and asked the court to determine the priorities and rights of the parties to those proceeds. In an amended answer, Schafer Elevator alleged that it had a first lien on the corn crop proceeds by virtue of its two fertilizer liens. Schafer Elevator also raised the affirmative defense of equitable estoppel. In support of this defense, Schafer Elevator claimed that Commerce Savings should be estopped from asserting the priority of its security interest because fraudulent misrepresentations of fact made by Commerce Savings to Schafer Elevator induced Schafer Elevator to extend credit to the Spechts which it would not have otherwise extended. Schafer Elevator also filed a counterclaim for fraudulent misrepresentation based on the same representations, which allegedly induced Schafer Elevator to extend credit to the Spechts.

Prior to trial, Commerce Savings made a motion for summary judgment on its petition and Schafer Elevator's counterclaim. The motion was overruled, and the case proceeded to trial.

At trial Howard Wigert, vice president of Commerce Savings, testified on behalf of the plaintiff. Jack Schafer, owner of Schafer Elevator, and his son John F. Schafer were the primary witnesses for the defendant. According to Wigert, in 1984 Commerce Savings loaned the Spechts $90,000 for farming operations on the condition that they find a fertilizer dealer who would provide fertilizer and chemicals on an open

account. The Spechts contacted Schafer Elevator, and Schafer Elevator provided the Spechts with fertilizer and chemicals for their 1984 crops. Wigert testified that Jack Schafer contacted him in 1984 prior to the planting year to discuss the Spechts' account. During that conversation, Wigert said he told Jack Schafer that Commerce Savings was going to finance a portion of the Spechts' operating expenses, but that fertilizer and chemicals were not going to be covered in the operating loan and that Schafer Elevator would have to wait until the crops were harvested before receiving any payment. He also told Jack Schafer that Commerce Savings' analysis showed that the Spechts would be able to "make it through the year," but that Schafer Elevator should protect its interest by filing a fertilizer lien, which would be junior to Commerce Savings' security interest. Wigert further testified that as the Spechts' crops were harvested and the checks for the proceeds came in, jointly payable to Commerce Savings and Schafer Elevator because of their status as lienholders, he would call Jack Schafer in to sign the checks. According to Wigert, Jack Schafer would receive a portion of those checks at that time, representing partial payment on the Spechts' account. In this manner Commerce Savings paid Schafer Elevator entirely from the proceeds of the Spechts' 1984 crop, and Schafer Elevator's account was paid in full. Based on Wigert's testimony regarding how the parties conducted business in 1984, the appellant contends Schafer Elevator knew that payment for fertilizer and chemicals was not covered by the operating loan, and payment on the Spechts' account came from the crop proceeds. In contrast, however, both Schafers testified that Wigert never told either Schafer that Commerce Savings' financing of the Spechts' operation did not include funds to pay for fertilizer and chemicals.

The financial condition of the Spechts deteriorated significantly from 1982 to 1985. In January of 1985, prior to any new operating loans made by Commerce Savings to the Spechts and before Schafer Elevator had been contacted about supplying fertilizer and chemicals for the 1985 crop, if the Spechts had been sold out and the liquidation value of the property realized, their debts would have exceeded collateral by approximately $33,000. In addition, the Spechts had serious

cash-flow problems in January of 1985. In 1984, the Spechts produced a good crop with above average yields and still lost almost $16,000.

Apparently because of the Spechts' poor financial condition coupled with the deterioration of land values and commodity prices, Commerce Savings decided to secure a Farmers Home Administration (FmHA) loan guaranty. Commerce Savings and the Spechts submitted three applications to FmHA for a loan guaranty. The first two applications were rejected by the FmHA on the grounds of negative or weak cash-flow. Before the submission of the third application, Wigert met with Richard Barta, the FmHA county supervisor, to determine what FmHA would approve and what Commerce Savings would request in the way of a loan guaranty. At that meeting, Barta told Wigert that he did not feel the Spechts' operation realistically stood a chance to succeed because it had too much debt. Nonetheless, the third application was approved because instead of guaranteeing term money, as its prior applications had requested, Commerce Savings sought only a guaranty for a 1-year operating loan. The guaranty was also approved because FmHA was to have a first lien position on all crops, which would adequately secure the guaranty, and because there was pressure within the FmHA to make this type of annual 1-year loan. Upon securing the loan guaranty from FmHA, Commerce Savings loaned the Spechts $99,400 for operational expenses for the 1985 crop-year. Even though the third application for the FmHA guaranty listed projected costs for fertilizer and chemicals for the 1985 growing year at $48,000, no part of this expense was to be financed by Commerce Savings or protected by the FmHA guaranty.

After the Spechts had signed the loan papers on April 16, 1985, they approached Schafer Elevator for the first time on April 17, 18, or 19, to discuss purchasing their fertilizer and chemical needs. As they had done in the past, the Spechts directed Schafer Elevator to discuss their financing and financial condition with Commerce Savings. John Schafer testified that the Spechts never participated directly in any discussion concerning their financial condition. According to the Schafers' testimony, Wigert was contacted twice by the

Schafers prior to any delivery of fertilizer or chemicals to the Spechts. On the day the Spechts contacted Schafer Elevator, John Schafer called Wigert to ensure that the Spechts' operating expenses would be financed. John Schafer testified that during that phone conversation, Wigert told John Schafer, in regard to Commerce Savings' financing of the Spechts' farming operations, that "we are going to finance them, in fact, we have got an [FmHA] loan guarantee for 1985 farming expenses." John Schafer went on to state that "[w]hen [Wigert] told me that I felt relatively, you know, I really had no problem with that because farming expenses, that would be the fertilizer, the chemical, the seed, whatever these people might need to produce a crop." To support John Schafer's belief that "farming expenses" included fertilizer and chemicals, he testified that fertilizer and chemicals are a large expense item in crop production and often constitute 30 to 40 percent of the total expense. At the conclusion of his discussion with Wigert on the phone, John Schafer related the conversation to his father, Jack Schafer, who then went to see Wigert in person.

However, according to Wigert, the first contact he had with anyone from Schafer Elevator in 1985 was when Jack Schafer went to Wigert's office to see him in the later part of March or first part of April, sometime prior to Commerce Savings' making the operating loan to the Spechts on April 16. Wigert testified that Jack Schafer had come to his office wanting to know the financing on the Spechts' account. Wigert stated that he told Jack Schafer that the Spechts' account would be handled in the same way Commerce Savings had handled the account in 1984 and that Commerce Savings was securing an FmHA guaranty on its operating line which required a first lien position on the crops. Wigert also stated that he asked Schafer Elevator to carry the fertilizer and chemical bill on an open account for the product year and to file a fertilizer lien to protect its interest, which would be junior to FmHA's guaranty. In response to Jack Schafer's question about whether the Spechts could make it through the year, Wigert told him that Commerce Savings' cash-flow projections indicated that there should be adequate money to pay both its operating loan and Schafer Elevator's fertilizer lien. In his testimony, Wigert

claimed he did not talk to John Schafer until after he had the above conversation with his father and that his phone call with John Schafer occurred prior to making the loan to the Spechts on April 16.

Yet, according to the Schafers' testimony, Jack Schafer went to see Wigert the next day or that afternoon after Wigert had talked to his son on the phone, which occurred after the Spechts had contacted Schafer Elevator and after the Spechts received their operating loan. Jack Schafer stated that at the meeting with Wigert, he had expressed concerns about the Spechts' financial situation. The evidence shows that the Spechts' account was the largest one Schafer Elevator carried. In response, Wigert said, " 'Jack, the [Spechts] are in better shape this year than they have been, they have made some real progress. Don't worry, everything is okay. Don't worry.' He said, 'And besides, we have an [FmHA] guaranteed loan commitment, you don't have to worry.' "

Then, according to Wigert's version of the facts, John Schafer called. Wigert stated that he told John Schafer that Commerce Savings' projections showed that there should be adequate cash-flow to pay the Spechts' account with Schafer Elevator but it would not guarantee that in writing. He went on to say that Commerce Savings had a first lien position on the crops and that it had secured an FmHA guaranty to cover the operating debt.

Despite the inconsistencies surrounding the dates when these conversations took place, the evidence is clear that the Schafers contacted Wigert twice before delivery of any product to the Spechts. Further, according to the Schafers, at no time in any of the conversations between Commerce Savings and the Schafers did Commerce Savings ever disclose that fertilizer and chemicals were not included in the operating loan for the 1985 crop expenses. Both Schafers stated that if they had known that fertilizer and chemicals were not to be included in the Spechts' operating loan, they would never have extended credit to the Spechts.

After the exchanges between Commerce Savings and Schafer Elevator, Schafer Elevator filed notices of fertilizer liens on April 19 and 22 and commenced delivery of fertilizer and

chemicals soon after. Between April 23 and August 21, 1985, Schafer Elevator delivered and supplied $46,164.75 worth of fertilizer and chemicals to the Spechts. During the trial, it was deduced that $26,047.73 represented all the charges for fertilizer and chemicals delivered and applied to the Spechts' corn crop.

In September of 1985, after the bean harvest had started, Jack Schafer called Wigert, wanting to know when the Spechts' account would be paid and if Commerce Savings had received any income from the bean crop. Wigert told Jack Schafer that the bean harvest checks had been received and that the proceeds had been used to reduce Commerce Savings' operating loan to the Spechts. He went on to tell Jack Schafer that there was trouble with the account, since the crop was going to be short and there would not be enough money to cover both Commerce Savings' operating loan and Schafer Elevator's account.

That same day, after Jack Schafer told John Schafer what Wigert had said, John Schafer had a meeting with Wigert and Barta at the FmHA office. John Schafer testified regarding what was said at the meeting:

> Q. And would you tell the ladies and gentleman of the jury what happened . . . ?
>
> A. Well, we discussed — I asked Howard [Wigert] why, how he could not include fertilizers and chemicals in this [FmHA] loan guarantee.
>
> Q. How did you discover that the fertilizer and chemicals had not been included?
>
> A. Mr. Barta told me.
>
> Q. Did you know before Mr. Barta told you that, did you have any idea that the fertilizer and chemicals had not been included in the loan guarantee?
>
> A. No, sir. Like I said, if I had known we wouldn't be here today.
>
> . . . .
>
> Q. What happened, what was the discussion?
>
> A. I was crushed, that was the first I knew, you know, here's $46,000 of my dad's retirement, it's my life, I was crushed. I do remember asking Mr. Wigert, you know, "How could you do this?" I mean, fertilizer and chemical,

you can't grow a crop without fertilizer and chemical or seed. You can grow crop hanging in the air, you don't even need the dirt, how can you not put that stuff into the operating budget and when you had told us you had.

Q. And was there any reply or did Mr. - - -

A. What could he say.

Q. Did he give you an answer?

A. No, what could he say.

Schafer Elevator was never paid anything on the $46,164.73 Specht account, and after the 1985 harvest, the Spechts declared bankruptcy. The proceeds of the bean crop used by Commerce Savings to reduce its operating loan reduced the initial $99,400 balance down to $52,000. Commerce Savings sold the Spechts' corn crop for $51,000, for which it received payment in the form of three checks which, in addition to having Henry Specht's and Commerce Savings' names on them, also had Schafer Elevator's name on them. By stipulation, the proceeds from the corn crop were deposited into an account at the First State Bank of Scottsbluff pending outcome of the suit.

At the close of all the evidence, Commerce Savings made three motions for a directed verdict. Commerce Savings first moved the court for a directed verdict on the issue of priority on its lien. The trial court sustained the motion, noting that "[o]n priority, I'm of the opinion that absent estoppel or fraud that you are entitled to priority and I intend to so instruct. So that's in effect sustained." Commerce Savings next moved for directed verdicts on the issues of equitable estoppel and Schafer Elevator's counterclaim for fraudulent misrepresentation, which motions were both overruled. The court instructed the jury that if it found for the defendant on the claim of equitable estoppel, it was limited to awarding only $26,047.73, which represented the amount of Schafer Elevator's lien on the corn proceeds, and the balance of the award would have to come from the fraud claim. The jury found for the defendant, Schafer Elevator, and returned a verdict of $26,047.73 on the claim of equitable estoppel and a verdict of $20,117.02 on the counterclaim. Commerce Savings moved for a judgment notwithstanding the verdict or, in the alternative, for a new

trial, which was overruled.

Commerce Savings appeals, assigning seven errors. Appellant claims the district court erred in (1) overruling appellant's motion for summary judgment prior to trial; (2) overruling appellant's motion for a directed verdict at the close of the evidence on the issue of equitable estoppel; (3) overruling appellant's motion for a directed verdict at the close of the evidence on the issue of the appellee's counterclaim for fraudulent misrepresentation; (4) giving jury instruction No. 2, an instruction on the equitable estoppel defense and fraudulent misrepresentation; (5) finding sufficient evidence adduced at trial on the issue of equitable estoppel; (6) finding sufficient evidence adduced at trial on the issue of the appellee's counterclaim for fraudulent misrepresentation; and (7) overruling appellant's motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial.

SUMMARY JUDGMENT

With regard to appellant's first assignment of error relating to the district court's overruling of its motion for summary judgment prior to trial, this court has repeatedly held that the denial of a motion for summary judgment is not a final order and therefore is not appealable. *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988). Furthermore, we note that any errors occurring at this stage in the proceeding were either remedied by the trial or preserved by the appellant's other assignments of error to be addressed below.

DIRECTED VERDICT

Appellant's second and third assignments of error concern the overruling of Commerce Savings' motions for a directed verdict on the issues of equitable estoppel and Schafer Elevator's counterclaim for fraudulent misrepresentation. It is a well-settled rule in this jurisdiction that

> [w]ith regard to the overruling of a motion for a directed verdict made at the close of all the evidence, our review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law.

Kearney State Bank & Trust v. Scheer-Williams, 229 Neb. 705,

708, 428 N.W.2d 888, 891 (1988).

> "In reviewing a directed verdict, the party against whom a motion for a direction of liability 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 reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. . . ."

Raben v. Dittenber, 230 Neb. 822, 824, 434 N.W.2d 11, 13 (1989). Having set out the standard of review applicable to Commerce Savings' second and third assignments of error, we now examine each issue separately.

EQUITABLE ESTOPPEL

In the first of two arguments in support of its second assignment of error, Commerce Savings attacks the applicability of equitable estoppel under the facts of this case. Commerce Savings, citing 28 Am. Jur. 2d *Estoppel and Waiver* §§ 32 and 33 (1966), claims that the purpose of raising the defense of equitable estoppel is to defeat a right or claim a party would otherwise have. Further, equitable estoppel does not create a new right or give a cause of action; rather, it serves to protect rights already acquired. Commerce Savings contends that the fertilizer liens are invalid under Neb. Rev. Stat. § 52-1103 (Reissue 1988) and that since the liens are not valid, Schafer Elevator cannot

> in this case claim a lien upon the proceeds of the corn crop if they do not otherwise have a valid fertilizer lien by virtue of alleging equitable estoppel regardless of whether there may be facts supporting said legal theory. To do so would allow equitable estoppel to create a right in the proceeds of the 1985 corn crop, which F.H. Schafer did not otherwise have.

Brief for appellant at 20.

Section 52-1103 states:

> In order to be valid against subsequent lienholders, any lien under section 52-1101 [in this case any supplier of fertilizer and chemicals] shall be filed within sixty days of the last date upon which the product, machinery, or

> equipment was furnished, or work or labor was performed under the contract, but in no event shall it have priority over prior lienholders unless prior lienholders have agreed to the contract in writing. Such lien shall attach as of the date of filing and may be foreclosed in the manner and form provided for the foreclosure of secured transactions as provided in Article 9, Uniform Commercial Code.

Commerce Savings makes the assertion that Schafer Elevator's fertilizer liens are not valid under § 52-1103 because the evidence showed that the last delivery of fertilizer by Schafer Elevator was August 21 and that the appellee had filed its notices of fertilizer liens in April, more than 60 days prior to the date of last delivery. In support of its interpretation of § 52-1103, the appellant cites *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985).

While noting that there is authority in this jurisdiction for appellant's argument that estoppel may be urged for the protection of a right, but it can never create a right, see *Warren v. Papillion School Dist. No. 27*, 199 Neb. 410, 259 N.W.2d 281 (1977), we find that appellee's liens were valid fertilizer liens under Neb. Rev. Stat. ch. 52, art. 11 (Reissues 1984 & 1988), relating to fertilizer and agricultural chemical liens. Commerce Savings' reliance on *Circle 76* is misplaced. The central issue of *Circle 76* was whether the elements of estoppel were sufficiently proved. The validity of the fertilizer lien under § 52-1103 was not at issue, and, therefore, any comment by the court relating to the validity of fertilizer liens under § 52-1103 was dictum. A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court. *Yoder v. Nu-Enamel Corporation*, 140 Neb. 585, 300 N.W. 840 (1941).

The general rules governing statutory construction and interpretation provide that

> "[i]n the absence of anything indicating to the contrary, statutory language is to 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." . . . Furthermore, "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 this court to read anything plain, direct, and unambiguous out of a statute."
> . . .
> . . . "In construing a statute it is presumed that the Legislature intended a sensible rather than an absurd result."

Cornhusker Christian Ch. Home v. Dept. of Soc. Servs., 229 Neb. 837, 841-42, 429 N.W.2d 359, 362 (1988).

An analysis of chapter 52, article 11, indicates that the Legislature created § 52-1101 (Reissue 1988) to define the validity of fertilizer liens such as the ones Schafer Elevator had and that § 52-1103 (Reissue 1988) was designed to establish the priority of these liens. Section 52-1101 provides:

> A person, including a firm or corporation, who shall contract or agree with another (1) to furnish any fertilizer, soil conditioner, or agricultural chemical, (2) to furnish machinery and equipment for the application of such products, or (3) to perform work or labor in the application of such products *shall have a lien* for the agreed charges, or in the absence of an agreement, for the reasonable charges and costs of satisfying such lien, *upon the crops produced within one year upon the land where such product was applied*, the machinery or equipment for application was used, or the work or labor of application was performed, and upon the *proceeds from the sale of the crops*.

(Emphasis supplied.) According to § 52-1101, a lien on the crops and proceeds from those crops, under this article, is established at the same time product, machinery, or labor is supplied. Section 52-1103 sets out the priority of that lien by providing that if the lien is to be *valid against subsequent lienholders*, it must be filed within 60 days of the last date the product, machinery, or labor is supplied. A lien not filed within 60 days of the last delivery is still a valid lien on crops produced within 1 year of the date the product was supplied and on the proceeds for the sale of such crops; the lien simply is not valid as to subsequent lienholders. As appellee notes in its brief,

"Nowhere in Article XI of Chapter 52, the Fertilizer Lien Law, is it stated that a lien filed more than 60 days before the last delivery of product is made is invalid." Brief for appellee at 28. Under the appellant's construction of § 52-1103, any supplier, such as Schafer Elevator, which knew it was to be providing products from April until the end of August would have to wait until the end of June before it could file a lien to protect itself. We do not think the Legislature intended a supplier like Schafer Elevator to be required to maintain an unsecured position, possibly for several months in a case like the one at bar, on products supplied until 60 days prior to the last delivery of product. Therefore, this court holds that under § 52-1101, a valid lien is created at the time products, labor, or machinery is supplied and that § 52-1103 merely establishes the priority of that lien. A lien must be filed within 60 days of the last delivery, or that lien, though still a valid lien on crops produced within 1 year of the date the product was supplied and on the proceeds for the sale of such crops, will not have priority over subsequent lienholders.

Commerce Savings' second argument attacks the sufficiency of the evidence on the elements of equitable estoppel. In *O'Neill Prod. Credit Assn. v. Mellor*, 220 Neb. 555, 371 N.W.2d 265 (1985), we set out the elements of equitable estoppel. To succeed on a defense of equitable estoppel, Schafer Elevator must establish the coexistence of two sets of elements. Schafer Elevator must first prove that Commerce Savings, as the party to be estopped, (1) engaged in conduct which amounted to a false representation or concealment of material facts, or, at least, which was calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which Commerce Savings attempted to assert; (2) had the intention, or at least the expectation, that such conduct would be acted upon by, or influence, Schafer Elevator; and (3) had knowledge, actual or constructive, of the real facts. The evidence must also show that, at the same time, Schafer Elevator (4) had a lack of knowledge and of the means of acquiring knowledge of the truth of the facts in question; (5) relied, in good faith, upon the conduct or statements of Commerce Savings; and (6) acted or refrained from acting

because of Commerce Savings' conduct such as to change its position or status to its injury, detriment, or prejudice. Moreover, these elements must be established by clear and convincing evidence. *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985). Resolving every controverted fact in Schafer Elevator's favor and giving it the benefit of every inference which can be reasonably drawn therefrom, *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989), an examination of the record indicates that there was sufficient evidence to establish each element of equitable estoppel by clear and convincing evidence. Since Commerce Savings, in support of its assignment of error, only contests the sufficiency of the evidence with regard to the fourth and fifth elements of equitable estoppel and thereby concedes the sufficiency of the evidence regarding the other elements, we limit our analysis only to the fourth and fifth elements of equitable estoppel.

Commerce Savings contends that there is not enough evidence to satisfy the fourth element because Schafer Elevator failed to prove that it did not know and could not have found out that the operating loan made by Commerce Savings did not cover the fertilizer and chemical account. Appellant states in its brief:

> Schafer Elevator knew that in the prior year of 1984, payments to them were made from the proceeds of the crop and not from any loan account of Commerce Savings. . . . [T]hat F.H. Schafer Elevator had knowledge that payments were to be made in 1985 the same as they were in prior years. . . . Schafer Elevator, Inc. filed a fertilizer lien in 1984 and 1985 because they knew the account would not be paid until the crop proceeds were available. [The Schafers] had the means of knowledge of the truth of the facts in question in that they had the access to the same information as Commerce Savings regarding Commerce Savings' loan to Mr. Specht in that they could have inquired of Mr. Specht as to the amount of his loan and the items covered by the operating loan or they could have inquired of Farmers Home Administration, who had guaranteed the loan in 1985 as to the conditions of the loan nor did they inquire of [Commerce Savings] as to what

portions of the operations were covered by the loan.
Brief for appellant at 26.

However, utilizing the standard of review detailed above, the evidence established that though the Schafers contacted Wigert twice prior to the extension of any credit to the Spechts in 1985, they never knew that the operating loans extended to the Spechts in 1984 and 1985 by Commerce Savings did not cover the fertilizer and chemicals purchased on account. Further, the Schafers testified that if they had known fertilizer and chemicals were not included in the Spechts' operating account, they never would have extended credit to the Spechts. A reasonable inference can be drawn from the evidence that when Wigert told John Schafer that Commerce Savings was going to finance the Spechts' farming expenses and that these expenses were going to be guaranteed by the FmHA, John Schafer believed fertilizer and chemicals were included in those expenses. The same inference can be drawn when, in response to Jack Schafer's expressed concern on whether the Spechts could make it through the year, Wigert told Jack Schafer not to worry, that "the [Spechts] are in better shape than they have been" and that "*we* have an [FmHA] guaranteed loan commitment . . . ." (Emphasis supplied.) Evidence was also introduced to show that Schafer Elevator filed fertilizer liens as a general business practice and not in response to Commerce Savings' assertion that the Schafers knew that fertilizer and chemicals were not included in the Spechts' operational loan. In addition, the Spechts never discussed their financial matters with Schafer Elevator, but always referred Schafer Elevator to Commerce Savings regarding matters concerning their financing with the appellant.

The rule, long held in this jurisdiction, is that no estoppel can arise where all the parties interested have equal knowledge of the facts, or where the party claiming estoppel has the same means of ascertaining or is chargeable with notice of the facts. *Watkins v. Dodson*, 159 Neb. 745, 68 N.W.2d 508 (1955); *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 54 N.W.2d 392 (1952). The converse of this rule is that estoppel will lie where the party asserting estoppel does not have the same knowledge of the facts that the party being estopped has, and

does not have the ability to ascertain or is not chargeable with notice of those facts. From the record, it is clear that documents setting forth the coverage of Commerce Savings' operating loan and the FmHA guaranty were internal financial documents not available to the public. Though the record is unclear as to whether Schafer Elevator could have had access to those records had the Schafers requested such access, we hold that the statements attributed to Wigert in this case are legally sufficient to support a finding that Schafer Elevator relied on the facts as related to it and that it was entitled to do so. Accordingly, we hold that there was sufficient evidence to establish the fourth element of equitable estoppel.

Commerce Savings also contends that there was not sufficient evidence to prove the fifth element of equitable estoppel, that of good-faith reliance by Schafer Elevator upon the conduct or statements of Commerce Savings. Apparently, the appellant argues that Schafer Elevator was on notice by the prior conduct of Commerce Savings in 1984 that the Spechts' account was being paid from proceeds of crops and not by an operating loan. Therefore, Schafer Elevator should not be permitted to assert estoppel, since it did not rely in good faith on Commerce Savings' actions. That contention, however, cannot stand, as the evidence establishes that the Schafers never knew the operating loans extended to the Spechts in 1984 and 1985 by Commerce Savings did not cover the fertilizer and chemicals purchased on account, especially since Commerce Savings had clearly represented in conversations with the Schafers that the 1985 farming expenses were going to be financed and protected by an FmHA loan guaranty. Therefore, there is clear and convincing evidence of the fifth element of equitable estoppel.

Accordingly, appellant's second assignment of error is without merit.

MISREPRESENTATION

> In order to show misrepresentation, the party alleging it must plead and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of

> its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.

Pawnee County Bank v. Droge, 226 Neb. 314, 322-23, 411 N.W.2d 324, 330 (1987).

Commerce Savings challenges the sufficiency of the evidence with regard to only one element of fraudulent misrepresentation, thereby conceding the sufficiency of the evidence establishing the other elements. Commerce Savings contends the evidence was insufficient to show that the representation made was false. The appellant argues the evidence demonstrated that the operating loan it was making to the Spechts did not cover fertilizer and chemicals and that it never made any representations to the contrary. Additionally, the appellant asserts that the Schafers assumed from the statements made by Wigert that the operating loan would cover those expenses. However, resolving every controverted fact in Schafer Elevator's favor and giving it the benefit of every inference which can be reasonably drawn, *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989), the representation by Wigert to the Schafers was that the 1985 farming expenses, without qualification, were to be financed and guaranteed. The evidence is sufficient to support a finding that the Schafers believed farming expenses included fertilizer and chemicals. The representation was definitely false, and the Schafers relied on it to their detriment. "A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity." *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 154, 396 N.W.2d 273, 281 (1986).

Therefore, Commerce Savings' third assignment of error is also without merit.

SUFFICIENCY OF THE EVIDENCE

Appellant's next three assignments of error, the giving of jury instruction No. 2 (an instruction on equitable estoppel defense and fraudulent misrepresentation) and insufficient evidence adduced at trial both to sustain appellee's burden of proof on the issue of equitable estoppel and to sustain appellee's burden

of proof on the issue of appellee's counterclaim for fraudulent misrepresentation, all concern the issue of sufficiency of the evidence. As set out above, we find that there was sufficient evidence to establish that Schafer Elevator met its burden of proof on the issues of equitable estoppel and fraudulent misrepresentation, and, therefore, the jury instruction on these claims was properly given. " 'In our judicial system, it is entirely within the province of the jury to weigh the evidence and resolve the resulting conflicts.' " *Raben v. Dittenber, supra* at 831, 434 N.W.2d at 17. A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury upon which it could find for the successful party. *Bell v. Williams Care Center*, 226 Neb. 1, 409 N.W.2d 294 (1987). The evidence before the judge and jury was clearly sufficient to support the instruction given and to support a verdict for the appellee on the issues of equitable estoppel and fraudulent misrepresentation.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL

Appellant's last assignment of error, the overruling of its motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial, is also without merit.

> "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."

Mundt v. Northwestern Bell Tel. Co., 230 Neb. 192, 195, 430 N.W.2d 530, 532 (1988).

> "On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. . . . A jury verdict will

not be disturbed unless it is clearly wrong. . . ." (Citation omitted.) *Carnes v. Weesner,* 229 Neb. 641, 645, 428 N.W.2d 493, 496 (1988). As detailed above, the verdict in this case was not clearly wrong, and a review of the record reveals no abuse of discretion on the part of the trial court.

Because of the relief granted Schafer Elevator, it is not necessary to discuss the cross-appeal filed herein. Accordingly, the decision of the district court is affirmed.

AFFIRMED.

SONJIA F. MAYFIELD, APPELLANT, V. ALLIED MUTUAL INSURANCE COMPANY, AN IOWA CORPORATION, APPELLEE.

436 N.W.2d 164

Filed February 24, 1989. No. 87-666.

1. **Motor Vehicles: Insurance.** A requirement in an automobile insurance policy that there be physical contact between a hit-and-run motor vehicle and the insured or the vehicle which the insured is occupying at the time of the accident, as a condition precedent to recovery under the hit-and-run clause of the uninsured motorist coverage of the policy, is valid and reasonable.
2. **Statutes: Judicial Construction: Legislature.** 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.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Con M. Keating, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

Kile W. Johnson, of Barlow, Johnson, DeMars & Flodman, for appellee.

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

BOSLAUGH, J.

This case involves a controversy over the uninsured motorist

coverage provided in an automobile liability insurance policy issued by the defendant, Allied Mutual Insurance Company, to the plaintiff, Sonjia F. Mayfield.

In her petition, the plaintiff alleged that she was the owner of a 1977 Honda Civic automobile which was insured under a policy of automobile insurance issued to her by the defendant and that the policy provided uninsured motorist coverage. On July 17, 1986, while the plaintiff was a passenger in her automobile, which was being driven by her daughter, the automobile was involved in a collision. At the time of the accident, the plaintiff's automobile, which was proceeding west on Cornhusker Highway, in Lincoln, Nebraska, was stopped in the left-turn lane at the intersection at 27th Street. An automobile whose operator and owner cannot be identified was stopped immediately in front of the plaintiff's car. This automobile suddenly and unexpectedly turned left, or south, onto 27th Street, directly in the path of an oncoming 1977 Buick Skylark automobile owned by Mathew L. Campbell, who was traveling in an easterly direction on Cornhusker Highway. When the unidentified automobile turned in front of the Campbell vehicle, Campbell swerved and struck the plaintiff's automobile, causing serious bodily injury to the plaintiff. The plaintiff alleged that although there was no physical contact between the plaintiff's car and the automobile driven by the unidentified driver, the sole and proximate cause of the accident was the negligence of the operator of the unidentified automobile, and that all efforts to locate the driver of the car had been futile. The plaintiff claimed damages for medical expenses in the amount of $10,390.81; future medical expenses; permanent disability; impairment of earning capacity; lost wages; and past, present, and future pain and suffering.

The defendant filed a general demurrer to the petition, which was sustained. The plaintiff elected to stand on her petition, and the petition was dismissed. The plaintiff has appealed.

The policy issued by the defendant provides in part C, "We will pay damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of 'bodily injury:' 1. Sustained by an 'insured;' and 2. Caused by an accident." An uninsured motor vehicle is defined

in the policy as a "land motor vehicle or trailer of any type . . . Which is a *hit and run* vehicle whose operator or owner cannot be identified and which *hits*: a. you or any 'family member.' " (Emphasis supplied.)

The issue in this case is whether the provision in the defendant's policy which requires physical contact between the uninsured motorist's automobile and the insured's automobile conforms to the requirements of the Nebraska uninsured motorist statute. The plaintiff contends that the provision in the policy issued by the defendant that defines a "hit and run vehicle" as one "which hits . . . you or any 'family member' " violates Neb. Rev. Stat. § 60-509.01 (Reissue 1988). Section 60-509.01 requires that automobile liability insurance policies delivered in this state provide coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and "hit-and-run motor vehicles."

In *Grace v. State Farm Mut. Auto. Ins. Co.*, 197 Neb. 118, 246 N.W.2d 874 (1976), we held that a provision in automobile insurance policies which required physical contact between the unidentified automobile and the automobile in which the plaintiff was riding in order for the unidentified vehicle to be a "hit-and-run vehicle" as defined in the uninsured motorist coverage of the policy did not violate the statutory requirement for uninsured motorist coverage.

In the *Grace* case, we said at 121-24, 246 N.W.2d at 876-77:

> The validity of physical contact requirements in connection with uninsured motorist coverage in automobile insurance policies has been considered by many courts in many different situations. . . . No matter which of the various statutory categories may be considered, courts have apparently reached opposite conclusions on the physical contact issue in every category. See Annotation, "Uninsured Motorist Endorsement: Validity and Construction of Requirement that there be 'Physical Contact' with Unidentified or Hit-And-Run Vehicle," 25 A. L. R. 3d 1299.
>
> The judicial appraisal of the critical issue of physical contact, in essence, rests upon a determination of

legislative policy and intent, particularly where uninsured motorist coverage is required by statute. Logical and persuasive reasons have been given by many courts to support the validity or invalidity of physical contact requirements. In general courts holding that the physical contact requirement is invalid have held that the requirement is contrary to public policy and legislative intent to protect persons injured on the public highways from the uninsured or hit-and-run motorist and is therefore invalid. See, for example, Hartford Acc. & Ind. Co. v. Novak, 83 Wash. 2d 576, 520 P. 2d 1368; Webb v. United Services Auto. Assn., 227 Pa. Super[.] 508, 323 A. 2d 737; Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337 (N.M.).

In those courts which have concluded that it is reasonable to require physical contact with or by a hit-and-run vehicle under uninsured motorist provisions, the reasoning is generally based on the premise that a physical contact requirement precludes fraud upon the insurer and prevents recovery of damages in cases where the insured's injuries are only accidental or the result of his own or his driver's negligence, without the intervention of any other vehicle; but it is alleged by the insured that the accident was caused by an unidentified vehicle which subsequently left the scene of the accident. See, Ely v. State Farm Ins. Co., 148 Ind. App. 586, 268 N. E. 2d 316; MVAIC v. Eisenberg, 18 N. Y. 2d 1, 218 N. E. 2d 524. See, also, Prosk v. Allstate Ins. Co., 82 Ill. App. 2d 457, 226 N. E. 2d 498.

In Nebraska the legislative history is not of much assistance in determining the intent of the Legislature in May of 1963, when Nebraska adopted its uninsured motorist statute. Neither can we say with any degree of assurance exactly what concept of "hit-and-run" the Legislature had in mind. The physical contact restriction was standard in most insurance policies at the time the Nebraska statute was adopted. See, Widiss, A Guide to Uninsured Motorist Coverage, § 2.2, p. 20. Comment on the floor during legislative discussion indicates that the

Legislature was aware that the statute was written in the universal insurance policy language of the time. Nevertheless, there was no discussion of the issue involved here.

Courts universally agree that the prevention of fraud is a permissible and justifiable legislative purpose. Courts may disagree, however, as to which factors the Legislature considered most important in making such a policy decision. It need only be said that a requirement of physical contact attempts to prevent fraudulent claims by requiring of the claimant tangible proof of a collision with a hit-and-run vehicle. That requirement defines and limits the risk underwritten by insurers so that "fulfillment of the liberal aims of the law is not incompatible with the economic realities of insurance coverage." See Ely v. State Farm Ins. Co., *supra*. It can be, and has been, argued that the term "hit-and-run" means exactly what it says and requires physical contact. See Prosk v. Allstate Ins. Co., *supra*. It might well be said that "hit-and-run" does not translate into "cause-and-run" where statutory and contract terms are involved.

The specific policy provision here requiring physical contact has been approved by the Nebraska Director of Insurance as required by section 60-509.01, R. R. S. 1943. While the basis for the conclusion may be ephemeral, we are convinced that the Legislature did not intend to broaden the then accepted insurance concept of a hit-and-run motor vehicle. A requirement in an automobile insurance policy that there be physical contact of a hit-and-run motor vehicle with the insured or the vehicle which the insured is occupying at the time of the accident, as a condition precedent to the assertion of a claim under the hit-and-run clause of an uninsured motorist provision, is valid and reasonable. It is not an impermissible limitation or restriction on the insurance coverage required by section 60-509.01, R. R. S. 1943, nor is it in conflict with the beneficial public policy of that statute.

Apart from the possibility of fraud which was discussed in

the *Grace* opinion, the coverage required by the statute is limited to damages that the insured is "legally entitled to recover" from the uninsured motorist. In many cases, the sole source of information as to how the accident happened will be the insured.

Section 60-509.01 was enacted in 1963. The *Grace* case was decided in 1976, and the statute has not been amended since that time. 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. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983).

We conclude that the decision in the *Grace* case is controlling and that the judgment of the district court should be affirmed.

AFFIRMED.

WHITE, J., concurs.

TERENCE JOHN ROGERS, APPELLEE, V. EVELYN ROSE ROGERS, APPELLANT.

435 N.W.2d 915

Filed February 24, 1989. No. 87-863.

Divorce: Appeal and Error. In appeals involving actions for dissolution of marriage, this court reviews the record de novo to determine if the district court abused its discretion. In the absence of such an abuse, the trial court's findings will not be reversed. When the evidence conflicts, this court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another.

Appeal from the District Court for Stanton County: RICHARD P. GARDEN, Judge. Affirmed as modified.

Ronald J. Albin for appellant.

R.D. Stafford, of Brogan & Stafford, P.C., for appellee.

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

PER CURIAM.

The respondent wife has appealed from the judgment of the district court, which entered a decree dissolving the marriage, awarding alimony, and dividing property. She alleges as errors (1) the finding by the trial court that the marriage was irretrievably broken, (2) the inadequacy of the alimony award, and (3) the distribution of the property.

In appeals involving actions for dissolution of marriage, the Supreme Court reviews the record de novo to determine if the district court abused its discretion. In the absence of such an abuse, the trial court's findings will not be reversed. When the evidence conflicts, this court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another. *Zavitka v. Zavitka*, 228 Neb. 267, 421 N.W.2d 798 (1988).

Terence John and Evelyn Rose Rogers were married on November 8, 1958. Three children were born during this marriage. All three were emancipated at the time petitioner filed for divorce. The petition for dissolution of the marriage was filed on March 17, 1987.

Petitioner husband is 48 years old and is a trooper with the Nebraska State Patrol. He plans to continue working as a trooper until age 55, when he will have 30 years of service. At that time, he will be eligible to receive a monthly pension equal to 75 percent of his average monthly salary for the 3 years preceding his retirement. He also plans to continue working after retiring from the State Patrol in order to qualify for Social Security benefits.

At the time of trial, petitioner was earning approximately $2,200 per month. His monthly take-home pay was approximately $1,500 after taxes, insurance, and $300 in savings were deducted. His monthly living expenses were estimated to be about $800.

Respondent is 47 years old and currently works as a teacher's aide in Norfolk through Educational Service Unit No. 8. For the major portion of the marriage she did not work outside the home. She does not have a college degree and has no desire to return to college now. Further, she has no special skills which would enable her to obtain employment.

Respondent returned to work in December of 1986. Her position with ESU No. 8 is not a permanent position, and she contracts for only 1 year at a time. Further, she does not receive any pay during the time school is not in session, although she did work part time for 6 weeks during the summer. She is paid $4.30 per hour and has an average monthly take-home income of approximately $500. She also contributes $182 per month to an annuity account, which is available to her only when she quits, retires, or is fired. She estimates her monthly expenses to be approximately $1,258.

Both parties testified as to their health problems. Respondent suffers from Raynaud's disease (a constriction of the blood vessels in the extremities, which causes discoloration and some pain) and varicose veins. Petitioner has arthritis and sees a chiropractor occasionally for back problems connected with a work-related injury.

At trial on August 4, 1987, petitioner stated it was his opinion that the marriage was irretrievably broken, that all efforts to reconcile the differences of the parties had failed, and that it was not worth pursuing further reconciliation attempts. He admitted the couple had not sought formal counseling, but stated that they had attempted to work out their differences between themselves and had failed. Respondent testified that, in her opinion, the marriage was not irretrievably broken and that they had not made reasonable efforts to reconcile their differences. She further stated that she did not want a divorce from her husband.

Applying the rule from *Zavitka*, we find that the record supports the conclusion of the trial court that the marriage was irretrievably broken, and it did not abuse its discretion in that regard.

Both parties introduced evidence regarding the valuation of the marital property, over which there was little disagreement. The marital property of the parties was divided as follows:

To petitioner:	
1978 Ford F150 truck	$3,600.00
1979 Road Ranger trailer	3,500.00
1974 truck camper top	400.00
Norwest Bank checking account	2,279.50

Nebraska State Employees Credit Union account	6,268.00
IRA, Woodmen Accident & Life	12,559.00
Retirement account, State of Nebraska	46,582.00
Total	$75,188.50

To respondent:	
House	$45,000.00
Less outstanding mortgage	(13,000.00)
1980 Datsun automobile	3,000.00
Norwest Bank checking account	776.50
Norwest Bank savings accounts (2)	10,562.00
Certificate of deposit, Norwest Bank	16,300.00
Loans due from children	4,350.00
Total	$66,988.50

In addition, each party was awarded one-half of the artifact collection, and certain other items of personal property were awarded variously to the two parties, over which award there can be no reasonable dispute.

The above-described property constituted the whole of the marital assets except that the $8,200 difference in the award was attributed to a cash inheritance from petitioner's mother in 1984. Petitioner also received between $9,400 and $9,600 as settlement for a workers' compensation claim, but there is no argument between the parties that this sum should not have been included in the marital estate.

Finally, petitioner was ordered to pay respondent $300 per month in alimony until the death of either party or until respondent remarried.

There is no claim by respondent that the distribution of property was unfair; however, she contends that the district court erred in awarding her the marital residence instead of cash. It is her position that the house will be difficult to sell and that she needs the cash to invest so she can use the interest from the investments to live on during the months she does not work.

Strangely enough, it was petitioner's testimony that

respondent and he should evenly split the checking account (he received part of the Norwest Bank checking account in the amount of $2,279.50, and she received the remaining amount of $776.50); that she should receive the savings account (which she did), the State Employees Credit Union account (which he was awarded, in the amount of $6,268), the IRA with Woodmen Accident & Life in the amount of $12,559 (which he was awarded), the balance of the certificate of deposit after paying petitioner the proceeds from his mother's estate (which amount was considered by awarding petitioner $8,200 more in property than respondent), and the loan to the children (which was awarded to respondent). Petitioner also suggested at one time that respondent be awarded the house and that he would make the house payments of some $333 per month. He also thought she should get $300-per-month alimony, but then he changed that to suggest that he did not propose both to give her alimony and make the house payments.

The testimony of petitioner shows that he plans to continue working for another 5 or 6 years, at which time he will retire and his income level—pension rather than salary—will reduce by 25 percent. However, it is his intention to continue working in some other line of work so that he can qualify for Social Security benefits.

It is apparent that at the time of his testimony, petitioner believed that his wife should have approximately $20,000 more in cash than she was actually awarded.

The prospects for future earnings for petitioner are quite bright; those of the respondent are dark for the foreseeable future. She is going to have a difficult time supporting herself on a limited earned income plus alimony payments and still making the house payments. A more reasonable award of alimony would be $500 per month during the time that petitioner continues to be employed by the Nebraska State Patrol; i.e., until he reaches the retirement age of 55, or before the time respondent dies or remarries. Upon his reaching retirement age, the alimony payments shall revert to $300 per month under the same terms and conditions as originally provided for in the decree of the district court.

In all other respects, we find no abuse of discretion on the

part of the trial court, and its judgment is affirmed as modified herein. Petitioner is ordered to pay $1,000 toward respondent's attorney fees.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. BRENT D. KISTENMACHER, APPELLANT.

436 N.W.2d 168

Filed February 24, 1989. No. 87-1050.

1. **Assault: Words and Phrases.** "Recklessly," as used in Neb. Rev. Stat. § 28-109 (Reissue 1985), means conduct in which an actor disregards a substantial and unjustifiable risk to another, which risk, in view of the nature and purpose of the actor's conduct and circumstances known to him, involves a gross deviation from the standard of conduct which a law-abiding person would have observed in the actor's situation.
2. **Jury Instructions: Appeal and Error.** All jury instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
3. **Jury Instructions: Assault: Weapons.** It is a correct statement of the law, and therefore proper to instruct, that the intentional pointing of a loaded firearm at another person, unless legally justified, is ordinarily an unlawful assault.
4. **Sentences: Appeal and Error.** Sentences imposed within the limits prescribed by statute will not be disturbed on appeal, absent an abuse of discretion.

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

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

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

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

PER CURIAM.

A jury found the defendant, Brent D. Kistenmacher, guilty of manslaughter in violation of Neb. Rev. Stat. § 28-305(1)

(Reissue 1985), and of using a firearm to commit a felony, a violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985), in the shooting death of Jason Cuellar. The defendant was subsequently sentenced to not less than 6 2/3 nor more than 20 years' imprisonment on count I, manslaughter, and not less than 3 nor more than 5 years' imprisonment on count II, the firearm charge, the sentence on count II to run consecutively to the sentence on count I. Defendant appeals, asserting that the trial court erred in (1) granting the State's motion in limine precluding the defendant from offering psychiatric testimony relevant to a material issue in the case; (2) instructing the jury over the defendant's objection that the intentional pointing of a loaded firearm at another person, unless legally justified, is ordinarily an unlawful assault; and (3) imposing an excessive sentence.

On April 12, 1987, at approximately 4:30 p.m., the defendant had returned to his apartment after playing in a softball game. A short time later the deceased, Cuellar, and Bill Morast arrived at the defendant's apartment. Cuellar and Morast remained for about an hour. Also present was Mark Deitering, the defendant's roommate. Thereafter, all four left the apartment, as Kistenmacher and Deitering had made plans to visit some friends.

The defendant and Deitering returned to their apartment at about 9:15 that evening. No one else was in the apartment at that time. The two went into the defendant's room and visited until approximately 9:50 p.m., when they began to hear noises coming from another room of the apartment.

The defendant and Deitering did not know anyone else was in the apartment at that time. Unknown to them, Cuellar and Morast had returned. Cuellar and Morast could hear the defendant and Deitering in the apartment, and let themselves in through the unlocked front door. Cuellar and Morast then sat down on the couch, and Cuellar began to throw Hot Tamale candies at the bedroom door of the defendant.

The defendant owned a .22-caliber double-action revolver which had been given to him by his father several months earlier. He kept this revolver in his nightstand drawer. The defendant testified that he kept the weapon loaded, except that

the chamber directly underneath the hammer and the next forward chamber were kept empty.

After hearing the noises caused by Cuellar's throwing the candies at the defendant's door, the defendant and Deitering exited the bedroom and walked down the hall toward the living room. At that point, the defendant thought the noise had been caused by an intruder. As they were approaching the living room, either the defendant or Deitering stated, "Who is it, we've got a gun," and Cuellar and Morast chuckled a bit.

When the defendant and Deitering reached the end of the hall, they recognized the "intruder" as Morast and Cuellar. At that point, believing that the chamber under the hammer was empty, the defendant raised the gun, pointed it at the deceased, and pulled the trigger. A shot was fired, striking Cuellar in the head. At that time, "everybody started just freaking out," and the defendant told Deitering to call 911 for an ambulance.

During questioning at the police station, the defendant admitted that he had shot Cuellar and that at the time of the shooting he knew it was Cuellar and not an intruder. When asked why he would point a gun at a friend of his, the defendant stated that his group of friends would play "head games" with each other to "freak everybody out" and would do things such as point guns at people.

Prior to the trial, the defense notified the State that it intended to call Dr. Thomas Radecki, a psychiatrist, as a witness on behalf of the defendant. The testimony of Dr. Radecki was intended to bear on the state of mind of the defendant at the time of the shooting. The testimony was being offered by the defense to negate the prosecution's claim of reckless conduct on behalf of the defendant. The substance of Dr. Radecki's testimony is contained in an offer of proof made by defense counsel at trial. He testified that his examination of the defendant revealed that Brent Kistenmacher was a 20-year-old who had become "desensitized to the serious nature of the games he was playing." This desensitization was brought about by, among other factors, his choice of violent television programs, heavy metal music, and horror-type movies. Dr. Radecki also stated that this "desensitization" theory was widely accepted in his profession. Because of desensitization,

the defendant could not and did not appreciate the great risk of danger posed by his behavior. Evidence of mental defects (desensitization) was excluded in *Zuber v. State*, 500 So. 2d 670 (Fla. App. 1986), the court noting, however, that the expert was not asked whether the defects described were such as would adversely affect and diminish defendant's mental capacity to form specific intent. That omission is not present in this case. Defense counsel argued that this testimony was relevant, as the definition of "recklessly" contained in Neb. Rev. Stat. § 28-109(19) (Reissue 1985) contains a subjective intent requirement, and Dr. Radecki's testimony would have some bearing on the determination of whether the defendant had the requisite subjective intent. The district court sustained the State's motion in limine to exclude the proposed testimony.

The defendant's first assignment of error concerns the exclusion of this expert testimony. Defense counsel asserts that the exclusion of the testimony of Dr. Radecki denied the defendant his constitutional right to present relevant, material evidence in his defense, as guaranteed by the U.S. Supreme Court in *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), and recognized by this court in *State v. Ammons*, 208 Neb. 797, 305 N.W.2d 808 (1981). Before we can determine whether this right was abridged, it must first be established that this evidence is relevant to the defendant's defense.

The focus of the prosecution was that the defendant was guilty of manslaughter in violation of § 28-305(1) because the defendant had killed another, without malice, while in the commission of an unlawful act. The underlying unlawful act was assault in the third degree.

Third degree assault is defined in Neb. Rev. Stat. § 28-310 (Reissue 1985). That statute provides in part: "(1) A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or (b) Threatens another in a menacing manner." Specifically, it was the State's position that the defendant acted recklessly. The term "recklessly" is statutorily defined in § 28-109(19). This subsection provides the following:

> (19) Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

The State argues that in accordance with *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987), the definition of "recklessly" contained in § 28-109(19) is an objective one, thereby making any testimony as to the defendant's subjective intent irrelevant. In *State v. Hoffman, supra*, the defendant became intoxicated, drove his car, and was involved in an accident which took the life of another driver. In *Hoffman*, the defendant was arguing that he did not have the mental capacity necessary to form the general intent required for second degree assault. Hoffman contended that his intoxication "induced" him to climb behind the wheel, and that he therefore did not "intentionally" cause the death of the victim. When defining "recklessly" in *Hoffman*, this court stated at 139, 416 N.W.2d at 237:

> However, under § 28-309(1)(b) concerning a second degree assault based on a reckless act or conduct, an intent to inflict or cause bodily injury is not an element; rather, the reckless act or conduct, causing serious bodily injury, is the gravamen. A reckless act involves a conscious choice in a course of action, made with knowledge of a serious danger or risk to another as a result of such choice of action or with knowledge of the attendant circumstances which, to a reasonable person, would indicate or disclose a serious danger or risk to another as a result of the course of action selected. See, *People v. Mason*, 198 Misc. 452, 97 N.Y.S.2d 462 (1950); *State v. Bischert*, 131 Mont. 152, 308 P.2d 969 (1957); 22 C.J.S. *Criminal Law* § 31(5) (1961).

The defendant's argument in this action is analogous to the theory propounded by the defendant in *Hoffman* and rejected

by this court. In this case, Kistenmacher's act involved a conscious choice in a course of action: pointing a loaded firearm at a person and pulling the trigger, made with the knowledge of a serious danger or risk to another as a result of the choice of action; the defendant realized that some danger existed when he pointed a loaded gun at Cuellar and pulled the trigger, which to a reasonable person would indicate or disclose a serious danger or risk to another as a result of the course of action selected; a reasonable person in a similar situation would realize the serious risk that his conduct posed to the victim.

Just as we rejected the argument in *Hoffman* that the statutory definition of "recklessly" contains a subjective element, so must we reject that argument in this case. Therefore, because the test for recklessness as statutorily defined in § 28-109(19) is purely objective, Dr. Radecki's testimony was irrelevant and properly excluded by the district court.

The defendant next assigns as error the instruction given to the jury regarding the definition of an unlawful assault. This jury instruction reads: "You are further instructed that the intentional pointing of a loaded firearm at another person, unless legally justified, is ordinarily an unlawful assault. Further, it is the law of this state that one who threatens another in a menacing manner, unless legally justified, commits an unlawful assault." The defendant contends that the giving of the first portion of the instruction, "the intentional pointing of a loaded firearm at another person, unless legally justified, is ordinarily an unlawful assault," was given in error, as this instruction invaded the province of the jury to pass upon the facts of the case.

This instruction was apparently taken from a line of Nebraska Supreme Court cases. *Ford v. State*, 71 Neb. 246, 98 N.W. 807 (1904); *Egbert v. State*, 113 Neb. 790, 205 N.W. 252 (1925); *Turpit v. State*, 154 Neb. 385, 48 N.W.2d 83 (1951); *State v. Archbold*, 178 Neb. 433, 133 N.W.2d 601 (1965). The trial court retains discretion in the wording of jury instructions. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). The instruction that was given to the jury in this case is a correct statement of the law. As stated in *State v. Bartholomew*, 212

Neb. 270, 275, 322 N.W.2d 432, 436 (1982), " 'All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.' "

This court has held, and it is a correct statement of the law and therefore proper to instruct, that "the intentional pointing of a loaded firearm at another person, unless legally justified, is ordinarily an unlawful assault." Therefore, this second assignment of error is without merit.

The defendant next assigns as error the sentence imposed upon him. The defendant was sentenced to a combined term of 9 2/3 to 25 years' imprisonment. The defendant was convicted of manslaughter, a Class III felony, carrying the possibility of a term of imprisonment from 1 to 20 years. Additionally, the defendant was convicted of use of a firearm in the commission of a felony, also a Class III felony. Section 28-1205 regarding use of a firearm in the commission of a felony requires that sentence to run consecutively to the sentence imposed for the underlying felony. In this case, the district court sentenced the defendant to the maximum possible sentence for manslaughter, 6 2/3 to 20 years' imprisonment, and then a consecutive sentence of 3 to 5 years' imprisonment for the use of a firearm charge.

The sentences given are obviously within the limits prescribed by statute. This court has repeatedly held that sentences imposed within the limits prescribed by the statutes in question will not be disturbed on appeal, in the absence of an abuse of discretion. *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). From a review of the record, no abuse of discretion is shown. Therefore, the defendant's contention that the trial court imposed an excessive sentence is without merit.

We cannot sustain any of the assignments of error urged by the defendant. It therefore follows that the judgment and sentences of the district court must be and are affirmed.

AFFIRMED.

WHITE, J., concurring.

I concur with the majority in affirming the appellant's conviction. However, I cannot agree with the court's interpretation of Neb. Rev. Stat. § 28-109(19) (Reissue 1985). This court holds that the definition of "recklessly" contained in

§ 28-109(19) is "purely objective," and therefore the subjective intent of the appellant in this case was wholly irrelevant. I believe such an interpretation is contrary to the plain meaning of the statute.

Section 28-109(19) provides:

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

This language supports an inference that the Legislature, in adopting § 28-109(19), intended the subjective mental state of the defendant to be an element of the definition of "recklessly." Section 28-109(19) requires the fact finder to determine whether the defendant was reckless by finding that the risk the defendant disregarded was "of such a nature and degree that, *considering the nature and purpose of the actor's conduct and the circumstances known to him . . .*" (Emphasis supplied.) This language connotes an element of subjectivity.

The statute does not say the risk must be of such a nature and degree that consideration must be made of the actor's conduct and the circumstances as seen by a reasonable person, but instead contains the phrase "and the circumstances known to him." It seems inconceivable that the majority could ignore this language and instead interpret the statute as containing only the objective standard of a reasonable person.

In *State v. Hoffman*, 227 Neb. 131, 139, 416 N.W.2d 231, 237 (1987), in language relied on by the majority, we stated,

> A reckless act [as defined in § 28-109(19)] involves a conscious choice in a course of action, made with knowledge of a serious danger or risk to another as a result of such choice of action or with knowledge of the attendant circumstances which, *to a reasonable person*, would indicate or disclose a serious danger or risk to another as a result of the course of action selected.

(Emphasis supplied.) The emphasized language contained in *Hoffman* is clearly contrary to the express words contained in § 28-109(19). In *Hoffman*, we held that the attendant circumstances must be examined as seen through the eyes of a hypothetical reasonable person. Yet, the statute states that we must view the circumstances as known to the defendant, before we can determine whether a disregard of the risks involved is a gross deviation from the acceptable standard of conduct. I believe that this court is required to follow the plain words contained in the statute, and any language in *Hoffman* misconstruing those words should now be disapproved. Therefore, the testimony of Dr. Radecki as to the subjective mental state of the defendant, that Brent Kistenmacher was "very desensitized to the great risk [of pointing a gun at the victim] and didn't realize . . . by any means, the great dangers that he was taking" was relevant in this case.

Whether this exclusion of psychiatric testimony was reversible error is another question. Expert testimony is admissible when it would assist the trier of fact to understand evidence or determine a fact in issue, Neb. Rev. Stat. § 27-702 (Reissue 1985), and *State v. Birge*, 223 Neb. 761, 393 N.W.2d 713 (1986), and evidence of an accused's mental condition at the time of the offense is always admissible to prove absence of intent, *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984). In addition, in *State v. Ammons*, 208 Neb. 797, 305 N.W.2d 808 (1981), this court recognized that the right of a defendant to present his own witnesses to establish a defense is a fundamental element of due process of law under the sixth amendment right to compulsory process, as established by the U.S. Supreme Court in *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). However, "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of . . . the improper . . . rejection of evidence . . . if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Neb. Rev. Stat. § 29-2308 (Reissue 1985); *State v. Turner*, 221 Neb. 852, 381 N.W.2d 149 (1986).

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. *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). Error in admitting or excluding evidence in a criminal trial is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *State v. Watkins, supra; State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). Upon a full review of the record, I find that the exclusion of Dr. Radecki's testimony, although error, was nonetheless harmless beyond a reasonable doubt, and therefore no reversal is required.

In the defendant's offer of proof, Dr. Radecki stated that the defendant was desensitized to violence such that he did not appreciate the "great risk" of his behavior. However, the doctor also stated that "[o]bviously, he realized there was some danger. He told me just the day before [the fatal shooting] he had gotten angry at his roommate for doing the same thing with a neighbor." If the defendant appreciated that his conduct posed some risk to the life of Jason Cuellar, enough of a risk that just the day before he had yelled at his roommate for doing precisely the same act, subjectively disregarding the existence of that risk was an act sufficiently reckless to be covered by the definition of "recklessly" contained in § 28-109(19).

I would therefore affirm the conviction on the basis that the exclusion of Dr. Radecki's testimony constituted harmless error.

SHANAHAN, J., dissenting.

Both the majority opinion and the concurrence contain a misinterpretation of the statutory definition of *recklessly* as well as a misreading of *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987), and incorrectly arrive at absolutes, rendering the majority opinion and concurrence absolutely incorrect concerning the nature and proof of reckless conduct as an element of third degree assault, the predicate unlawful act in Kistenmacher's conviction for manslaughter.

While the majority opinion correctly concludes that Kistenmacher's conviction is governed by principles enunciated in *Hoffman*, the majority actually disregards the *Hoffman* principles in disposing of this appeal. On the other hand, the

concurrence initially embraces the standard stated in *Hoffman*, but later disapproves language in the *Hoffman* standard and ultimately posits that there is no reversible error in excluding Kistenmacher's evidence offered regarding the "element of subjectivity" emphasized in the concurring opinion.

Both the majority and concurring opinions express the misperception that *Hoffman* negates a subjective element in the recklessness characterized in Neb. Rev. Stat. § 28-109(19) (Reissue 1985). The majority goes even further and holds that the test for recklessness is "purely objective."

Rather than repeating the *Hoffman* passage stated in both the majority and concurring opinions, one sees the clear meaning of *Hoffman* in the following excerpts which appear in immediate proximity to the *Hoffman* passage contained in the majority opinion and concurrence:

> According to the definition contained in § 28-109(19), *recklessly* . . . means conduct in which an actor disregards a substantial and unjustifiable risk of serious bodily injury to another, which risk, in view of the nature and purpose of the actor's conduct and circumstances known to the actor, involves a gross deviation from a standard of conduct which a law-abiding person would have observed in the actor's situation. . . .
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> . . . .
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> When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence. [Citation omitted.] Evidence established that Hoffman drank a considerable quantity of alcoholic beverage (root beer schnapps); drove his automobile on the city streets of Lincoln after consuming that alcohol; was conscious, alert, and conversing with hospital personnel after the fatal collision; and discussed the "Implied Consent Advisement Form" with Officer Bassett. *Those facts provided the trial court with sufficient circumstantial evidence from which to draw the conclusion that Hoffman was able to make a conscious choice to drive his automobile*, rather than refrain from operating his vehicle, *and thereby*

> *disregarded the substantial risk of bodily injury to the public* . . . .

(Emphasis supplied.) *State v. Hoffman, supra* at 138, 140, 416 N.W.2d at 237-38. Therefore, to determine whether conduct is reckless, as characterized in § 28-109(19), the *Hoffman* court used a test which requires a finding that a defendant made a "conscious choice" to "disregard" a substantial risk of harm to another.

Only very rarely, however, will there be direct evidence that a defendant knew and appreciated the risk involved in the defendant's particular conduct alleged to be criminally reckless. "When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman, supra* at 140, 416 N.W.2d at 237. The *Hoffman* court recognized that a defendant's state of mind necessary for recklessness may be proved by (1) the defendant's acknowledged awareness and appreciation of the serious danger or risk resulting from the defendant's chosen course of conduct, or (2) the defendant's knowledge of attendant circumstances sufficient to justify a reasonable inference that the defendant actually realized the danger involved in the questioned conduct. In either case, the trier of fact is required to determine the defendant's state of mind at the time of the alleged reckless conduct. A factual finding that a reasonable person would have perceived the danger, but that the defendant, for some reason, failed to perceive the danger, would not support a finding of reckless conduct under *Hoffman*. While conduct contrary to or inconsistent with a reasonable person's conduct may constitute negligence, such conduct is not reckless as the term is defined in § 28-109(19).

Whether a defendant has recklessly acted is determined by the two-part test contained in § 28-109(19):

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and

> purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

The preceding statute is, perhaps, more comprehensible if the statute's two sentences are treated as distinct components of a test for recklessness. First, the defendant must have realized that a risk existed, and must have "disregarded" that risk. Obviously, to "disregard" a risk, a person must be aware that the risk existed in the first instance. Consequently, appreciation of risk is the subjective element of recklessness. If the fact finder determines that the defendant appreciated the risk inherent in prospective conduct, and yet the defendant chose the conduct which resulted in the risk, then the "nature and degree" of the resultant risk must be evaluated, a process which relates to the second or objective part of the recklessness characterized by § 28-109(19). In this second component of the test, the fact finder must ask whether the risk was of such nature and degree that, when the defendant's appreciation of the risk is considered, disregarding the risk constituted a "gross deviation from the standard of conduct that a law-abiding person [a reasonable person] would observe in the actor's situation."

This two-part test to determine recklessness is by no means novel. The Model Penal Code § 2.02, comment 3 at 238 (1985), states:

> Ultimately, then, the jury is asked to perform two distinct functions. First, it is to examine the risk and the factors that are relevant to how substantial it was and to the justifications for taking it. *In each instance, the question is asked from the point of view of the actor's perceptions, i.e., to what extent he was aware of risk, of factors relating to its substantiality and of factors relating to its unjustifiability.* Second, the jury is to make the culpability judgment in terms of whether the defendant's conscious disregard of the risk justifies condemnation. . . . [T]he question is whether the defendant's disregard of the risk involved a gross deviation from the standards of conduct that a law-abiding person would have observed in the actor's situation.

As noted in Treiman, *Recklessness and the Model Penal Code*, 9 Am. J. Crim. L. 281, 299-300 (1981):

> Both recklessness and negligence require the existence or creation of a substantial and unjustifiable risk that circumstances exist or that a result will occur. In addition, the trier of fact must make an objective, after the fact, determination of the character of the risk. Further, there must be a gross deviation from the standard of behavior (conduct/care) of a fictional person (law-abiding/reasonable).
>
> The one crucial difference between recklessness and negligence is that recklessness has a subjective component. In this sense it is more like knowledge than negligence. With regard to negligence, the actor fails to perceive the risk. It is the failure to perceive the risk that is judged by an objective standard. With respect to recklessness there is subjective perception or awareness of the risk, but the actor consciously disregards the risk. It is this conscious disregard that is to be judged by the objective standard.

In jurisdictions which have a statutory definition of *recklessly* similar to the definition in § 28-109(19), none apply the "purely objective" test adopted by this court's majority but, quite to the contrary, recognize a subjective element in reckless conduct and utilize a test which requires that a defendant appreciate a risk in order to disregard the risk. See, *People v. Gates*, 140 A.D.2d 994, 529 N.Y.S.2d 663 (1988); *State v. Wilson*, 145 Wis. 2d 143, 426 N.W.2d 56 (1988); *State v. Koonce*, 731 S.W.2d 431 (Mo. App. 1987); *State v. Flewelling*, 524 A.2d 765 (Me. 1987); *State v. Malines*, 11 Conn. App. 425, 527 A.2d 1229 (1987); *State v. Allen*, 128 N.H. 390, 514 A.2d 1263 (1986); *Dalton v. State*, 488 So. 2d 13 (Ala. Crim. App. 1986); *Edgmon v. State*, 702 P.2d 643 (Alaska App. 1985); *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

By today's decision, the majority erroneously equates criminal recklessness, which requires "disregard" of a risk, with civil negligence, and thereby ignores the basic difference between negligent and reckless conduct—a negligent person fails to perceive a risk which should have been perceived, while a reckless person disregards a risk perceived by that person. In

prescribing the elements of third degree criminal assault reflected in Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1985), the Legislature specified the three mental states required for a criminal assault: intent, knowledge, or recklessness. Under the definition of *recklessly* expressed in § 28-109(19), a negligent actor cannot be guilty of a third degree assault as a predicate for a manslaughter conviction. See Neb. Rev. Stat. § 28-305 (Reissue 1985). According to the majority, a person is reckless as the result of a failure to perceive a risk which a reasonable person would have perceived, but such conclusion by the majority disregards the explicit language of § 28-109(19) and *Hoffman*.

While this court may disagree on policy grounds with a definition of recklessness which requires the defendant's appreciation of a risk, the Legislature, nevertheless, has exercised its power to statutorily define crimes. "When the Legislature has spoken, it is not up to this court to disagree with its decision on a purely policy basis." *Arant v. G. H., Inc.*, 229 Neb. 729, 731, 428 N.W.2d 631, 632 (1988). To conform with Nebraska precedent, consistent with the better reasoned decisions of courts in other jurisdictions having a statutory definition of *recklessness* similar to the definition in § 28-109(19), I would hold that, to be guilty of violating a statute proscribing reckless conduct, the defendant must appreciate the substantial risk of injury inherent in a particular course of conduct, and then consciously embark on such conduct in disregard of that risk.

Turning to the evidential question in this appeal, in Kistenmacher's offer of proof, Dr. Radecki, a physician and psychiatrist qualified to give an opinion regarding Kistenmacher's mental state, testified that, at the time of the shooting, Kistenmacher was "desensitized to the great risk of that behavior [pointing a loaded gun at someone] and didn't realize the — by any means, the great dangers that he was taking." Dr. Radecki explained that "desensitization" is a state of mind in which an individual "markedly underestimate[s] the seriousness of violence as well as overestimating the dangers of society." According to Dr. Radecki, Kistenmacher "realized there was some danger." Hence, the concurrence concludes

that, although exclusion of the offered testimony was error, the exclusion was harmless beyond a reasonable doubt, apparently because the physician's opinion was somewhat equivocal.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)). See, also, *State v. Robertson*, 219 Neb. 782, 789, 366 N.W.2d 429, 434 (1985) ("Only relevant evidence is admissible, and evidence which is not relevant is not admissible"); *State v. Oliva*, 228 Neb. 185, 188, 422 N.W.2d 53, 55 (1988) ("[E]vidence is probative [and therefore relevant] if it tends in any degree to alter the probability of a material fact"). Kistenmacher's appreciation of the risk in his chosen course of conduct, pointing the gun at another, was, as noted above, a "fact . . . of consequence to the determination of the action . . . ." Whether we, as judges, believe or disbelieve the opinion expressed by Dr. Radecki, his opinion rendered the existence of Kistenmacher's appreciation of the risk less likely and was, therefore, relevant. See *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986) (credibility of witnesses and weight to be given testimony are matters for the jury). Kistenmacher's offer of proof contained evidence which, if believed, tended to negate an element of the crime charged, namely, Kistenmacher's disregard of a substantial risk.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)). However, I am unable to characterize the error in excluding Dr. Radecki's testimony as error which is harmless beyond a reasonable doubt. In the trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988); *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). If there is some incorrect conduct in a jury trial which, on a review of the entire record, did not materially

influence the jury in its verdict adverse to a substantial right of the appellant, the error is harmless. *State v. Watkins, supra.*

Dr. Radecki's offered opinion was the only evidence regarding Kistenmacher's state of mind at the time of the shooting. Furthermore, Dr. Radecki's opinion had direct bearing on Kistenmacher's guilt, inasmuch as a third degree assault by reckless conduct was the predicate "unlawful act" required for Kistenmacher's manslaughter conviction.

In the present case, the substantial right violated was Kistenmacher's right to present Dr. Radecki's testimony which tended to establish Kistenmacher's innocence. See, *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Crane v. Kentucky*, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) ("exclusion of . . . exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing' ").

Therefore, I would reverse Kistenmacher's conviction and remand the cause for a new trial, allowing Kistenmacher to present testimony regarding his appreciation of the substantial risk inherent in his chosen course of conduct, the subjective element required for criminally reckless conduct.

LANCE L. VANCE, APPELLEE, V. RHONDA K. VANCE, APPELLANT.
436 N.W.2d 177

Filed February 24, 1989. No. 88-438.

Child Custody: Appeal and Error. Determinations as to the custody of minor children in a dissolution of marriage case are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

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

Thomas C. Hemphill, of Harris, Feldman Law Offices, for appellant.

William G. Line, of Kerrigan, Line & Martin, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

PER CURIAM.

The parties were married in California on June 21, 1986, and moved to Fremont, Nebraska, where petitioner-appellee husband, Lance L. Vance, had lived prior to the marriage and where he was employed in the family plumbing business. Respondent-appellant wife, Rhonda K. Vance, was a California resident before the marriage. Both parties were in their midthirties, and each had been married and divorced once before.

After 4 months, the parties did not share the same bed, and the marriage gradually disintegrated. A child was born on May 22, 1987. The wife informed the husband of her pregnancy in March 1987. On November 17, 1987, the wife left Nebraska with the child and returned to California, where she lived with her parents. The husband filed this action for dissolution of the marriage on November 20, 1987, seeking custody of the son of the parties.

After trial, the court found both parties to be fit for custody, and awarded joint custody of the child to the parties, with physical possession of the child, aged 11 months at the time of trial, to the father, subject to substantial visitation in the wife.

The wife has appealed, alleging as the only error the trial court's action in awarding custody of the young son to the father, citing *Turner v. Turner*, 205 Neb. 6, 286 N.W.2d 100 (1979). We find the "tender years" doctrine not controlling in matters of custody, and that such matters are now controlled by the light of Neb. Rev. Stat. § 42-364(2) (Reissue 1988), which provides:

> In determining with which of the parents the children or any of them shall remain, the court shall not give preference to either parent based on the sex of the parent, and no presumption shall exist that either parent is more

fit to have custody of the children than the other.

The ultimate decision as to custody is based on the best interests of the child.

We have held that determinations as to the custody of minor children in a dissolution of marriage case are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988); *Delaney v. Delaney*, 222 Neb. 33, 382 N.W.2d 16 (1986).

We have reviewed this case de novo. We affirm the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER J. HOER, APPELLANT.

436 N.W.2d 179

Filed February 24, 1989. No. 88-469.

1. **Motor Vehicles: Police Officers and Sheriffs: Probable Cause: Search and Seizure: Evidence.** If a reasonable person, viewing all the objective circumstances encountered by a law enforcement officer and considering the officer's possession of reasonably trustworthy information, would believe that a vehicle likely contained contraband or other evidence of criminal activity, a law enforcement officer has probable cause to search the vehicle notwithstanding the absence of a search warrant.
2. **Police Officers and Sheriffs: Search and Seizure: Evidence.** To uphold a warrantless seizure under the plain view doctrine, first, the officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.

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

Stephen C. Hansen, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

SHANAHAN, J.

As the result of a bench trial, Christopher J. Hoer was convicted of possessing a controlled substance (methamphetamine) in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1986). In his motion to suppress physical evidence, see Neb. Rev. Stat. § 29-822 (Reissue 1985), Hoer claimed that methamphetamine obtained in a warrantless search of his automobile was inadmissible as the product of an unreasonable search and seizure contrary to the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. The court overruled Hoer's suppression motion and, over Hoer's objection at trial, admitted the methamphetamine into evidence, which resulted in Hoer's conviction.

STANDARDS OF REVIEW

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Blakely, supra.* Admission or exclusion of evidence is a matter for the discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v.*

Clancy, 224 Neb. 492, 398 N.W.2d 710 (1987). If police have acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

State v. Abdouch, 230 Neb. 929, 930, 434 N.W.2d 317, 319 (1989).

THE SEARCH

Deputy R.D. Mayer of the Platte County Sheriff's Department stopped a car for speeding and running a stop sign. Christopher Hoer was the car's driver and only occupant. On arrival at the driver's door of Hoer's car, where Hoer was seated behind the wheel, Mayer smelled the odor of alcohol emanating from inside the vehicle and also detected the odor of alcohol on Hoer's breath. Mayer asked for Hoer's license to operate a motor vehicle and the vehicle's registration. Hoer's license showed that he was under 21 years of age. Neb. Rev. Stat. § 53-180.02 (Reissue 1988) prohibits a minor, that is, anyone under the age of 21 years, from possessing or physically controlling any alcoholic liquor inside a vehicle on a public street, alley, road, or highway. See Neb. Rev. Stat. § 53-103(23) (Reissue 1988) (a minor is any person under 21 years of age). Mayer then asked Hoer to perform field sobriety tests, including a balance test, and administered a preliminary breath test to Hoer. The tests indicated that Hoer was intoxicated. Mayer arrested Hoer for drunk driving and told him the consequences of refusing to give a blood or breath sample under the implied consent law. According to Mayer, Hoer displayed "mood swings," alternating between hostility and cooperativeness. Although Hoer agreed to supply a sample of his blood for testing, he "appeared to be nervous" and asked Mayer whether the blood test was limited to a disclosure of alcohol only. In that setting, Mayer concluded that Hoer "had ingested something into his body other than alcohol that he didn't want his blood to be screened for."

After Hoer's arrest, Mayer searched Hoer's car and looked primarily for alcohol, but also for "other contraband." Under the driver's seat, Mayer found a partially consumed bottle of

wine, a "750 milliliter bottle of MD 20/20 wine that contains a clear plastic straw." Under the front passenger's seat, Mayer discovered a cardboard box, 6 1/2 by 4 by 1 1/2 inches, held together with black electrical tape. Mayer opened the cardboard box because it might contain a relatively small container of alcohol, or, in Mayer's words:

> Any bottle that would contain hard liquor that could be purchased on an airline, a half-pint bottle would have fit in there. I'm not sure of the size, but I believe there is a quarter-pint bottle that's recently been produced in various flavors of schnapps, that sort of thing.

Inside the box, Mayer, who had law enforcement training in identifying controlled substances, found a plastic packet containing a white powder, which he believed to be a controlled substance and which was later tested and determined to be methamphetamine.

Hoer contends the methamphetamine, found inside the cardboard box, was constitutionally inadmissible evidence obtained through an unreasonable search of his automobile.

VEHICLE SEARCHES

The Supreme Court, in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), held that, when police officers have probable cause to believe that a vehicle contains contraband, a vehicular search by officers without a warrant is reasonable under the fourth amendment to the U.S. Constitution. In *Carroll*, the Court found that officers had probable cause to search a car for alcohol and, therefore, justification for ripping the car's upholstery to locate concealed whiskey. The Court in *Carroll* observed:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights

of individual citizens.

267 U.S. at 149. It then concluded:

> [T]he facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

267 U.S. at 162.

In *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), police officers, with probable cause to search an automobile for narcotics, searched inside a brown paper bag and a zippered red leather pouch found in the automobile's trunk. With the background of *Carroll*, the Supreme Court discussed the nature of probable cause which justified a warrantless vehicle search:

> [T]he probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. . . .
>
> In short, the exception to the warrant requirement established in *Carroll* . . . applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.

456 U.S. at 808-09.

Referring to *Carroll*, the Court in *Ross* noted:

> The scope of the search was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search. Since such a warrant could have authorized the agents to open the rear portion of the roadster and to rip the upholstery in their search for concealed whiskey, the search was constitutionally permissible.
>
> . . . .
>
> In its application of *Carroll*, this Court in fact has sustained warrantless searches of containers found during a lawful search of an automobile. In *Husty v. United*

> *States*, 282 U. S. 694, the Court upheld a warrantless seizure of whiskey found during a search of an automobile, some of which was discovered in "whiskey bags" that could have contained other goods. In *Scher v. United States*, 305 U. S. 251, federal officers seized and searched packages of unstamped liquor found in the trunk of an automobile searched without a warrant.

456 U.S. at 818-19.

The *Ross* Court continued:

> As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history. It is therefore significant that the practical consequences of the *Carroll* decision would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle. . . . The Court in *Carroll* held that "contraband goods *concealed* and illegally transported in an automobile or other vehicle may be searched for without a warrant." 267 U. S., at 153 (emphasis added). As we noted in *Henry v. United States*, 361 U. S. 98, 104, the decision in *Carroll* "merely relaxed the requirements for a warrant on grounds of practicability." It neither broadened nor limited the scope of a lawful search based on probable cause.

456 U.S. at 820.

In reaffirming the constitutional validity of a vehicular search such as that considered in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), the Supreme Court in *Ross* concluded:

> [A]n individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened. These interests must yield to the authority of a search, however, which—in light of *Carroll*—does not itself require the

> prior approval of a magistrate. The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.
>
> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.

United States v. Ross, 456 U.S. 798, 823-24, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).

Finally, the Court in *United States v. Ross* held:

> The exception recognized in *Carroll* is unquestionably one that is "specifically established and well delineated." We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

456 U.S. at 825.

This court has previously relied on the vehicle exception to a search warrant requirement, exemplified by *Ross*, in upholding searches of containers found during a probable cause search of a vehicle. In *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984), the search of luggage inside an automobile's trunk was reasonable when the searching police officer had probable cause to search the car for a .45 automatic reportedly carried by the defendant. In *State v. Hansen*, 221 Neb. 103, 375 N.W.2d 605 (1985), the search of the defendant's purse found inside her car was reasonable when the searching officer had probable cause to search the car for a controlled substance "which could have been secreted in a small container . . . ." 221 Neb. at 109, 375 N.W.2d at 610.

If a reasonable person, viewing all the objective circumstances encountered by a law enforcement officer and considering the officer's possession of reasonably trustworthy

information, would believe that a vehicle likely contained contraband or other evidence of criminal activity, a law enforcement officer has probable cause to search the vehicle notwithstanding the absence of a search warrant. *State v. Aden*, 196 Neb. 149, 241 N.W.2d 669 (1976); *United States v. Ross, supra*; *Carroll v. United States, supra*.

The scope of a warrantless search of a vehicle, as in a search pursuant to a warrant,

> is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

United States v. Ross, supra at 824.

We need not decide whether Deputy Mayer had probable cause to search Hoer's car and the cardboard box found inside the car in an effort to locate some unspecified controlled substance, because we find that Mayer's discovery of the methamphetamine was the result of a probable cause search for alcohol in Hoer's automobile.

Mayer smelled alcohol coming from Hoer's automobile and breath, saw Hoer fail the field sobriety tests, witnessed Hoer's failure of the preliminary breath test, and knew from the displayed operator's license that Hoer was underage for possession of alcohol. Given these facts, a reasonable person would conclude that a search of the automobile would likely reveal alcohol possessed by a minor in violation of § 53-180.02. Therefore, Mayer had probable cause to search for alcohol in the automobile operated by Hoer, who was a minor. Cf., *State v. Peterson*, 407 N.W.2d 221 (S.D. 1987) (odor of alcohol from car and driver gave probable cause to search for violations of "open container" law); *State v. Schinzing*, 342 N.W.2d 105 (Minn. 1983) (odor of alcohol from car gave probable cause to search for violations of "open container" law).

With probable cause to search for alcohol in Hoer's automobile, Mayer was authorized to search inside the car for anything which might serve as an alcohol container, including

the cardboard box found under the front passenger's seat inasmuch as the cardboard box was capable of concealing a small bottle or container of alcohol. *United States v. Ross, supra.*

PLAIN VIEW

The controlled substance inside the box was properly seized under the "plain view" doctrine. In *State v. Haselhorst*, 218 Neb. 233, 353 N.W.2d 7 (1984), we listed three requirements which must be met to uphold a warrantless seizure under the plain view doctrine:

> First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.

Haselhorst, supra at 236, 353 N.W.2d at 10. See, also, *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

In Hoer's case, Mayer's seizure of methamphetamine met all the requirements for application of the plain view doctrine. First, the methamphetamine was discovered in a place where Mayer was lawfully conducting a search, namely, a box that may have concealed a container of alcohol inside Hoer's automobile. Second, although Mayer suspected that the box might contain an undetermined controlled substance, Mayer's search of the box was not a pretensed search for alcohol to cover an actual search for a controlled substance. Mayer was searching the car for alcohol and found the box which may have contained alcohol. Consequently, Mayer's discovery of the methamphetamine was inadvertent. Third, it was immediately apparent to Mayer that the white powder, encased in plastic, was probably a controlled substance.

CONCLUSION

The seizure of the methamphetamine in Hoer's car was constitutional. The methamphetamine was inadvertently

discovered during a lawful warrantless vehicle search based on probable cause that Hoer, an intoxicated motorist and a minor, had alcohol in his automobile. Therefore, the trial court properly overruled Hoer's motion to suppress the methamphetamine obtained through a valid search of Hoer's automobile. The methamphetamine, as physical evidence taken from Hoer's automobile, was constitutionally admissible in Hoer's trial.

AFFIRMED.

RICHARD E. REEVES, APPELLANT, V. HILL AERO, INC., APPELLEE.

436 N.W.2d 494

Filed March 3, 1989. No. 86-264.

1. **Contracts: Actions.** An action for breach of contract presents an action at law.
2. **Judgments: Appeal and Error.** In an action at law, where a jury trial has been waived, the judgment of the trial court has the effect of a jury verdict and will not be set aside unless clearly wrong.
3. **Contracts.** In construing a contract, words must be given their plain and ordinary meaning as reasonable persons would understand them.

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

James M. Kelley for appellant.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

On June 23, 1983, plaintiff-appellant, Richard E. Reeves (Reeves), an architect, filed this action against Call Brothers, Ltd. (Call Bros.), a corporation, and defendant-appellee, Hill Aero, Inc. (Hill Aero), seeking damages arising from the alleged breach of a written owner-architect agreement for the design and construction of a hangar/office complex at the

Lincoln Municipal Airport. Reeves had completed the design portion of the work and had submitted plans, when the contract was terminated. Reeves claimed Hill Aero breached the contract by using Reeves' work product to construct a building using plans substantially the same as those developed by Reeves. Reeves subsequently dismissed the action against Call Bros. and filed an amended petition naming Hill Aero as the sole defendant.

On November 19, 1985, the parties waived a jury trial, and the matter was tried to the district court for Lancaster County upon a stipulated record consisting of the documents and letters between the parties. In dismissing Reeves' amended petition, the trial court found that the contract was terminated pursuant to contract article 8 and that Hill Aero paid Reeves compensation for his services to that termination date, plus termination expenses. The court held that contract article 9 provided "the drawings and specifications shall remain the property of the plaintiff, but only prohibits their use by [Hill Aero] on other projects or extensions to this project without permission" (emphasis in original) and that Hill Aero was not prohibited from using them on the pending hangar project. The court further held that even if Reeves were entitled to recover, there was no evidence of actual damages.

Reeves timely appealed, contending the trial court erred (1) in holding that contract article 9 only prohibited Hill Aero from using Reeves' work product on other projects or extensions to the original project without Reeves' permission; (2) in excluding, on the basis of hearsay, a written report of the opinion of Reeves' expert witness; (3) in ruling that the measure of compensation to Reeves, under the terms of the contract, is a determination of what "would appear to be fair compensation," rather than what the contract actually provided; and (4) in imposing upon Reeves the burden of proving actual damages independent of the contract price. We affirm.

The cause alleged seeks damages for breach of contract and, as such, presents an action at law. In an action at law, where a jury has been waived, the judgment of the trial court has the effect of a jury verdict and will not be set aside unless clearly

wrong. *Kreikemeier v. McIntosh*, 223 Neb. 551, 391 N.W.2d 563 (1986). In construing a contract, words must be given their plain and ordinary meaning as reasonable persons would understand them. *Id.*

The record shows that on August 9, 1979, Reeves and Hill Aero executed a "Standard Form of Agreement Between Owner and Architect" (American Inst. of Architects Document B141 (Jan. 1974)) for the design and construction of a project, defined on page 1 of the contract as "[a] new hanger [sic] office area for aircraft refinishing and custom interior work, to be located in the general aviation area of the Lincoln Municipal Airport." The work was divided into five types of "Basic Services" or phases, and the contract contained a detailed outline of the basic services covered by each phase. The contract provided that "Basic Compensation" for basic services would be 7 percent of total construction cost. The total construction cost was estimated by Reeves to be $339,400. The contract further specified that payments for basic services were to be allocated over the various phases of the contract as follows:

Schematic Design Phase	15%
Design Development Phase	35%
Construction Documents Phase	75%
Bidding or Negotiation Phase	80%
Construction Phase	100%

Contract article 9 provided:

> Drawings and Specifications as instruments of service are and shall remain the property of the Architect whether the Project for which they are made is executed or not. They are not to be used by [Hill Aero] on other projects or extensions to this Project except by agreement in writing and with appropriate compensation to the Architect.

Contract article 8 provided that the agreement "may be terminated by either party upon seven days' written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination." Contract article 8 further provided that if the contract was terminated due to the fault of parties other than Reeves, Reeves would be paid his compensation for services performed to termination date, including a

termination fee of 10 percent of the total compensation earned to the time of termination if the termination occurred during the design development phase of the project.

Reeves had completed the design development phase of the project when Hill Aero sought to terminate the agreement. By letter dated February 15, 1980, Reeves confirmed the termination of the agreement and billed Hill Aero for "Reimbursable Expenses and a ten (10) percent termination fee as outlined in ARTICLE 8 of the Owner-Architect Agreement." The record shows that Reeves was paid $8,315 (($339,400 times 7 percent) times 35 percent, rounded) for basic services through the design development phase prior to termination, and an $831.50 ($8,315 times 10 percent) termination fee.

Reeves' amended petition alleges that Hill "sold, delivered, gave, or otherwise transferred" Reeves' work product to Call Bros. The amended petition further alleges that Call Bros., with the knowledge of Hill Aero, "used substantially all of [Reeves'] drawings, specifications, and other work product without his consent as the basis for the construction of a hanger/office [sic] area for aircraft refurnishing and custom interior work, the same located in the general aviation complex of the Lincoln Municipal Airport, Lincoln, Nebraska," and that these acts amounted to a breach of Hill Aero's contract with Reeves.

We agree with the trial court that under the plain and unambiguous language of the contract, Hill Aero was entitled to use Reeves' work product in the construction of "[a] new hanger [sic] office area for aircraft refinishing and custom interior work, to be located in the general aviation area of the Lincoln Municipal Airport," and was only prohibited from using the drawings on other projects or extensions to the current project. We do not accept Reeves' assertion that the hangar/office complex allegedly constructed by Call Bros. was, at the very least, an "extension" of the project described in the contract. The record shows that if Reeves' work product was used, it was used to complete the original project, not an "other" project or an "extension" to the project.

We agree fully with the finding of the trial court that Hill Aero did not breach its contract with Reeves. It is, therefore, unnecessary for us to discuss Reeves' other assignments of

error.

The order of the district court, dismissing Reeves' amended petition, is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

PIONEER ANIMAL CLINIC, A PARTNERSHIP, APPELLANT, V. TOM GARRY, APPELLEE.

436 N.W.2d 184

Filed March 3, 1989. No. 87-325.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a summary judgment, this court must take the view of the evidence most favorable to the party against whom it operates and give that party the benefit of all favorable inferences which may be drawn from the evidence.
2. **Principal and Agent: Liability.** The apparent authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declaration, or conduct of the agent.
3. **Joint Ventures: Words and Phrases.** To constitute a joint venture, the relationship must be an agreement to enter into an undertaking in the object 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, although one may entrust performance to the other.
4. **Actions: Torts: Negligence: Principal and Agent.** In a tort action based exclusively on the negligence of an agent, the valid release of that agent releases the principal, even though the release specifically reserves all claims against such principal.
5. **Actions: Pleadings: Torts: Contracts.** 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.

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

Law Offices of Cobb & Hallinan, P.C., for appellant.

Joy Shiffermiller, of Atkins Ferguson Zimmerman Carney, P.C., for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

HANNON, D.J.

The plaintiff sued Bill Garry and Tom Garry, and later settled with Bill Garry. The trial court granted Tom Garry's motion for summary judgment and dismissed the case. The plaintiff appeals from that order. We affirm.

In reviewing an order granting 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. *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988); *Schatz v. Vidlak*, 229 Neb. 4, 424 N.W.2d 613 (1988).

A summary of the facts most favorable to the plaintiff is as follows.

The plaintiff, the Pioneer Animal Clinic (Pioneer), is a partnership composed of three veterinarians, Drs. Arden Wohlers, Dale L. Kurtz, and Dudley J. Smith, doing business in Scottsbluff, Nebraska. The defendant, Tom Garry, lives in Modesto, California, and from there manufactures and sells cattle feed additives under the name of P.D.Q. Livestock Products (P.D.Q.).

Tom Garry's son Bill Garry lives in Grand Island and sells the products of P.D.Q. In the fall of 1983, Bill Garry approached the plaintiff about using P.D.Q. products. After a few meetings, the partners agreed to become a dealer of P.D.Q. products under the following oral agreement: Without compensation from Pioneer, Bill Garry would use leads and introductions supplied by Pioneer to sell P.D.Q. products for Pioneer. The products were expensive, and Pioneer desired not to maintain a significant inventory. When Bill Garry sold some product to a third party, he would tell Pioneer, Pioneer would pay P.D.Q. for the product when it was shipped from California, and Pioneer would look to the customer for payment. Pioneer would buy the product at wholesale and make a profit by selling for a retail price.

During the conversations leading up to the agreement, Bill Garry either stated or implied that he was one of the owners of P.D.Q. and that he was in charge of the distribution of P.D.Q. products east of the Rocky Mountains. He used a business card showing himself as "General Sales Manager." Ostensibly, he agreed to sell for nothing so that he could develop the area before moving on to other areas in need of development. All of the information that the owners of Pioneer had about the ownership and control of P.D.Q. was obtained from Bill Garry, and this information was to prove to be incorrect.

On February 20, 1984, Bill Garry told Dr. Smith, one of the partners of the plaintiff, that he had sold 5 tons of product to Micro-Chemical, Inc., of Amarillo, Texas. A few days later, he left a note at Dr. Smith's office telling him the order had been reduced to 3 tons. On February 22, 1984, Bill Garry issued an invoice for $22,279 for 3 tons of Quick-Fix and another product. The invoice showed P.D.Q. of Modesto as seller, Pioneer as buyer, and Bill Garry as salesman, and showed the product was to be shipped to Micro-Chemical in Amarillo. Pioneer made a check for $22,279 to P.D.Q. to pay for these products. Pioneer expected Micro-Chemical to pay for the products, but later Micro-Chemical denied ordering the products and refused to accept delivery or pay for the products. A few months later, the products were sold as unclaimed freight.

Bill Garry followed the usual practice and picked up the check, endorsed it "P.D.Q. Livestock Products," and negotiated it through a Nebraska bank. He ordered the product from Tom Garry by telephone.

When Pioneer did not get its money, the partners contacted Bill Garry. He told Pioneer that Micro-Chemical refused the product but that "they were going to put their attorneys" from California on it, and he would make them take it. When nothing happened, the partners contacted Micro-Chemical directly and learned that Micro-Chemical maintained it never ordered the product. Later, one of the partners called Tom Garry. He said he would talk to his son and get back to them. He did not do so, but in the summer of 1984, he came to Scottsbluff and visited with some of the partners about the matter. At that

time, he said Bill Garry had done similar things before, and he would make it right with them.

The evidence shows without dispute that Tom Garry was the sole owner of P.D.Q. products. In July of 1981, Tom Garry had established a branch office in Grand Island, Nebraska, with Bill Garry as manager, but this agreement ended in October of that year, and the partners of the plaintiff had no knowledge of it. In October of 1981, Tom and Bill Garry entered into a "Distributor Agreement," which agreement provided that Bill Garry could buy the products from Tom Garry on a "C.O.D. basis," and specifically denied him status as an employee or agent. The agreement did not give Bill Garry any exclusive territory, but Tom Garry agreed not to sell P.D.Q. products to dealers established by Bill Garry during the life of the agreement. This was the agreement under which Tom and Bill Garry were working at the time of the dealings with the plaintiff.

When Bill Garry sold P.D.Q. products, he would call his father on the telephone and have him ship them to the desired destination. He paid for the product, but irregularly, that is, at times he did not pay for all of it right away, and sometimes his checks did not clear his bank. The assertions in the plaintiff's brief that Bill Garry took all of the money from the sale of P.D.Q. products and never paid the defendant and that the defendant did not object or complain about not getting the money are simply not supported by the record.

Neither party offered an affidavit or deposition of Bill Garry.

The trial court did not state its reason for granting the motion for summary judgment. In the briefs, the parties recognize two possible reasons: (1) Tom Garry was not liable for the actions of Bill Garry under any theory, and (2) the plaintiff's settlement with Bill Garry had the effect of releasing Tom Garry, notwithstanding a reservation of rights against Tom Garry.

The evidence shows that Tom Garry knew that Bill Garry was a distributor of P.D.Q. products with the nonexclusive right to establish dealers of the products and to buy the products on a c.o.d. basis from Tom Garry and sell them to third persons. In

Reeves v. Associates Financial Services Co., Inc., 197 Neb. 107, 247 N.W.2d 434 (1976), this court quoted with approval the Restatement (Second) of Agency § 14 J (1958):

> "One who receives goods from another for resale to a third person is not thereby the other's agent in the transaction: whether he is an agent for this purpose or is himself a buyer depends upon whether the parties agree that his duty is to act primarily for the benefit of the one delivering the goods to him or is to act primarily for his own benefit."

Reeves, supra at 114, 247 N.W.2d at 438.

There is no evidence that Bill Garry was acting for the benefit of Tom Garry, and the "Distributor Agreement" specifically denied him any authority to bind Tom Garry.

The plaintiff also maintains that Bill Garry had apparent authority to bind Tom Garry. There is no evidence to suggest any communication of any type from Tom Garry to anyone in Nebraska before the events significant to this action occurred. True, in 1981, Tom Garry had started an office in Grand Island with Bill Garry as manager, but there is no evidence that the plaintiff knew about this until after the lawsuit was filed. All of the communications that the plaintiff must rely upon to establish apparent authority of Bill Garry to bind Tom Garry come from Bill Garry. "Apparent authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declaration, or conduct of an agent." *Hassett v. Swift & Co.*, 222 Neb. 819, 824, 388 N.W.2d 55, 59 (1986).

The plaintiff relies upon the fact that Bill Garry used a business card identical to Tom Garry's, except Bill Garry's name appears thereon showing him to be general sales manager. There is no evidence that Tom Garry knew about Bill Garry's using such a card. Neither party introduced any evidence from Bill Garry, and Tom Garry denies doing any act which might give Bill Garry apparent authority.

On July 7, 1986, the plaintiff and Bill Garry settled this suit with the plaintiff and its partners, and they covenanted not to sue Bill Garry for any matter arising out of any business done between Bill Garry and the plaintiff or its partners. In that

agreement, the plaintiff and its partners clearly reserved all rights against Tom Garry.

The plaintiff maintains Tom and Bill Garry were engaged in a joint venture.

> "[T]o constitute [a joint venture] there 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 . . . ."

Fangmeyer v. Reinwald, 200 Neb. 120, 131, 263 N.W.2d 428, 434 (1978). The only agreement between Tom and Bill Garry is for Bill Garry to purchase Tom Garry's products for sale to others. Not only did they not have equal voice in the doings of each other, they had no voice in the business pursuits of the other. There was no actual agreement between the parties for a joint venture, and there is no apparent authority for Bill Garry to act for an apparent joint venture for the same reasons stated above as to the alleged apparent agency.

The defendant argues that even if Tom Garry was liable under some theory, the release of Bill Garry releases Tom Garry also. In *Dickey v. Meier*, 188 Neb. 420, 424, 197 N.W.2d 385, 388 (1972), this court held: "[I]n a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or prinicpal [sic] from liability, even though the release specifically reserves all claims against the employer-principal." In *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982), this court held that a valid release of the principal releases the agent also.

The plaintiff recognizes these principles and seeks to avoid their effect by stating in the amended petition, after the allegations of facts, Bill and Tom Garry "breached the verbal contract between plaintiff and defendants by shipping and delivering products for which there were no orders," and then argues in its brief that liability of Tom Garry is contractual and not tort liability; hence, the principle stated in *Dickey v. Meier, supra*, does not apply. 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. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984); *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954). The facts the plaintiff alleges for the first and second causes of action plead torts, although at least some of the duties violated by the torts arose from the contractual relationship of Pioneer with Bill Garry. If Tom Garry could be liable for the torts of Bill Garry, that liability would be secondary, and the release of Bill Garry would release Tom Garry.

AFFIRMED.

VIC HORMANDL, DOING BUSINESS AS FRONT STREET CARPETS, APPELLEE, V. LECHER CONSTRUCTION COMPANY, AND UNIVERSAL OF OMAHA CASUALTY INSURANCE COMPANY, APPELLANTS. LECHER CONSTRUCTION COMPANY, APPELLANT, V. VIC HORMANDL, DOING BUSINESS AS FRONT STREET CARPETS, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, UNIVERSAL OF OMAHA CASUALTY INSURANCE COMPANY, THIRD-PARTY DEFENDANT, APPELLANT.

436 N.W.2d 188

Filed March 3, 1989. Nos. 87-407, 87-430.

Moot Question: Appeal and Error. When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question.

Appeal from the District Court for Keith and Lincoln Counties: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

Michael L. Bacon for appellants.

No appearance for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

GRANT, J.

These are appeals from the district courts for Lincoln and Keith Counties. By stipulation of the parties, both cases were tried in Lincoln County. The cases were consolidated for purposes of this appeal.

Appellee, Vic Hormandl, doing business as Front Street Carpets (Hormandl), had subcontracted with appellant Lecher Construction Company (Lecher), a general contractor, to install flooring in two Super 8 Motels located in Ogallala and North Platte.

In case No. 87-407, Hormandl filed a mechanic's lien against the Ogallala property on June 24, 1985. Pursuant to the provisions of Neb. Rev. Stat. § 52-142 (Reissue 1988), Lecher filed a surety bond issued by appellant Universal of Omaha Casualty Insurance Company (Universal), thus substituting the bond as the collateral of the lien. On July 16, 1986, Hormandl filed a petition to foreclose mechanic's lien in the Keith County District Court. The petition acknowledged the substitution of the bond above referred to. After a trial, the district court found generally in favor of Hormandl and against Lecher and Universal. Judgment was entered in favor of Hormandl and against Lecher and Universal, jointly and severally, in the amount of $10,280 plus interest.

In case No. 87-430, Lecher sued Hormandl, who in turn brought Universal in as a third-party defendant. Hormandl filed a mechanic's lien against the Lincoln County property on May 2, 1985. Universal apparently filed another bond pursuant to § 52-142. On December 6, 1985, Hormandl, as defendant and third-party plaintiff, filed a "Petition for Foreclosure of Mechanic's Lien and Third Party Petition by Defendant Against Third Party Defendant Universal of Omaha Casualty Insurance Company" in the Lincoln County District Court. Again, this petition acknowledged the substitution of the bond for the lien. After trial, the district court found in favor of Hormandl and against Lecher and Universal, jointly and severally, and entered judgment for Hormandl in the amount of $9,750 plus interest.

In both cases, the district court held that the petitions filed by Hormandl were actions on a bond, as contemplated by

§ 52-142, which incorporates the provisions of Neb. Rev. Stat. § 52-141(6) (Reissue 1988), allowing the court to award reasonable attorney fees to the prevailing party. The district court taxed a total of $2,858.44 in attorney fees to Universal.

Appellants' motions for new trial were overruled, and they timely appealed to this court, alleging the trial court erred (1) in entering judgment against Lecher and Universal, because there was no evidence that the bonds had been substituted for the mechanic's liens; and (2) in awarding attorney fees against Universal pursuant to §§ 52-142 and 52-141(6).

On October 22, 1987, Hormandl filed a "Notification" in this court, in which Hormandl advised the court that the judgments he received in the two cases had been fully satisfied by payment from Universal. On January 13, 1989, Hormandl filed a motion to dismiss the appeals for the reason that the judgments were satisfied by Universal, and the appeals are moot. Accompanying Hormandl's motion are copies of satisfactions of judgment which were filed in the district courts for Keith and Lincoln Counties on January 11, 1989.

In *Schlanbusch v. Schlanbusch*, 103 Neb. 588, 589, 173 N.W. 580 (1919), we stated, "When an ordinary law action is pending in this court on appeal, and the parties by agreement settle and dispose of the whole controversy, it becomes, so far as this court is concerned, a moot case, and will not be further investigated, but will be dismissed."

When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question. *School Dist. No. 65 v. McQuiston*, 163 Neb. 246, 79 N.W.2d at 413 (1956). The record shows that Universal, one of the appellants and Lecher's surety, voluntarily satisfied the judgments entered against it and Lecher. The issues presented on appeal, therefore, are moot, and the appeal is dismissed.

APPEAL DISMISSED.

KENNETH L. ZEEB, APPELLANT, V. DELICIOUS FOODS, A NEBRASKA CORPORATION, ET AL., APPELLEES.

436 N.W.2d 190

Filed March 3, 1989. No. 87-443.

1. **Courts: Jurisdiction: Appeal and Error.** Upon the perfection of an appeal to the Nebraska Supreme Court, the district court loses jurisdiction.
2. **Jury Instructions: Proof: Appeal and Error.** In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden to show that he was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.
3. **Jury Instructions: Appeal and Error.** Instructions must be read together, and if taken as a whole they correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error upon which a reversal on appeal may be based.
4. **Rules of Evidence: Jurors: Affidavits.** Neb. Rev. Stat. § 27-606(2) (Reissue 1985) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Donald J. Loftus, P.C., for appellant.

William L. Tannehill, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Delicious Foods.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

CAPORALE, J.

Plaintiff-appellant, Kenneth L. Zeeb, claims in his operative petition that he sustained injury as the proximate result of the negligence of defendant-appellee Delicious Foods, a Nebraska corporation. The petition also names Zeeb's employer, appellee Millard Warehouse, Inc., a Nebraska corporation, as a party defendant for the purpose of protecting its workers' compensation subrogation interest. Delicious Foods denied any negligence and alleged that Zeeb was himself contributorily negligent sufficient to bar his recovery and that he had assumed the risk. Nominal defendant Millard Warehouse asserted its subrogation interest but neither admitted nor denied Zeeb's

allegations of negligence against Delicious Foods. Following trial, Zeeb's petition was dismissed in accordance with the jury's verdict, and this appeal ensued. Zeeb assigns as errors, in summary, the district court's refusal to grant a new trial because it failed to (1) give the jury the instructions he requested and (2) permit him to prove that the district court's bailiff admonished the jurors that during their deliberations, they could ask no questions of the trial judge. We affirm.

Zeeb was employed by Millard Warehouse as a construction and maintenance laborer from January 1977 until he was fired in November 1983. On Friday, July 22, 1983, Zeeb was injured while working in a portion of his employer's Lincoln facility which had been leased to Delicious Foods.

Zeeb had worked the entire day preceding the occurrence in the Delicious Foods loading dock area of the facility, rebuilding freezer doors through which Delicious Foods' forklift trucks carried pallets of its products for loading onto trucks. During this time, Zeeb observed forklift trucks operating in the area, moving both forward and backward carrying both single and double loads, and he was familiar with the work patterns in the area.

At approximately 10:30 on the morning of the occurrence, Zeeb's Millard Warehouse supervisor ordered Zeeb to report to the same Delicious Foods loading dock and repair doors that were not working properly. Over Zeeb's objection, his assistant was ordered not to accompany him, as there was other work needing the assistant's immediate attention elsewhere in the facility.

Upon arriving in Delicious Foods' area, Zeeb found several Delicious Foods employees on break. Zeeb set up an 8-foot stepladder in the middle of the loading dock and climbed to the top to work on a mechanism attached to the ceiling, about 12 feet above the floor. Zeeb did not ask Delicious Foods' manager to close the area to forklift traffic, did not attempt to construct barriers around his work area to signal his presence to forklift operators, and did not warn the forklift drivers of his presence, nor did he ask Delicious Foods' manager to provide one of its employees to act as Zeeb's lookout.

As Zeeb worked, he heard the Delicious Foods employees

called back to labor. At this time, Zeeb was standing on the ladder facing a nearby office, with his back to the doors through which Delicious Foods' forklift trucks entered the area.

Shortly thereafter, a Delicious Foods forklift operator drove through one of the doors to which Zeeb had turned his back. The forklift was loaded with a double stack of products on pallets, the stack reaching approximately 8 feet high. The operator proceeded through the door and into Zeeb's work area very slowly, moving the forklift forward and looking around the load, as was the custom when entering the area through that particular door. At first, it appeared to Delicious Foods' manager, who watched from the office, that the forklift would bypass Zeeb's ladder; however, as the forklift turned, one edge of the load scraped against the ladder, causing it to vibrate, and Zeeb fell to the floor.

As a result of his fall, Zeeb suffered injury to his arms and right knee.

After the jury returned its verdict, Zeeb moved for judgment notwithstanding that verdict and for new trial. In a hearing on these motions, Zeeb's attorney stated that he was prepared to call a member of the jury to adduce testimony regarding "certain errors that took place after the jury was released to deliberate the case." As outlined in the relevant part of Zeeb's in camera offer of proof, the complaining juror would testify that immediately after being released to deliberate, the jurors asked the bailiff whether the judge would answer questions concerning the instructions. According to this juror, the bailiff replied that "this could not be done, that no questions, either oral or written, could be asked" of the judge. Zeeb's attorney then asked leave to interrogate the court's bailiff in chambers, asserting she would confirm the facts alleged in the foregoing offer. The district court, upon Delicious Foods' objection, declined to allow Zeeb to adduce live testimony regarding his allegations, but did invite both Zeeb and Delicious Foods to submit affidavits in connection with Zeeb's motion for new trial. Asked by Zeeb's attorney whether the court had instructed its bailiff to inform jurors they were not allowed to ask either oral or written questions, the trial judge properly replied, see

State v. Barker, 227 Neb. 842, 420 N.W.2d 695 (1988), "The Court is not going to have any comment at all."

Delicious Foods subsequently filed with the district court a written offer of proof and the bailiff's affidavit. Its offer of proof asserts, through the words of one of Delicious Foods' attorneys, that if four other named jurors were called to do so, each would testify that at no time did the court's bailiff state that requests for clarification of the court's instructions could not under any circumstances be delivered or communicated to the trial judge. The bailiff's affidavit denies that any juror ever said that clarification of the instructions was desired or needed. The bailiff also denied ever telling any individual juror or the jury as a whole that questions from the jury to the judge would not be permitted in any form under any circumstance.

Zeeb thereafter filed a written offer of proof through the complaining juror's affidavit, in which the complaining juror essentially confirmed the contents of Zeeb's earlier oral offer.

After Zeeb had perfected his appeal to this court, the district court judge purported, on Delicious Foods' motion, to strike Zeeb's written offer of proof. However, since the district court had lost jurisdiction upon the perfection of the appeal to this court, that ruling was a nullity, *Nuttelman v. Julch*, 228 Neb. 750, 424 N.W.2d 333 (1988), and we treat it as such.

Zeeb's first summarized assignment of error challenges the district court's instructions to the jury. To establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden to show that he was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case. *Bishop v. Farm Bureau Life Ins. Co.*, 228 Neb. 74, 421 N.W.2d 423 (1988).

Regarding the element of prejudice, this court looks first to the instructions as given, mindful that jury instructions must be read together, and if taken as a whole they correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error upon which a reversal on appeal may be based. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989); *Kearney State Bank & Trust v. Scheer-Williams*, 229 Neb. 705, 428 N.W.2d 888 (1988). See,

also, *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988). Zeeb does not argue that the instructions given, taken as a whole, were either incorrect statements of the law or misleading. Rather, Zeeb contends that, in various ways, the instructions given did not adequately cover the issues.

Zeeb first argues he is entitled to an instruction on concurrent negligence. According to Zeeb, the evidence supported the conclusion that his employer's failure to send his assistant along to help in the repair work was an act of negligence which the jury may have taken as a proximate cause of Zeeb's injury. In Zeeb's view, the jury, without benefit of an instruction on the legal effect of his employer's concurrent negligence, may have improperly denied him a verdict against Delicious Foods.

If his employer had in fact been negligent, Zeeb would indeed have been entitled to an instruction on the effect of the concurrent negligence of multiple parties. See *Weiseth v. Karlen*, 206 Neb. 724, 295 N.W.2d 103 (1980). However, it is clear that the evidence does not fairly support such an inference of negligence; the conduct of his employer, Millard Warehouse, at most, created a condition under which the negligence of Delicious Foods, if any, operated to bring about Zeeb's injury. See *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987). Zeeb was therefore not entitled to that requested instruction because it was not applicable to the evidence in the case.

Zeeb next argues that he was entitled to instructions regarding various nuances of the land possessor's duty toward invitees and that the instruction the district court gave with respect to those matters was not adequate. The questioned instruction advised the jury that Zeeb was a business invitee of Delicious Foods and explained, in summary, that (1) if Delicious Foods knew or should have known of activities on its premises which presented Zeeb with an unreasonable risk of harm, (2) if it had no reasonable ground for believing that Zeeb would discover or realize the risk, and (3) if Zeeb did not or could not reasonably be expected to know of the risk, or if Zeeb actually knew of the risk and Delicious Foods should have known Zeeb would fail to protect himself, then Delicious Foods was under a duty to use reasonable care for Zeeb's safety or to

give warning adequate to enable Zeeb to avoid harm. That instruction, when read together with the other instructions, correctly states the duty Delicious Foods owed Zeeb under the evidence in this case.

Inasmuch as the questioned instruction is a correct statement of the law applicable to the evidence, is not misleading, and, when read with the other instructions, adequately covers the issues, Zeeb was clearly not prejudiced by its inclusion. *Fisher Corp. v. Consolidated Freightways, supra*; *Kearney State Bank & Trust v. Scheer-Williams, supra*. See, also, *Auer v. Burlington Northern RR. Co., supra*.

Accordingly, there is no merit to Zeeb's first summarized assignment of error.

Zeeb's second summarized assignment of error challenges the district court's refusal "to permit Plaintiff to substantiate his claim of misconduct on the part of the Court's bailiff in admonishing the jurors that no questions could be asked by them of the Court during their deliberations."

Neb. Rev. Stat. § 27-606(2) (Reissue 1985) provides as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

In *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), we, in the course of holding that the affidavits proffered in that case did not reflect that extraneous prejudicial information had entered into the verdict, after a thorough review of the case law, concluded that "[§ 27-606(2)]

permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial." 226 Neb. at 456, 412 N.W.2d at 78. See, also, *State v. Woodward*, 210 Neb. 740, 745, 316 N.W.2d 759, 762 (1982), a criminal case in which this court noted:

> While it is true that one may not inquire as to whether the presence of the evidence affected the juror's mind, it is proper and necessary that evidence be presented by the objecting party to show that *extraneous prejudicial information* was improperly brought to the jury's attention.

(Emphasis in original.) See, also, *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

In this case, Zeeb presented a juror's affidavit asserting that the bailiff told the jurors that even if they were confused regarding matters of law or the issues before them, they would not be allowed to seek clarification through written questions posed to the trial judge. If the bailiff did, in fact, so state, she was wrong, and the miscommunication would constitute extraneous information improperly brought to the jury's attention within the meaning of § 27-606(2). The bailiff's denial of the miscommunication does nothing more than establish that an issue of fact exists in that regard. Thus, an evidential hearing would have been required but for the fact that the record fails to specify what any juror wished to ask. Under that circumstance, the general allegation that jurors wished to inquire about instructions which were correct and complete as given fails to claim the prejudice § 27-606(2) requires.

Thus, the second summarized assignment of error is as meritless as was the first. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

MARCELYN M. FREZELL, APPELLANT, V. FRANK J. IWERSEN, M.D., APPELLEE.

436 N.W.2d 194

Filed March 3, 1989. No. 87-460.

1. **Limitations of Actions: Time: Appeal and Error.** In reviewing the district court's judgment on the issue of the statute of limitations, the findings and decision of the district court will not be set aside unless clearly wrong. The point in time when the statute of limitations begins to run is determined by the facts of the individual case.
2. **Limitations of Actions: Malpractice.** In the context of the discovery rule, a cause of action accrues when the plaintiff discovers, or through reasonable diligence should have discovered, the act of malpractice or the resulting injury.
3. _____: _____. The continuous treatment doctrine applies when there has been either a misdiagnosis upon which incorrect treatment is given or when there has been a continuing course of negligent treatment. It does not apply when there have been only isolated acts of negligence.
4. **Limitations of Actions: Fraud.** One who wrongfully conceals material facts, which delays the filing of suit, cannot avail himself of the statute of limitations defense.

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

Joseph B. Muller and Ronald J. Palagi for appellant.

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

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

OLBERDING, D.J.

Marcelyn M. Frezell filed this malpractice action against Dr. Frank J. Iwersen on January 14, 1986. She alleged negligent treatment during her back surgery performed February 2, 1981, and continuing through her hospitalization, ending March 10, 1981. Dr. Iwersen denied any negligence and raised the affirmative defense of the statute of limitations.

After a bench trial on the sole issue of the statute of limitations, the district court for Douglas County found: (1) The specific acts of negligence occurred on February 2, 1981; (2) the action was filed more than 2 years after the negligence occurred; (3) Frezell should have been aware of and should

reasonably have discovered the basis for her cause of action more than 1 year before the filing of her petition; and (4) the action was barred by the statute of limitations, Neb. Rev. Stat. §§ 25-222 (Reissue 1985) or 44-2828 (Reissue 1988). We affirm.

The assignments of error claim the trial court erred in failing to find the 2-year statute of limitations did not apply due to the following: (1) the discovery rule exception, (2) the continuous treatment exception, and (3) the estoppel exception.

THE RECORD

In January of 1973, Frezell injured her back at work. Because her employment required heavy lifting, she continued to aggravate the injury.

On January 29, 1981, a myelogram indicated a degenerative lumbar disk. Dr. Iwersen performed a surgical procedure called a hemilaminectomy on Frezell on February 2, 1981, to partially remove the disk. During the surgery, severe bleeding occurred and the wound was packed with Surgicel. Two Surgicel packs were left in the wound to control postoperative bleeding. Dr. Iwersen, in his deposition, admitted he had not used Surgicel prior to the Frezell surgery, he had not read any literature on the use of Surgicel, and he had since learned Surgicel was contraindicated for this type of surgery.

After the surgery, Frezell lost bladder control and developed severe pain and weakness in her legs. A postoperative consultation report indicated her new problems were partially caused by the use of Surgicel.

A second surgery was performed on February 5, 1981. During this surgery, a complete laminectomy in the same region was performed, and the Surgicel packs were removed.

Dr. Iwersen made the following findings in his operative report, dated February 5, 1981:

> FINDINGS: There was evidence of compression of the cauda at the L4-L5 level due to Surgicel which had been placed in the wound for hemorrhage. This Surgicel was causing an actual tamponade of the cauda pressing the cord clear to the right side and nearly completely constricting it.

Dr. Iwersen treated Frezell for the pain, leg, and bladder problems through October 8, 1985. During that period, Frezell

was hospitalized at least 16 times, primarily to give her relief from the severe pain.

During 1982, Dr. Gernon Longo, a urologist, also treated Frezell for her bladder problems. He testified he had informed Frezell that her bladder problems were permanent.

Dr. Iwersen's records show "To Whom It May Concern" letters (letters to insurance companies) summarized as follows:

February 11, 1981: "She has a definite neurological deficit in both lower extremities" and "will have some residuals."

May 18, 1981: She has shown "some improvement," but "I am sure it will be a year from the time of her surgery before the patient will gain her maximum result."

November 24, 1981: "I do not feel too optimistic about much further return of function."

June 8, 1983: "In the last year, the patient has shown no progress in her treatment and in my opinion is 100 percent permanently and totally disabled."

August 19, 1983: "I do not feel that this patient will ever be able to return to work and have listed her as 100 percent totally disabled. The patient is willing to accept this at this time and realizes her problem."

Frezell contacted an attorney concerning a workers' compensation claim in 1981. He requested and received complete copies of Dr. Iwersen's records on November 2, 1981.

Frezell retained her current attorney in 1984 to assist her in obtaining Social Security disability benefits. He asked Dr. Iwersen for a letter describing the extent of her disability. Dr. Iwersen's letter, dated June 13, 1984, stated she was totally disabled. In 1984, her new attorney also requested and received complete copies of Dr. Iwersen's records.

Frezell contends that from February 1981 to June of 1985, Dr. Iwersen told her she would fully regain the use of her legs and control of her bladder, but that her recovery would take 5 years. Because of these statements, she felt she was only temporarily totally disabled, and she did not learn her condition was permanent until June 1985, during her hospitalization at the University of Nebraska Medical Center pain clinic.

STANDARD OF REVIEW

In reviewing the district court's judgment on the issue of the statute of limitations, the findings and decision of the district court will not be set aside unless clearly wrong. *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988). The point in time when the statute of limitations begins to run is determined by the facts of the individual case. *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988).

STATUTE OF LIMITATIONS

This case is controlled by the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 et seq. (Reissues 1984 & 1988). The act provides:

> [A]ny action to recover damages based on alleged malpractice . . . shall be commenced within two years next after the alleged act or omission . . . except that if the cause of action is not discovered and could not be reasonably discovered within such two-year period, 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.

§ 44-2828 (Reissue 1988).

The undisputed record shows that the alleged act or omission occurred on February 2, 1981. Frezell's petition was filed January 14, 1986. The petition is barred by the 2-year statute of limitations unless one of her argued exceptions applies.

DISCOVERY EXCEPTION

A cause of action accrues when the plaintiff discovers, or through reasonable diligence should have discovered, the act of malpractice or the resulting injury. *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976); *Toman v. Creighton Memorial St. Josephs Hosp., Inc.*, 191 Neb. 751, 217 N.W.2d 484 (1974).

In *Toman*, this court held:

> The presence of an unexpected result after surgery should not be tantamount to discovery of the negligent act and the resultant injury, where the surgeon himself repeatedly reassures the patient that she is improving and recovering from the unexpected result, prescribes a course of therapy outside the office to aid in recovery, keeps the patient

> returning, and fails during the post-operative period to either determine or advise the patient that the unexpected result (weakness of the left arm) is a permanent condition from which she will not recover.

Id. at 758-59, 217 N.W.2d at 489.

There was evidence before the trial court that Dr. Iwersen assured Frezell she would *not* recover from the complications of the surgery and that her condition was permanent. She admitted that Dr. Iwersen told her the complications related to the surgery and that the cause of the complications was the hemorrhage, which had been controlled with packing. In fact, Dr. Iwersen's records show he wrote letters to insurance companies and her present attorney stating that she was totally disabled. Dr. Longo, not a party to this action, also testified he told Frezell that her bladder condition was permanent. In addition, she was hospitalized on at least 16 different occasions for treatment of the pain and complications resulting from the original surgery. In view of this evidence, she should have reasonably discovered the basis for her cause of action more than 1 year before the filing of her petition, as found by the trial court.

CONTINUOUS TREATMENT EXCEPTION

Dr. Iwersen continued to treat Frezell for the residual effects of the cauda equina syndrome. Frezell contends this subsequent treatment constitutes continuous treatment within the exception first announced in *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941).

Frezell argues that Dr. Iwersen continued to treat her for the complications of the February 2, 1981, surgery up to and including June 24, 1985. This fact was not disputed by Dr. Iwersen.

The continuous treatment doctrine applies when there has been either a misdiagnosis upon which incorrect treatment is given or when there has been a continuing course of negligent treatment. It does not apply where there have been only isolated acts of negligence. *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985); *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983); *Williams v. Elias, supra*.

Frezell does not allege the treatment after the surgery was

negligent, nor does she allege the original diagnosis (cauda equina syndrome) was wrong. The trial court found that the specific acts of negligence occurred on February 2, 1981. The amended petition and record support only an isolated act of negligence, which precludes the application of the continuous treatment exception.

ESTOPPEL EXCEPTION

Frezell alleges that Dr. Iwersen is estopped from relying on the statute of limitations due to his misrepresentations to her. The facts alleged to have been misrepresented are permanency of the complications, length of recovery period, and improper use of Surgicel.

One who conceals material facts, which delays the filing of suit, cannot avail himself of the statute of limitations defense. *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988).

The record does not support a finding that Dr. Iwersen concealed any material fact from Frezell. Even his postoperative report after the second surgery shows that Surgicel may have been a contributing factor. His candor with Frezell is shown by the record references to permanency of the complications, letters as to total disability, and two complete copies of his records being given to her attorneys.

After a review of the above record, we cannot say that the findings and decision of the district court were clearly wrong.

AFFIRMED.

CUMMINGS ENTERPRISES, INC., A CORPORATION, APPELLEE, V. MARTIN SHUKERT ET AL., APPELLANTS.

436 N.W.2d 199

Filed March 3, 1989. No. 87-497.

1. **Appeal and Error.** Under common law, absent statutory provisions to the contrary, a perfected appeal operates as a supersedeas.
2. **Statutes.** In Nebraska, in the absence of statute we follow the common law.
3. **Administrative Law: Appeal and Error.** An appeal by a party described in Neb. Rev. Stat. § 14-817 (Reissue 1987) operates as a supersedeas of a lower court judgment.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Appeal dismissed.

Herbert M. Fitle, Omaha City Attorney, Charles K. Bunger, and Jo A. Bennett for appellants.

Martin A. Cannon, of Matthews & Cannon, P.C., for appellee.

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

WHITE, J.

In this mandamus action, defendants, members of the planning department for the city of Omaha, appeal from an order of the district court for Douglas County directing them to issue a building permit. We hold that the appellants waived their right of appeal when they issued the permit in compliance with the court's order prior to filing an appeal to this court.

Appellee owns a 2.96-acre tract of land located at 9516 Calhoun Road in Omaha, Nebraska. On December 3, 1985, the city council of Omaha passed an ordinance rezoning appellee's parcel from second suburban district to first commercial. Appellee applied for a building permit for the construction of a carwash on November 3, 1986. The evidence at trial showed that a carwash was a permissible use under the first commercial zoning classification. Martin Shukert, the city of Omaha planning director, denied the appellee's application. In early 1987, the land appellee had set aside for the carwash was rezoned to limited commercial district, a zoning classification excluding carwashes as well as some other commercial uses.

On March 11, 1987, appellee filed a petition for an alternative writ of mandamus, seeking to compel the appellants to issue the building permit which the appellee applied for on November 3. The court issued an alternative writ of mandamus ordering appellants to issue the permit or, in the alternative, to show cause for noncompliance with the order. On April 27, the court entered judgment for the appellee and issued a peremptory writ of mandamus commanding the appellants to issue the building permit for the carwash to the appellee. The appellants issued the permit on May 4. Notice of appeal to this

court was filed on May 22.

Under common law, absent statutory provisions to the contrary, a perfected appeal operates as a supersedeas. *St. Regis Paper Co. v. Kerlin*, 476 So. 2d 64 (Ala. 1985); *Spellman v. Ruhde*, 28 Wis. 2d 599, 137 N.W.2d 425 (1965); *Harper v. Quinlan (No. 2)*, 62 Montg. Co. L.R. 116 (1946), *aff'd* 159 Pa. Super. 367, 48 A.2d 113. See 4A C.J.S. *Appeal and Error* § 627 (1957). In Nebraska, in the absence of statute we follow the common law. Neb. Rev. Stat. § 49-101 (Reissue 1988); *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984). This state has enacted a statutory scheme regulating the process for appeal to the state Supreme Court. See, generally, Neb. Rev. Stat. §§ 25-1911 et seq. (Reissue 1985 & Cum. Supp. 1988). In general, our statutes provide that an appeal in a civil case is deemed perfected when notice of appeal has been filed and docket fees deposited in the office of the clerk of the district court. Section 25-1912(3) (Cum. Supp. 1988). The defeated party may secure a stay of execution of the lower court's judgment, decree, or order pursuant to § 25-1916 (Cum. Supp. 1988), which states in pertinent part that no appeal shall operate as a supersedeas unless the appellant files a bond with the clerk. In the case at bar, there is an applicable statutory exemption to § 25-1916. Neb. Rev. Stat. § 14-817 (Reissue 1987) provides:

> No bond for cost, appeal, supersedeas, injunction or attachment shall be required of any city of the metropolitan class or of any officer, board, commission, head of any department, agent or employee of any such city in any proceeding or court action in which said city of the metropolitan class or its officer, board, commission, head of department, agent or employee is a party litigant in its or his official capacity.

Under § 14-817, the appellants were not required to post a bond to obtain a supersedeas. The filing of a notice of appeal would have stayed the peremptory writ. See, also, *Spellman v. Ruhde, supra*.

The issue then raised is whether compliance with a peremptory writ of mandamus deprives the appellants of their right to appeal. Our research has revealed a split of authority on this issue. Some jurisdictions hold that compliance with a

peremptory writ of mandamus does not affect the right to appeal, since the appellant is subject to attachment, fine, or other coercive measures. *Beronio v. Pension Commission of City of Hoboken*, 130 N.J.L. 620, 33 A.2d 855 (1943); *Wise v. First National Bank*, 49 Ariz. 146, 65 P.2d 1154 (1937); *Lucas v. First Nat. Bank of Pawnee*, 171 Okla. 606, 43 P.2d 752 (1935); *O'Neill v. City of Chicago*, 169 Ill. App. 546 (1912); *Hindman v. Boyd*, 42 Wash. 17, 84 P. 609 (1906); *State v. Young*, 66 S.C. 115, 44 S.E. 586 (1902); *Martin v. William J. Johnston Co.*, 128 N.Y. 605, 27 N.E. 1017 (1891). See, Annot., 39 A.L.R.2d 183 (1955); Annot., 36-39 A.L.R.2d Later Case Service 153-191 § 18 at 379 (1977).

In contrast, other jurisdictions hold that where compliance with a peremptory writ of mandamus is voluntary there is no right to appeal. *State ex rel. Hooker v. City of St. Charles*, 668 S.W.2d 641 (Mo. App. 1984); *City of Carmel-By-The-Sea v. Monterey Cty.*, 137 Cal. App. 3d 964, 187 Cal. Rptr. 379 (1982); *Industrial Lease-Back v. Romulus Twp.*, 23 Mich. App. 449, 178 N.W.2d 819 (1970); *Nunn v. Selly*, 182 So. 2d 568 (La. App. 1966); *Callbeck et al v. Kell et al*, 211 Or. 640, 317 P.2d 589 (1957); *Travis County v. Matthews*, 221 S.W.2d 347 (Tex. Civ. App. 1949); *State ex rel. Kurth et al. v. Grinde et al.*, 96 Mont. 608, 32 P.2d 15 (1934); *Reese v. Adamson et al., Commrs., Appellants*, 276 Pa. 253, 119 A. 920 (1923); *Board of County Commrs. v. Bassett*, 14 Idaho 324, 93 P. 774 (1908); *Crouse v. Nixon*, 65 Kan. 843, 70 P. 885 (1902); *David v. The Parish of East Baton Rouge*, 27 La. Ann. 230 (1875). See, Annot., 39 A.L.R.2d, *supra*; Annot., 36-39 A.L.R.2d Later Case Service, *supra*. Under this approach, some jurisdictions focus on the issue of whether compliance was "voluntary" or "involuntary." See, e.g., *City of Carmel-By-The-Sea v. Monterey Cty., supra*.

In the present case, upon the issuance of the peremptory writ the appellants had two options available to them: either appeal that judgment, thereby obtaining a supersedeas, or comply with it. The record clearly shows the appellants failed to perfect an appeal prior to complying with the court's order. Nor do we feel that the existence of a coercive order would change the result, since the coercive order itself would have been automatically superseded by the filing of a notice of appeal.

The appellants voluntarily complied with the order; therefore, they have waived their right to appeal that order.

In addition, we also note that at oral argument, counsel for both parties conceded that the carwash had been built, therefore rendering this appeal moot.

Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

BOSLAUGH, J., concurs in the result.

LINDA KNUTSON, APPELLEE, V. SNYDER INDUSTRIES, INC., A NEBRASKA CORPORATION, APPELLANT.

436 N.W.2d 496

Filed March 3, 1989. No. 87-591.

1. **Judgments: Appeal and Error.** When a law case is tried to the county court without a jury, this court will not disturb its findings unless they are clearly wrong; furthermore, this court will view the evidence in a light most favorable to the prevailing party.
2. **Employer and Employee: Employment Contracts: Wages.** If an employer and employee agree upon a bonus to be paid upon certain conditions, and the employee fulfills the conditions required, the employee is not deprived of the bonus merely because he or she resigned.
3. _____: _____: _____. When an employer and employee agree upon a bonus' being payable in the future upon fulfillment of certain conditions, and the bonus will be payable at some time after the conditions are fulfilled, employment on the date of payment is not necessarily implied.
4. **Employer and Employee: Employment Contracts: Wages: Words and Phrases.** If an employer and employee agree upon a bonus to be paid upon certain conditions and the conditions are fulfilled, the bonus is wages under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1988).

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Terry K. Barber for appellant.

Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

HANNON, D.J.

On November 5, 1984, the plaintiff, Linda Knutson, was hired as a supervisory employee of the defendant, Snyder Industries, Inc., for an annual salary payable biweekly. She resigned on August 20, 1985, and the defendant refused to pay her a bonus she claimed to be entitled to under an incentive plan. She sued in the county court and, after a bench trial, was awarded judgment against the defendant for $1,338.06 plus costs and $350 for attorney fees under Neb. Rev. Stat. § 48-1231 (Reissue 1988). The defendant appealed, and the district court affirmed and awarded an additional $350 for attorney fees in the district court. We affirm.

On January 2, 1985, the defendant announced in writing an "Incentive Compensation Plan" for its supervisory employees. The officers of defendant explained to the employees that profits were down, that the salary of certain supervisory personnel would be cut from 10 to 20 percent, and that if a certain level of profitability was reached each month during the year, the lost wages would be restored on a month-to-month basis. The plan was unpopular, and a second plan was proposed and adopted by the defendant.

The second plan was promulgated at a meeting held on January 11, 1985, and confirmed by a letter dated January 15, 1985. In that plan, the salary of supervisory employees in the plaintiff's category would be reduced 5 percent, but if a certain profit level was reached for the fiscal year ending July 31, 1985, the lost salary would be restored and the employees would receive a bonus of that much more.

The parties stipulated that the profit level requiring the payment of a full bonus to the plaintiff was reached. The defendant refused to pay the bonus solely on the ground that the plaintiff was not employed at the time the bonus was to be paid, although she was employed at the end of the fiscal year.

The memorandum of January 2, 1985, said nothing about when any yearend bonus would be paid. The memorandum of January 15, 1985, stated the timeframe when the bonus would

be computed: "At the end of the fiscal year (July 31) we will have our regular, audited statement of profit and loss. These will be done in September . . . ." Neither statement said anything about continued employment being a condition to receiving the bonus.

Everyone understood the bonus would not be finally computed or paid until sometime in September. The plaintiff and another former employee testified that they did not hear anyone at any meeting say the bonus would only be paid to those persons who were still employed when the bonus was paid. An owner of the defendant and a person still employed by it testified management did announce that employment on the date of payment was a condition to receiving the payment.

The trial judge specifically found that he accepted the plaintiff's version of the January meetings and that continued employment was not a term of the original incentive plan. This case is a law case tried to the court without a jury, and this court will not disturb its findings unless they are clearly wrong; furthermore, this court will view the evidence in a light most favorable to the prevailing party. *Hahn v. Weber & Sons Co.*, 223 Neb. 426, 390 N.W.2d 503 (1986).

In part, the defendant relies upon a letter to Knutson dated August 9, 1985, in which the defendant stated that her pay was being returned to the preplan level, that preliminary information indicated she would be entitled to the bonus, and that it would probably be paid at the second payday of September to "those participants currently employed on the payment date." This communication came long after any agreement was made, and after any performance required by the plaintiff was complete, and could not have changed the terms of the agreement made in January.

The defendant maintains that even under the plaintiff's version there was not agreement on the point, and therefore employment on the date of disbursement was an implied term of the bonus agreement. The defendant relies upon the cases of *Sinnett v. Hie Food Products, Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970), and *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981), to support this position. In the *Sinnett* case, the issue was whether the wrongful discharge of an

employee on the last day of the bonus year deprived him of a bonus he had otherwise earned. In the *Feola* case, the issue was whether an employee drawing severance pay was still employed for purposes of being entitled to a bonus. Neither case is applicable to the case at hand.

Perhaps the trial court could have found an implied provision in the agreement of January that each employee must be employed on the date the bonus was distributed to be entitled to it, but there is no authority for a proposition that the trial court was required to find such an implied provision. If the purpose of a bonus plan is to retain long-term employees, such an implication might be required, or at least justified, but the evidence in this case would support, if it did not compel, a finding that the purpose of the bonus plan was to improve productivity.

Section 48-1231 of the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissues 1984 & 1988), provides that if wages are not paid within 30 days and the employee secures a judgment, and if the employee has employed an attorney, the employee "shall be entitled to recover . . . an amount for attorney fees assessed by the court which fees shall not be less than twenty-five percent of the unpaid wages." The statute also provides for an additional attorney fee of not less than 25 percent if the employee prevails on appeal. The county court and the district court each allowed $350 as an attorney fee. The defendant maintains the bonus sued for was not wages, and therefore the plaintiff is not entitled to an allowance for attorney fees.

Section 48-1229(3) (Reissue 1984) provides: "Wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." The defendant argues that the above definition does not include nonroutine benefits. The plaintiff argues the bonus is a fringe benefit.

Webster's New Universal Unabridged Dictionary 208 (2d ed. 1983) defines "bonus" as "(3) extra compensation beyond an amount agreed upon; an extra payment or consideration given

as a reward or an inducement," and "fringe benefit" as "a payment other than wages or salary made to an employee, as in the form of a pension, vacation, insurance, etc." *Id.* at 734. Under the above definitions, a bonus may or may not be wages under the statutory definition, depending upon whether or not the bonus is an inducement or a reward, that is, whether the employer and employee agreed to it beforehand. The trial court necessarily found they had agreed, and the record supports that finding.

It is difficult to imagine a more comprehensive definition of wages than the one contained in § 48-1229. In it the wages must be (1) compensation for labor or services, (2) previously agreed to, and (3) the conditions stipulated must have been met. In finding for the plaintiff, the county court necessarily found that the bonus had been previously agreed to and that the stipulated conditions had been met. The plaintiff is entitled to an award of attorney fees in the trial court and both appellate courts in at least the amount of 25 percent of the award. The plaintiff is allowed $750 as attorney fees in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DAVID J. POWERS, RESPONDENT.

436 N.W.2d 201

Filed March 3, 1989. No. 87-815.

Original action. Judgment of disbarment.

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

PER CURIAM.

This is an original disciplinary proceeding against David J. Powers, an attorney admitted to practice law in Nebraska.

On September 14, 1988, formal charges for disciplinary action were filed with this court by the Nebraska State Bar

Association. The respondent in this action has never replied to any of the proceedings instituted against him, and as of this date his whereabouts remains unknown. Thus, the facts of this case are not in dispute.

On March 5, 1984, Powers was appointed personal representative of the estate of Cleora West. In his capacity as personal representative, respondent opened an account at FirsTier Bank, Lincoln, Nebraska, into which he deposited money belonging to the estate. At the same time, Powers had the right to deposit and withdraw money from a Havelock Bank account called the David J. Powers Trust Account. This account was the account into which Powers deposited money held in trust for his clients.

The formal charges filed by the Nebraska State Bar Association set forth four counts alleging violations of respondent's oath of office as an attorney as provided in Neb. Rev. Stat. § 7-104 (Reissue 1987). The first count alleges that on August 1, 1985, respondent drew a check for $500 upon the Cleora West estate and deposited the same amount into the Havelock Bank account. This money was then used by the respondent to pay his personal business expenses. In count II, it is alleged that on November 5, 1985, Powers deposited a check for $4,000 drawn on the Cleora West estate into the Havelock Bank account. Thereafter, respondent withdrew $3,724.39 of the amount previously deposited and converted it to his own personal use. Count III alleges that on March 31, 1986, Powers deposited $2,000 from the Cleora West estate into the Havelock Bank account and on the same date converted this money to his own use. Finally, count IV states that on April 4, 1986, Powers deposited $2,631.53 from the Cleora West estate into the Havelock Bank account and on the same date used the money to pay the medical bills of another client. As stated above, no communication has been made with the respondent, and his current whereabouts is unknown.

The above allegations, if true, constitute a violation of Powers' oath of office as an attorney as provided in § 7-104. Additionally, his conduct constitutes violations of the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102, Misconduct; Canon 7, DR 7-101, Representing a

Client Zealously; and Canon 9, DR 9-102, Preserving Identity of Funds and Property of a Client. After a careful review of the record, we find that there exists no issue of fact or law. Therefore, pursuant to Neb. Ct. R. of Discipline 4(A)(1) (rev. 1986), it is the order of this court that the respondent, David J. Powers, be, and hereby is, disbarred from the practice of law, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MARLO BRYCE BEERMANN, APPELLANT.

436 N.W.2d 499

Filed March 3, 1989. Nos. 87-968, 87-969, 87-970, 87-971, 87-975.

1. **Indictments and Informations.** The function of an indictment, information, or complaint is twofold. With reasonable certainty, an indictment, information, or complaint must inform an accused concerning the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.
2. _____. In a multicount information, or in the case of multiple informations consolidated for trial, another purpose of the information is to allege the crime charged with sufficient specificity to enable the fact finder to identify the crime charged with the facts alleged to constitute that crime.
3. **Indictments and Informations: Time: Limitations of Actions.** In the absence of demonstrated prejudice to a defendant's substantial right, a formal charge in prosecuting a criminal offense alleging a date or period within the statutory time specified to commence prosecution for the crime charged is sufficient, unless the particular offense charged requires establishment of a specific time as an essential element of that crime charged.
4. _____: _____: _____. Generally, describing an offense only as occurring within the period of the statute of limitations is insufficient as a matter of law.
5. **Criminal Law: Pretrial Procedure.** A defendant is entitled to a preliminary hearing on any felony complaint.
6. **Lesser-Included Offenses: Words and Phrases.** The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is

impossible to commit the greater without at the same time having committed the lesser.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded for further proceedings.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

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

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

GRANT, J.

Following a jury trial on August 19 and 20, 1987, defendant-appellant, Marlo Bryce Beermann, was convicted in the district court for Dakota County on three charges of first degree sexual assault in violation of Neb. Rev. Stat. § 28-319 (Reissue 1985) (cases Nos. 87-968, 87-969, and 87-975), one charge of second degree sexual assault in violation of Neb. Rev. Stat. § 28-320 (Reissue 1985) (case No. 87-971), and one charge of sexual assault of a child in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1985) (case No. 87-970). Defendant was sentenced to 10 to 15 years' imprisonment for each of the three first degree sexual assault convictions, with the provision that the sentences be served consecutively. He was sentenced to 15 to 45 months' imprisonment for sexual assault of a child and to 5 to 10 years' imprisonment for the second degree sexual assault, with the provision that these sentences be served concurrently with the sentences imposed for the first degree sexual assaults.

On appeal, through the third attorney who has represented him in this matter, defendant contends the trial court erred in admitting certain corroborative testimony and opinion evidence, in failing to properly instruct the jury, in imposing excessive sentences, and in permitting the State to amend all five informations to allege that the crimes charged occurred "after the 20th day of February, 1984, and before the 20th day of February, 1987." We conclude that the amended informations did not inform defendant with reasonable

certainty of the offenses charged, nor did the amended informations and the instructions submitted to the jury furnish any identifiable basis for the jury's verdicts of guilty for conduct on five separate offenses. We therefore reverse defendant's convictions and remand for further proceedings on all charges.

These actions were filed in the county court for Dakota County on February 18, 1987, in five separate complaints. Three of the complaints were amended and were refiled on March 9, prior to a preliminary hearing held, without objection, on all complaints on that date. At the preliminary hearing, defendant was rearraigned on the three amended complaints and the other two pending complaints. After the preliminary hearing, defendant was bound over to district court on all five complaints. Five separate informations were filed in district court on March 11, 1987, numbered as separate cases as set out below. Why this was done, rather than filing one information with five counts, is not known. Defendant was arraigned in district court on April 14 and pled not guilty to all charges.

On August 7, 1987, the State filed motions to amend all five informations to allege that the crimes charged had occurred during the 3-year period "on or after the 20th day of February, 1984, and before the 20th day of February, 1987." Defendant filed a "Resistance to Motion to Amend," stating, in part, that "to amend the information[s] as proposed by the State does not sufficiently inform the defendant with reasonable certainty of the charge[s] against him so that he may adequately prepare his defense," and "to amend said information[s] at this time does not enable the defendant to plead to the judgment thereon as a bar to later prosecution for the same offense[s]."

On August 12, the district court sustained the State's motions to amend the informations. In four of the amended informations, filed on August 18, 1987 (the day before trial), it was alleged in part, in identical language, that defendant

> did, on or after the 20th day of February A.D. 1984, and before the 20th day of February A.D. 1987 in the County of Dakota and State of Nebraska aforesaid, subject another person to sexual penetration and overcame the

> victim by force, threat of force, express or implied, coercion, or deception; or knew or should have known the victim was mentally or physically incapable of resisting or appraising the nature of her conduct; or the actor is nineteen years of age or older and the victim is less than sixteen years of age; to-wit: the victim is a 10 year old female; Contrary to the form of the statute in such case made and provided . . . .

The other amended information charged that defendant, in the same timeframe, did "subject a female child, fourteen years of age or younger, to sexual contact and that the defendant is at least 19 years of age or older." The informations did not set out the victim's name, nor indicate that the victim was the same child in each case.

Defendant waived his right to have copies of the informations served 24 hours prior to arraignment, and was rearraigned on all charges on the morning of August 19. Defendant objected to the arraignment and filing of the amended informations on the grounds raised in his resistance to motion to amend, with counsel stating, "Here we are ready to try these cases and we now are informed of charges which look to be basically altogether different." His objections were overruled, and defendant entered pleas of not guilty to all charges. The trial immediately followed.

The record shows that on February 9, 1987, social worker Evonne Kramper contacted Dakota County Deputy Sheriff Robert Day about possible sexual abuse involving the victim in these cases, a 10-year-old child. The victim is the niece of defendant's second ex-wife, who lives with defendant. The victim had often visited defendant's family on weekends. At that time, defendant's family included himself, his ex-wife, and their two small children. On February 8, 1987, the victim's mother asked her why she no longer wanted to visit the defendant's residence. After some discussion, the victim told her mother that "Marlo has been doing icky things." The child revealed the nature of the problem to her mother, who contacted Kramper at the Nebraska Department of Social Services. Deputy Day subsequently conducted three interviews with the victim. Day was the State's sole witness at the

preliminary hearing.

The proceedings and the testimony, in both the preliminary hearing and at trial, in the five cases are summarized as follows. The proceedings are grouped as best this court can, from the information in the record before us. Five crimes were described in the preliminary hearing, and testimony as to five crimes was adduced at the trial.

The reference to various "counts" is made because that is the manner in which the various charges were referred to at trial and submitted to the jury. On the verdict form in each case, the Roman numeral count number is typed in. Also shown on the verdict form is a "case number," placed on the verdict in handwriting. Who made the correlations between the various case numbers and the counts, and when, is not known.

1. *County Court No. CR87-187; District Court No. 43-156 (submitted as "Count I"); Supreme Court No. 87-975*

A. The criminal complaint filed on February 18, 1987, alleged that defendant committed sexual assault of a child "on or about the 10th day of September A.D. 1985."

B. The amended complaint filed on March 9 alleged that defendant committed first degree sexual assault "on or about the 10th day of September A.D. 1985."

C. At the March 9 preliminary hearing, Deputy Day testified that the victim told him the very first sexual assault occurred one night in September 1985. She had just started fourth grade and was visiting the Beermann residence. The victim told Day that defendant's wife and his two children were sleeping and that she and defendant were watching television. The victim was sitting in a chair. Defendant brought her some pop and started "rubbing her privacy," that is, penetrating her vagina with his finger.

D. The information filed in district court on March 11 alleged that defendant committed first degree sexual assault "on or about the 10th day of September A.D. 1986." At this point, although no party has called this to our attention, and no objection was made, it is clear that an error has been made between the allegation of the complaint (September 10, 1985) and the allegation of the information (September 10, 1986).

Recognizing that the combination of the two different dates means that defendant has been bound over on an allegation of a 1985 crime which has been somehow transformed into a 1986 crime—a problem similar to that discussed hereinafter in connection with case No. 87-968—we will discuss the incident as if it had occurred as first alleged in the information on this count, i.e., September 10, 1986.

E. The amended information filed on August 18 alleged that defendant committed first degree sexual assault on or after February 20, 1984, and before February 20, 1987.

F. The victim's trial testimony which seems to be the basis of defendant's conviction on this charge was that she had first been sexually assaulted by defendant in the dining room of the Beermann residence sometime after a family vacation to California in August 1986, but before Christmas, and when she was in the fifth grade. She testified that she had been sleeping on the dining room floor on a sleeping bag. Defendant's two children were also in the room sleeping, and defendant's ex-wife was asleep on the waterbed in another room. Defendant got the victim some pop and told her to sit in a chair with him. While they watched television, defendant "started doing icky things" to her, sometimes putting his finger inside her vagina.

2. *County Court No. CR87-188; District Court No. 43-157 (submitted as "Count II"); Supreme Court No. 87-968*

A. The criminal complaint filed on February 18, 1987, alleged that defendant committed sexual assault of a child "on or about the 1st day of May A.D. 1986."

B. The amended complaint filed on March 9 alleged that defendant committed first degree sexual assault "on or about the 1st day of May A.D. 1986."

C. Day testified at the preliminary hearing that this incident occurred during May 1986, when it was hot outside. The victim told Day she was at the Beermann residence and defendant was giving the children rides on a small tractor. When it was her turn to get a ride, defendant had her sit on his lap and started rubbing her, putting his index finger into her vagina.

D. The information filed in district court on March 11 alleged that defendant committed first degree sexual assault

"on or about the 1st day of May A.D. 1986."

E. The amended information filed on August 18 alleged that defendant committed first degree sexual assault on or after February 20, 1984, and before February 20, 1987.

F. The victim's trial testimony which might support defendant's conviction on this charge was that an incident occurred in the Beermanns' downstairs bedroom on their waterbed, after the California vacation but before Christmas, when she was in fifth grade. Defendant, his ex-wife, their two children, and the victim were all sleeping together in the waterbed. The victim testified that defendant was right next to her on the bed and that he put his hand in her panties and "started rubbing on [her] privacy" with his finger.

3. *County Court No. CR87-189; District Court No. 43-158 (submitted as "Count III"); Supreme Court No. 87-969*

A. The criminal complaint filed on February 18 alleged that defendant committed sexual assault of a child "on or about the 1st day of December A.D. 1986."

B. The amended complaint filed on March 9 alleged that defendant committed first degree sexual assault "on or about the 1st day of December A.D. 1986."

C. Day testified at the preliminary hearing that this incident occurred on a weekend morning during December 1986 in the attic of the Beermann residence. The victim told Day she was in the fifth grade when it happened and that it was cold outside and there may have been snow on the ground. She was wearing a long shirt and pants, and defendant was wearing underwear. The victim stated that defendant woke her up and escorted her upstairs to the attic. He went back downstairs and returned with a small bottle of clear liquid. Defendant told the victim to take her clothes off. She did, and defendant put the clear liquid on her vaginal area and rubbed her, achieving digital penetration.

D. The information filed in district court on March 11 alleged that defendant committed first degree sexual assault "on or about the 1st day of December A.D. 1986."

E. The amended information filed on August 18 alleged that defendant committed first degree sexual assault on or after

February 20, 1984, and before February 20, 1987.

F. The victim's trial testimony possibly supporting defendant's conviction on this charge was that the incident happened in an upstairs bedroom in the Beermann home after the California vacation and before Christmas, while it was still warm outside. The victim testified that one morning while defendant's two children were asleep and his ex-wife was at work, defendant told her to follow him upstairs. When they were upstairs, defendant told her to take her clothes off. He also took his clothes off, told her to "get on him," and started rubbing her. Defendant left for a minute to go downstairs. He came back with lotion, using his finger to put the lotion "in my privacy and on his [penis]." The victim further testified, "He put his privacy in mine and then told me to go up and down." She testified that defendant then sexually penetrated her on a chair in the bedroom.

4. *County Court No. 87-190; District Court No. 43-159 (submitted as "Count IV"); Supreme Court No. 87-970*

A. The criminal complaint filed on February 18, 1987, alleged that defendant committed sexual assault of a child on or about January 17, 1987.

B. The complaint was amended by interlineation at the March 9 preliminary hearing to allege that defendant committed sexual assault of a child "on or about the 1st day of Dec. A.D. 1986."

C. Day testified at the preliminary hearing that during the encounter which was the basis for the charge in Supreme Court case No. 87-969, above, defendant also had the victim rub "his privacy," which was "where he goes to the bathroom and it looks like a worm."

D. The information filed in district court on March 11 alleged that defendant committed sexual assault of a child "on or about the 1st day of December A.D. 1986."

E. The amended information filed on August 18 alleged that defendant committed sexual assault of a child on or after February 20, 1984, and before February 20, 1987.

F. The victim's trial testimony supporting defendant's conviction on this charge was that an incident occurred in

defendant's car during the night, after the California vacation but before Christmas, when she was in the fifth grade. Defendant was taking the victim home and asked her to sit right next to him in the car. The victim testified that defendant unzipped her jeans and rubbed her vaginal area on the outside of her panties.

5. *County Court No. CR87-191; District Court No. 43-160 (submitted as "Count V"); Supreme Court No. 87-971*

A. The criminal complaint filed on February 18, 1987, alleged that defendant committed first degree sexual assault "on or about the 17th day of January A.D. 1987."

B. There was no amended complaint on this charge.

C. Day testified at the preliminary hearing that this incident occurred on a weekend approximately 3 weeks prior to February 9, 1987, in the children's bedroom at the Beermann residence. The victim told Day that she and the Beermanns' two children were sleeping in the bedroom. When defendant's small daughter left the room, defendant lay down beside the victim and started "rubbing her privacy," that is, inserting a finger into her vagina. This activity continued for approximately 1 hour. The victim told Day that defendant would come into the bedroom, rub her, lie down with her, leave for a while, and then return.

D. The information filed on March 11 alleged that defendant committed first degree sexual assault on or about January 17, 1987.

E. The amended information filed August 18 alleged that defendant committed first degree sexual assault on or after February 20, 1984, and before February 20, 1987. The information was again amended at trial, without objection, to allege that defendant committed second degree sexual assault on or after February 20, 1984, and before February 20, 1987.

F. The victim's trial testimony which seems to be the basis of defendant's conviction for second degree sexual assault was that an incident occurred in the kitchen of the Beermann residence, after the California vacation but before Christmas, when the victim was in the fifth grade. The victim testified that she woke up from a nap and went into the kitchen to eat some

cherries. Defendant subsequently entered the room and "started rubbing on [her] privacy," rubbing her with his hand by reaching underneath. His hands remained outside her clothing, but the rubbing hurt. The victim testified that defendant then "took his penis out of behind and asked [her] if [she] wanted to put it in [her] mouth, and [she] said no."

Defendant contends on appeal that he was denied due process of law because the amended informations, in failing to specify a date or time when the crimes were alleged to have occurred, did not inform him with reasonable certainty of the charges against him so that he could adequately prepare a defense, or plead to the judgments thereon as a bar to later prosecution for the same offenses. In *State v. Wehrle*, 223 Neb. 928, 930, 395 N.W.2d 142, 145 (1986), we stated:

> [T]he function of an indictment, information, or complaint is twofold. With reasonable certainty, an indictment, information, or complaint must inform an accused concerning the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.

In *Wehrle, supra*, and *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984), we also stated that an information charging an offense in substantially the words of the statute is generally sufficient, that the time of occurrence is not an essential element of first degree sexual assault, and that charging an individual with the commission of a crime anytime within the statute of limitations is sufficient. These principles pertain only to the sufficiency of a formal criminal charge and do not address the notice function of a complaint, indictment, or information. The State contends that *Piskorski* authorizes the filing of informations of the type filed in this case.

An information may sufficiently allege the statutory elements of a criminal offense, yet fail to state with sufficient particularity information about the alleged crime which is vital to the preparation of a defense. The amended informations filed against defendant on the day before trial are defective in

the latter sense, and are also defective in the sense the amended informations do not differentiate the identical crimes charged. We hold that in a multicount information, or in the case of multiple informations consolidated for trial, other purposes of the information are to allege the crime charged with sufficient specificity to enable the fact finder to identify the crime charged with the facts alleged to constitute that crime, and to assist the trial judge in determining admissibility of evidence with relation to the various crimes alleged.

The amended informations in cases Nos. 87-968, 87-969, 87-971, and 87-975 all alleged, in identical language as set out above, that defendant committed a first degree sexual assault, in each count or case, "on or after the 20th day of February A.D. 1984, and before the 20th day of February A.D. 1987 . . . ." This situation is easily distinguished from the facts of *State v. Piskorski, supra*, and *State v. Wehrle, supra*.

Both of these cases involved first degree sexual assaults of a child. *Piskorski, supra*, was based on one charge, which the information alleged occurred " '[o]n or after December 11, 1982 and before December 25, 1982 . . . .' " 218 Neb. at 547, 357 N.W.2d at 210. At the close of its case, the State moved to amend the information to allege that the assault occurred on or after September 1, 1982, and before December 25, 1982, and to set out the name of the victim. The amendment was opposed, but the trial court permitted the change and this court approved, stating:

> This amendment did not make any new or additional charges nor raise matters with which Piskorski was not previously aware. It simply attempted to cause the information to conform to the proof. No one could determine the date of the assault any closer than sometime between September 1, 1982, and December 25, 1982.

Id.

In *Wehrle, supra*, two charges of first degree sexual assault were concerned. The first count charged an assault occurring " 'on or after February 1, 1984 and on or before March 31, 1984' "; the second charged an assault " 'on or about the 11th day of September, 1985.' " 223 Neb. at 929, 395 N.W.2d at 144. There was a clear differentiation of the two charges. Wehrle

challenged the first count, and the trial court quashed that count. On an appeal by the county attorney, this court reversed, holding that

> where an indictment, information, or complaint alleges commission of a crime, using the language of the statute defining that crime or terms equivalent to such statutory definition, a formal charge against an accused is sufficient. . . . By the clear terms of § 28-319(1), the time of occurrence is not an essential element of first degree sexual assault.

State v. Wehrle, 223 Neb. 928, 930-31, 395 N.W.2d 142, 145 (1986).

Similarly, in *Piskorski*, we stated, "[C]harging an individual with the commission of a crime anytime within the statute of limitations is sufficient." *State v. Piskorski*, 218 Neb. 543, 547, 357 N.W.2d 206, 210 (1984).

It is from the blind application of these holdings that the basic problem in these cases arises. We adhere to those statements, but it must be clear that, as set out above, both *Piskorski* and *Wehrle* recognized that the purpose of a complaint or information is twofold: to apprise a defendant with reasonable certainty concerning the crime so that (1) the accused person may prepare a defense to the prosecution and (2) if convicted, the accused may plead the judgment of conviction on the charge as a bar to a later prosecution for the same offense. *Piskorski, supra*; *Wehrle, supra*; *State v. Adams*, 181 Neb. 75, 147 N.W.2d 144 (1966); *Cowan v. State*, 140 Neb. 837, 2 N.W.2d 111 (1942). The informations in *Wehrle* and *Piskorski* satisfied the twofold test.

Applying that basic premise to the case before us, it is clear that the amended informations do not advise the defendant with reasonable certainty of the crimes charged against him. With the allegations of the four amended informations, defendant was faced with defending four charges, each alleging that he had committed a specific criminal act on an unnamed victim on four unspecified occasions over a 3-year prior. Prior to the amendment, defendant was charged with four offenses, occurring on or about September 10, 1986; May 1, 1986; December 1, 1986; and January 17, 1987. Defendant had to

know that "on or about" had been interpreted in *Piskorski* and *Wehrle* to mean a period of time from 2 to 4 months and that, in *Piskorski*, the amendment was made to conform with the proof. The State, in the instant cases, before the trial began, and thus not to conform to the evidence, changed the alleged times to a 3-year period.

The change, in the manner requested, was absolutely unnecessary in that, in proving each offense on the day after the wide-sweeping amended informations were filed, the State's evidence narrowed the time of the offense to a period after the victim's summer California vacation, which other testimony indicated was in late August 1986; while the victim was in fifth grade in school, which was established to be in the fall of 1986; and before Christmas. This time period was established as to each alleged incident, by the testimony of the child. The time period could have been easily, and properly (so far as the time element is concerned), alleged to have been between September 1, 1986, and December 25, 1986—a time period which, by coincidence, is exactly that approved in *Piskorski, supra*. Then, a clean and relatively precise question would have to be determined by the trial court; that is, whether the informations charging offenses on or about May 1, 1986, and January 17, 1987, could be amended.

> [I]n the absence of demonstrated prejudice to a defendant's substantial right, a formal charge in prosecuting a criminal offense . . . alleging a date or period within the statutory time specified to commence prosecution for the crime charged is sufficient, unless the particular offense charged requires establishment of a specific time as an essential element of that crime charged.

State v. Wehrle, supra at 934, 395 N.W.2d at 147. In the present case, defendant has demonstrated prejudice to his substantial right to be adequately informed of the charges against him. On the face of the amended informations, defendant was charged with the same crime, first degree sexual assault, four times. Except for the docket numbers, the informations were identical, and the State made no attempt to distinguish the four offenses, by time or place of occurrence or otherwise, in the charging documents.

The evidence adduced at trial and the prosecutor's technique in eliciting testimony from the victim demonstrate that the State could have alleged specific acts of first degree sexual assault instead of four undifferentiated incidents. In the trial, to differentiate various crimes, the prosecutor would show the victim a picture of a room of defendant's house and ask her if she could identify the room. The victim was then asked whether she had been in that room with the defendant and what took place in the room. The victim would then describe an incident of sexual assault. The prosecutor then elicited testimony concerning when the event took place, referring to the August 1986 vacation to California, what grade in school the victim attended when the sexual assault occurred, whether the incident had occurred before or after Christmas, and whether it was warm or cold outside.

Crimes are not fungible. There is no way from the record before us that the prosecutor, the defendant and his counsel, the jury, the trial judge, or this court could determine which of defendant's actions violated, for example, the charges in district court case No. 43-158, also known as count III. We agree with the defendant that his ability to prepare a defense was seriously impaired due to the State's failure to sufficiently inform him with reasonable certainty of the charges against him. We hold that an information alleging the time of an offense only by reference to the period of time in a statute of limitations is insufficient as a matter of law.

In reaching our conclusion that all five convictions must be reversed, we note the substantial differences between the preliminary hearing testimony and the victim's testimony at trial. This presents another problem which we feel was raised by defendant in objecting to the amended informations.

Nebraska law is settled that a defendant is entitled to a preliminary hearing on any felony complaint. In *State v. Brevet*, 180 Neb. 616, 619, 144 N.W.2d 210, 213 (1966), we stated:

> It has long been the rule in this state that in a prosecution for a felony, in the absence of a waiver of the right to a preliminary hearing, the defendant cannot be put on trial over his objections until such preliminary hearing is

> accorded him. Jahnke v. State, 68 Neb. 154, 94 N.W. 158. The statute awarding one accused of crime the right to a preliminary hearing was enacted for the benefit of the accused.

In the present case, at the preliminary hearing, Deputy Day testified that the victim had told him that she had been sexually assaulted (1) during January 1987 in the children's bedroom; (2) during a tractor ride in May 1986; (3) during September 1985, while watching television with defendant; and (4) during December 1986, in the upstairs of the Beermann home, with defendant using some type of lotion. He described four sexual assaults in the first degree. Day also described an incident of sexual touching that would constitute the sexual assault of a child.

The victim testified at trial that she had been sexually assaulted (1) between September and December 1986, while watching television with defendant; (2) between August and December 1986, on the Beermanns' waterbed; and (3) in an upstairs bedroom, with defendant using some type of lotion. She described three sexual assaults in the first degree. The victim further testified at trial that defendant had sexually assaulted her in the kitchen and in his automobile. Thus, the victim has described five criminal offenses, but not necessarily the offenses on which defendant was bound over.

Only the victim's trial testimony of the incident involving defendant's use of lotion bears a clear resemblance to Day's preliminary hearing testimony. The preliminary hearing testimony supporting the charge for sexual assault of a child involved defendant's taking the victim to an upstairs room and forcing her to touch him for his sexual gratification. The trial testimony supporting defendant's conviction for sexual assault of a child was that the sexual contact occurred in an automobile. There was no preliminary hearing testimony involving sexual contact in an automobile. There was no trial testimony regarding a tractor ride.

We recognize that the State may have been unable to determine the actual dates of the alleged offenses due to the child victim's inability to recall specifics, and acknowledge that, obviously, the State does not have a duty to disclose to an

accused information that the State does not have. See *State v. Saraceno*, 15 Conn. App. 222, 545 A.2d 1116 (1988). It is clear from the preliminary hearing testimony and the trial testimony, however, that the prosecution had information that would allow it to allege the times of the offenses with much greater specificity than to merely allege that all the offenses occurred during the 3-year statute of limitations period.

As seen from the brief summary of the preliminary hearing and the trial, as set out above, it is apparent that defendant was bound over on an offense involving his conduct while driving a tractor. No testimony at trial was adduced which stated the word "tractor," nor even remotely concerned a tractor. Therefore, the logical conclusion is that defendant has been charged with an offense that was not proved at trial. If this court could determine, with certainty, which case or count was involved in this connection, we would reverse and dismiss that charge. We cannot so determine.

Similarly, at trial, defendant was convicted, possibly in connection with count IV, of sexual assault of a child, stemming from an incident of sexual contact in a green station wagon. No such testimony concerning a station wagon or any car was even mentioned in the preliminary hearing. Logically, therefore, defendant has been convicted of a crime that he was not bound over on after a preliminary hearing. That count must be reversed for a new trial.

The error resulting from the obvious differences between crimes described at the preliminary hearing and the testimony adduced at trial was accentuated by Day's testimony at the trial. That testimony, in part, was:

> Q. [by the deputy county attorney] You heard [the victim's] testimony in court today, didn't you?
>
> A. [by Deputy Day] Yes.
>
> Q. Was it consistent with what she told you?
>
> A. Yes, sir.
>
> Q. Okay. Basically, the basic facts are there?
>
> A. Yes, sir.
>
> Q. Okay. Based upon your training and experience, officer, and your observations of the victim, do you have an opinion whether or not [the victim] was sexually

abused?

A. Yes.

Q. What is that opinion?

A. I believe she was sexually abused.

The State and defendant have differences about whether the objections made by defendant at trial were directed to this testimony. The court had granted defendant a "continuing objection" to the testimony of corroborating witnesses. No objection was made to this testimony, but we will consider it as plain error. In the first instance, while "[b]asically, the basic facts" are set out in the child's testimony, it is certain Deputy Day did not testify at the preliminary hearing to the facts testified to by the child. The deputy's testimony is not accurate, because what he testified to at the preliminary hearing was not what the trial testimony was.

Secondly, it is totally improper for one witness to testify as to the credibility of another witness. The question of any witness' credibility is for the jury. Deputy Day's testimony may be construed as stating that the child's testimony is true. In that context, it is improper to permit any evidence that a witness is truthful, except under the provisions of Neb. Evid. R. 608 (Neb. Rev. Stat. § 27-608 (Reissue 1985)), which permits testimony, under certain conditions, concerning the character of a witness for truthfulness. This testimony was not of that type.

If the testimony can be considered a lay expert opinion, the testimony was further objectionable as in violation of Neb. Evid. R. 701 (Neb. Rev. Stat. § 27-701 (Reissue 1985)). As stated in connection with similar testimony in *State v. Romero*, 147 Wis. 2d 264, 278, 432 N.W.2d 899, 905 (1988):

> The testimony in this case was not helpful to the jury. Rather, it tended to usurp the jury's role. The credibility of a witness is left to the jury's judgment. *State v. Friedrich*, 135 Wis. 2d 1, 16, 398 N.W.2d 763 (1987). As the court of appeals declared in *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."

The subject of the testimony is not appropriate for lay expert opinion, in any event, and the testimony could not have been admissible under Neb. Evid. R. 702 (Neb. Rev. Stat. § 27-702 (Reissue 1985)), because there is no evidence that Deputy Day was an expert on the subject. The evidence was inadmissible and highly prejudicial, and sufficient to require reversal on that ground alone.

It is also clear that such testimony was not admissible as corroborating evidence of the assaults. Other cases have stated:

> "The rule is well established in this state that in a prosecution for sexual assault, *the prosecutrix may testify* in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, *to the fact and nature of the complaint, but not as to its details*; and that *others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. . . .*"

(Emphasis in original.) *State v. Daniels*, 222 Neb. 850, 853, 388 N.W.2d 446, 449 (1986), citing other cases.

In the case before us, Day's testimony, in effect corroborating all the testimony of the child, was testimony as to the details of the criminal incidents. Such testimony is not proper corroborating evidence, nor was Day's testimony admissible under the "complaint of rape" rule discussed in *Daniels* and many other cases. No "complaint" was made to Day, but, rather, he was called to investigate a series of crimes referred to him by a social worker.

The trial court's instructions to the jury also reflect the underlying problem. In the instructions as they affect cases Nos. 87-968, 87-969, and 87-975, the court incorrectly instructed the jury that defendant had been charged in a five-count information and that "[t]he first three counts of the Information are indentical [sic]." Although the three charges were indeed identical, they were not separate counts of a single information, but were separate cases. We repeat again that we are unable to determine when the correlations between counts and charges were made, but the charges seem to have been made after the verdicts were returned. If the verdicts were submitted to the jury in such form that the jury could think that count V

was the fifth count in case No. 43-160 and count IV was the fourth count in a different case, the jury would have to conclude that there were many more charges not submitted.

The court instructed the jury as to the material elements and lesser-included offenses of first degree sexual assault. The instructions were identical in each case and, for conviction, required that the jury find beyond a reasonable doubt that defendant

> on or after the 20th day of February, 1984, and before the 20th day of February, 1987 . . . intentionally subjected the victim to sexual penetration, and the defendant either;
>
> 2. (a) Overcame the victim by force, threat of force, express or implied, coercion, or deception, so as to be able to accomplish that penetration, or
>
> (b) Defendant knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or
>
> (c) Defendant was 19 years of age or older and the victim was less than 16 years of age.

The jury instructions do not reflect the trial testimony, and it is impossible to determine from the record whether defendant was convicted of the same offense three times or was convicted of three separate offenses. Indeed, if a juror believed some of the State's evidence, but disbelieved other parts of such evidence, that juror would be hard pressed to determine the case in which he or she wanted to vote guilty or not guilty.

It is not possible for this court to hold that defendant has been afforded due process of law.

Since the causes are to be remanded, we discuss another alleged error, in that the court instructed the jury on sexual assault in the second degree. We determine that the jury should not have been instructed on either second or third degree sexual assault.

Section 28-320 provides:

> (1) Any person who subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, or (b) knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature

of his or her conduct is guilty of sexual assault in either the second degree or third degree.

(2) Sexual assault shall be in the second degree and is a Class III felony if the actor shall have caused serious personal injury to the victim.

(3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

Section 28-320.01 provides:

(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.

(2) Sexual assault of a child is a Class IV felony.

Whether "serious personal injury to the victim," as set out in § 28-320(2), and defined in Neb. Rev. Stat. § 28-318(4) (Reissue 1985), is an element of the crime of second degree sexual assault or simply a jury determination of the degree of the crime committed need not be decided in this case. The controlling fact is that for the defendant to be convicted of second degree sexual assault, there must be a jury determination as to whether the victim suffered "serious personal injury." Before such a question is submitted to the jury, the court must determine, as a matter of law, if there is enough evidence on the question for the jury to consider it. See *State v. Hogan*, 194 Neb. 207, 231 N.W.2d 135 (1975).

In this case, there was literally no evidence as to any such injury. Section 28-318(4) provides that "[s]erious personal injury shall mean great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." The jury was so instructed. There was no evidence in the trial of bruises or beatings. No psychologist testified. No medical witness testified, and the only medical evidence submitted was a stipulation between the parties that "if Dr. Waltson were called to testify, he would state that as a part of the investigation, [the victim] was examined in his office on February 9, 1987, by Ted Deadman, a physical's assistance [sic] who found her hymen to be entact [sic]." Where there is no evidence as to a crime, that

crime should not be submitted to the jury. In this case, sexual assault in the second degree should not have been submitted to the jury as a separate crime or as a lesser-included crime.

In connection with that issue, we note that in each of the three first degree sexual assault cases, the court submitted to the jury all the elements in the statute as to first degree sexual assault. When the evidence is considered as a whole, there was really no evidence as to the factors set out in § 28-319(1)(a) and (b), in that the defendant did not use force nor did the State attempt to prove the victim was incapable of resisting or understanding. The State's case was clearly within the provisions of § 28-319(1)(c), in that the State established the defendant was 35 years old and the victim 10. Subsections (1)(a) and (b) were superfluous to the crimes charged against defendant and should not have been included in the instructions given, although there does not appear to be prejudicial error in the instructions.

Nonetheless, if properly submitted under § 28-319(1)(c), there is a serious question whether the offenses listed in §§ 28-320 and 28-320.01 are lesser-included offenses of sexual assault in the first degree. We have held:

> "The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. . . ."

State v. Arthaloney, 230 Neb. 819, 822, 433 N.W.2d 545, 547 (1989).

It is apparent that assault in the second or third degree as defined in the statute requires proof of force, deception, or lack of knowledge on the part of the victim. A defendant may violate § 28-319(1)(c) without exerting force in any degree. Proof of sexual assault under § 28-319(1)(c), the greater offense, may be made without in any way proving a violation of § 28-320, the lesser offense.

Similarly, with regard to § 28-320.01, the greater offense of sexual assault in the first degree under § 28-319(1)(c) might be

proved by establishing that the defendant is over 19 years of age and the victim is 15 years old, that is, less than 16. Such proof would not necessarily establish a violation of § 28-320.01, which requires that the victim be less than 14. Sexual assault of a child is not a lesser-included offense of first degree sexual assault.

The allegations of sexual assault in the second or third degree should not have been submitted to the jury, in this case, either as a separate charge or as a lesser-included offense of sexual assault in the first degree, as defined in § 28-319(1)(c).

The conviction of defendant in each case is reversed and the causes remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RODNEY L. STEWART, APPELLANT, V. FRANK DELGADO, APPELLEE.
436 N.W.2d 512

Filed March 3, 1989. No. 87-1087.

Sentences. Where two sentences are imposed in the same court at the same time for two offenses, the sentences will run concurrently if the trial judge does not otherwise order.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded with directions.

Rodney L. Stewart, pro se.

Robert M. Spire, Attorney General, and Marie C. Pawol for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

GRANT, J.

In 1975, plaintiff-appellant was found guilty of first degree

murder and shooting "with intent to kill, wound or maim." He was sentenced to death on the murder charge and to 15 to 50 years' imprisonment on the shooting charge. He appealed to this court, where, on February 2, 1977, the conviction on each count was affirmed, as was the sentence on the shooting charge. On the murder charge, this court stated we "modify the sentences imposed upon him by reducing his sentence to death under count I to a sentence of life imprisonment." *State v. Stewart*, 197 Neb. 497, 527-28, 250 N.W.2d 849, 866-67 (1977). Neither the sentence of the trial court nor the modification thereof in this court stated whether the sentences, as ultimately imposed, were to be served concurrently or consecutively.

On April 21, 1986, appellant filed a "complaint" (hereinafter called a petition) in the district court for Lancaster County, alleging that defendant-appellee is the records administrator of the Nebraska state penitentiary and has construed the applicable court sentencing orders to require the sentences imposed be served consecutively rather than concurrently. The petition requested the court to "order the defendant . . . to change the plaintiff's records to indicate his sentences are concurrent . . . ."

The court, pursuant to Neb. Rev. Stat. § 25-2158 (Reissue 1985), treated this pro se filing as an application for an alternative writ of mandamus, as distinguished from a peremptory writ, and, on December 15, 1986, issued an order requiring that the defendant show cause within 21 days why the writ should not be issued.

After defendant's demurrer was overruled, defendant answered on January 26, 1987, admitting that he was the records administrator at the penitentiary and some other facts, and denying the remainder. Defendant requested the petition be denied.

After a hearing, the district court dismissed appellant's petition. This appeal followed. Since appellant is pro se, the pleading and briefing in the case are not as helpful as might be expected, but appellant does raise the issue before us: "Are the appellant's two (2) sentences concurrent or consecutive?" Brief for appellant at 2. We determine that issue and reverse the order of the trial court.

Appellee has admitted that the trial court did not specify whether the sentences were to be served concurrently or consecutively, but correctly alleged in his answer and argues in this court that because the district court imposed the death penalty on count I, "a specification of whether the sentences were to be served concurrently or consecutively was not required." That is a correct statement, and we so held in *State v. Jones*, 218 Neb. 713, 358 N.W.2d 765 (1984) (*Jones II*).

In *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982) (*Jones I*), Jones was sentenced to life imprisonment on a second degree murder conviction and then to death on a first degree murder conviction. On appeal to this court, the life sentence was affirmed but the death sentence was vacated. The cause was remanded to the district court for resentencing on the first degree murder charge, "with directions to hold a new sentencing hearing and sentence the defendant in accordance with the provisions of Neb. Rev. Stat. §§ 29-2520 et seq. (Reissue 1979) and this opinion." *Jones I, supra* at 15, 328 N.W.2d at 174.

On remand, the district court resentenced Jones on the first degree murder charge to life imprisonment, with the specific provision that the life sentence on the first degree murder charge was to be served consecutively to the life sentence on the second degree murder charge.

In *Jones II*, this court affirmed that sentencing, thus overruling Jones' contention of double jeopardy. We pointed out that "any rule that in the absence of a consecutiveness direction two sentences pronounced at the same time by the same court are to be served concurrently can have no application when death has been imposed as one of the sentences." *Jones II, supra* at 715, 358 N.W.2d at 767.

If the present case had been remanded to the district court for resentencing after the 1977 affirmance of the conviction as to first degree murder, and the district court had sentenced appellee to a life sentence to be served consecutively, we would have precisely the *Jones II* case, and the determination that the sentences were to be served consecutively would be affirmed.

That is not what happened in this case. This court modified the death sentence to life imprisonment and affirmed the

sentence of 15 to 50 years on the shooting charges. Nothing was said concerning whether the sentences were to be served concurrently or consecutively. Consequently, we are now faced with two sentences imposed in the same case, albeit one imposed by the trial court and one, in effect, by this court, modifying the trial court's sentence. The same situation is thus presented to us as if this court had remanded the cause for resentencing and the trial court had sentenced defendant to life imprisonment without specifying whether the sentence was to be served consecutively.

This court has set out a rule in such cases. In *Culpen v. Hann*, 158 Neb. 390, 392, 63 N.W.2d 157, 158 (1954), we said, "It is the rule, however, that where two sentences are imposed in the same court at the same time for two offenses, the sentences will run concurrently if the trial judge does not otherwise order." See, also, *Luke v. State*, 123 Neb. 101, 242 N.W. 265 (1932).

Other states have held to the same effect. In *Wheeler v. Jernigan*, 248 Ga. 302, 282 S.E.2d 891 (1981), the Georgia Supreme Court stated, "This court has consistently held that sentences imposed upon convictions by the courts of state jurisdictions run concurrently unless there is an express mention that they are to be served consecutively." See, also, *State v. Furman*, 288 S.C. 243, 341 S.E.2d 795 (1986).

In addition, we note that many states have enacted statutes to the same effect. See, e.g., Mo. Ann. Stat. § 558.026(1) (Vernon 1989), in which Missouri provides: "Multiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively . . . ."

We hold that in the absence of any statement as to how the sentences are to be served, such sentences shall be served concurrently.

The judgment of the trial court is reversed and the cause remanded to the district court with directions to issue the alternative writ of mandamus prayed for by appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. STANLEY D. COHEN, RESPONDENT.

436 N.W.2d 202

Filed March 3, 1989. No. 88-255.

1. **Disciplinary Proceedings: Appeal and Error.** In a disciplinary proceeding, the determination by the Supreme Court as to whether discipline should be imposed and what discipline is appropriate is made upon a de novo review of the record.
2. **Attorney and Client.** A lawyer shall not assist a client in conduct the lawyer knows to be illegal. The lawyer must also avoid the appearance of impropriety.
3. **Disciplinary Proceedings.** The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

Original action. Judgment of suspension.

Alison L. Larson, Assistant Counsel for Discipline, for relator.

Paul E. Galter, of Bauer, Galter & O'Brien, for respondent.

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

BOSLAUGH, J.

This is an original disciplinary proceeding against the respondent, Stanley D. Cohen, who was admitted to the practice of law on June 24, 1966.

Formal charges against the respondent were filed in this court on March 24, 1988. The respondent was charged with having violated his oath of office as an attorney at law, as provided by Neb. Rev. Stat. § 7-104 (Reissue 1987), and the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> (3) Engage in illegal conduct involving moral turpitude.
> . . . .
> (5) Engage in conduct that is prejudicial to the

administration of justice.

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

. . . .

DR 2-110 Withdrawal from Employment.

. . . .

(B) Mandatory withdrawal.

A lawyer representing a client . . . shall withdraw from employment . . . if:

. . . .

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

. . . .

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

. . . .

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

On April 13, 1988, a referee was appointed, and the matter was heard on May 31. The report of the referee was filed in this court on July 28, 1988.

The referee found that the respondent had violated DR 7-102(A)(7) and DR 1-102(A)(1), (3), and (5), but had not violated DR 2-110(B). The referee recommended that the respondent be suspended from the practice of law for 30 days. Exceptions to the report were filed by the relator on August 8, 1988. The exceptions relate to certain findings of fact made by the referee.

The record shows that a client of the respondent had purchased a toy chest at an estate sale. Several years later she found six series E U.S. savings bonds in the chest. The bonds had been issued to Hans and Louise Johnson as joint tenants. After attempting unsuccessfully to cash the bonds, the client employed the respondent to find the owners and obtain a reward or finder's fee. The client told the respondent to ask for a reward of one-third, but she would take less, and if she did not get a reward, she would light her fireplace with the bonds.

In December 1986, the respondent located Dick Johnson, a

grandson of the original owners, both of whom were deceased. The respondent told Johnson that his client wanted a reward of one-third and would kindle her fireplace with the bonds if she did not get a reward. Johnson contacted Earl Ludlam, a lawyer then practicing in Lincoln, Nebraska. After negotiations between the respondent and Ludlam, an agreement was reached for a reward of one-third of the net recovery after the payment of all costs, including Ludlam's attorney fees.

On February 16, 1987, Johnson contacted Stephen Guenzel, a lawyer practicing in Lincoln, and requested a second opinion concerning the arrangement made with Ludlam. On February 23, Guenzel called the respondent and, among other things, discussed Neb. Rev. Stat. § 28-514 (Reissue 1985) with the respondent. Section 28-514 provides:

> A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient commits theft if, with intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it. Any person violating the provisions of this section shall, upon conviction thereof, be punished by the penalty prescribed in the next lower classification below the value of the item lost, mislaid, or delivered under a mistake pursuant to section 28-518.

Guenzel suggested a reward of $1,000 and offered to talk to the family about paying $1,000 plus the respondent's fee. During the conversation, the respondent said that his client had said that if she did not receive a reward she would use the bonds for kindling.

On that date, Ludlam withdrew from the matter.

On February 27, 1987, Guenzel called the respondent and notified him that the previous offer was withdrawn and that his clients did not need the original bonds because duplicates could be obtained from the Treasury department.

In January 1987, Gladys Watson, a granddaughter of the original owners, learned about the bonds from her sister, who had talked with Dick Johnson. On February 1, 1987, Watson talked with a Lincoln police officer, and Watson eventually

wrote to the Counsel for Discipline of the Nebraska State Bar Association. Later, an officer of the Lincoln Police Department suggested that she call the respondent and record the conversation.

On March 2, 1987, Watson telephoned the respondent and recorded the conversation. The respondent said that he had closed his file and was no longer involved in the matter, but instead of discontinuing the conversation continued to talk to Watson. During this conversation the respondent said, "So, my client feels that she'll light her fireplace with them if she can't get some money out of this . . . and *if she decides to light her fireplace with it, I'm gonna applaud her*, that you people are so greedy that nobody wants to pay her anything." (Emphasis supplied.)

When asked if burning the bonds was not a criminal offense, the relator said, "Nobody will ever know who she is, will they. No, I don't think [it's] a federal offense, we found something, we found something that ought to be of value."

When Watson asked if she could see the bonds, the respondent refused and said, "Yeh it is because you could get the serial numbers off of them and you could see if you couldn't write away and bypass her efforts entirely."

Later in the conversation, the respondent said, "If you don't believe that those bonds exist, just continue to ignore *me* . . . [a]nd ignore my client and *we* will take care of the whole thing ourselves." (Emphasis supplied.)

As the referee stated in his report, in this conversation the respondent voiced his client's threat and his personal concurrence with that unlawful conduct and demonstrated his participation in the threat.

On April 7, 1988, Officer Jerry Lowe of the Lincoln Police Department spoke with the respondent and recorded the conversation. In that conversation the respondent said, "Shit, they managed to screw me and my client out of her find and my time and you think we did something wrong."

In a disciplinary proceeding, the determination by the Supreme Court as to whether discipline should be imposed and what discipline is appropriate is made upon a de novo review of the record. *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d

833 (1985).

As the referee stated in his report, a lawyer shall not assist a client in conduct the lawyer knows to be illegal. DR 7-102(A)(7). The lawyer must also avoid the appearance of impropriety. Canon 9. The appearance of impropriety is conduct which adversely reflects on the fitness of a lawyer to practice law. DR 1-102(A)(6).

Under § 28-514, the respondent's client was guilty of theft if, "with intent to deprive the owner thereof," she failed to "take reasonable measures to restore the property to a person entitled to have it." It is abundantly clear from the record that the respondent's client intended to hold the bonds for ransom and to destroy the bonds if she did not receive the reward she wanted.

The respondent's misconduct consisted of adopting the client's methods and repeating his client's threat to burn the bonds if she did not get the reward. The respondent persisted in this conduct even after being specifically informed of § 28-514, after he knew that the rightful owners could get the bonds reissued without knowing the serial numbers, and after he supposedly had closed his file and was no longer involved in the matter.

The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Kelly, supra.*

Counsel for the respondent emphasizes the respondent's reputation and absence of disciplinary sanctions during the practice of law for 22 years. This is to the respondent's credit, but as an experienced lawyer his conduct must be judged accordingly.

We conclude that the respondent should be suspended from the practice of law for a period of 6 months. All costs are taxed to the respondent.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ADAM D. WRIGHT, APPELLANT.
436 N.W.2d 205

Filed March 3, 1989. No. 88-325.

Trial: Hearsay: Rules of Evidence. For admissibility of a document as a business record under Neb. Rev. Stat. § 27-803(5) (Reissue 1985), first, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made as a part of a regular business practice at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Robert C. Wester, Assistant Sarpy County Public Defender, for appellant.

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

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

PER CURIAM.

In a jury trial in the district court for Sarpy County, Adam A. Wright was convicted of theft by receipt of stolen property, see Neb. Rev. Stat. § 28-517 (Reissue 1985), and was also convicted of criminal mischief, see Neb. Rev. Stat. § 28-519 (Reissue 1985). The district court sentenced Wright to imprisonment for both convictions, with the sentence for criminal mischief to run consecutively to the sentence for the theft conviction. Wright appeals from the judgments of conviction and sentences by the district court and contends that hearsay evidence was admitted during his trial.

In his appeal, Wright does not complain about the evidence supporting his conviction for theft in violation of § 28-517. As Wright states in his brief:

> The evidence at trial consisted of several eyewitnesses to a motor vehicle chase involving the Bellevue Police Department and an individual alleged to be the Appellant, and there is testimony a 1979 Chevrolet Blazer automobile

> was recovered after the chase and the Appellant was found hiding in the area where the Blazer automobile was brought to rest after the chase . . . . Finally, a witness testified the vehicle in question was stolen shortly before the chase . . . .
>
> For the purpose of this appeal, other than the background information set forth above, the only other relevant fact is there was an evidentiary controversy at the time of trial concerning the admissibility of Exhibit 7 . . . a contract for the purchase of the vehicle in question, apparently designed to prove the value of the vehicle in question.

Brief for appellant at 2.

We find the evidence sufficiently supports the verdicts of guilty and convictions of Wright on the substantive charges of theft in violation of § 28-517 and criminal mischief in violation of § 28-519, and affirm Wright's convictions. See *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983).

Neb. Rev. Stat. § 29-2026.01 (Reissue 1985) states: "When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in its verdict the value of the property stolen, embezzled, or falsely obtained."

In order to establish the value of the 1979 Chevrolet Blazer stolen by Wright at an amount in excess of $1,000, authorizing punishment as a Class III felony under Neb. Rev. Stat. § 28-518(1) (Reissue 1985), the State called Randy Purcell, a manager for Superior Honda, from which the Blazer was stolen. The exact duties of Purcell are not disclosed by the record. During the course of Purcell's testimony, there was reference to a written sales contract for the Blazer. The contract showed a purchase price of $5,480 for the Blazer stolen from Superior Honda. During direct examination of Purcell by the prosecutor, the following took place:

> [Prosecutor:] Do you have any knowledge whether or not that purchase agreement is regarding the same Blazer as you just identified in the same photograph?
>
> [Purcell:] Yes, it's the same one.

[Prosecutor:] All right. I'd offer Exhibit No. 7.

[Defense counsel:] I'd just like to ask a question of the witness before the introduction, Judge. Are you at all privy to this contract? Did you sign the contract on behalf of Superior Auto?

[Court:] Wait a minute, there's two questions there.

[Defense counsel:] Did you sign the contract on behalf of Superior Auto on that exhibit?

[Purcell:] On that particular exhibit there, no, I didn't.

[Defense counsel:] Then I'd object, Your Honor, as calling for hearsay.

[Court:] Overruled, it's received.

In his lone assignment of error, Wright alleges that the copy of the sales contract for the Blazer was hearsay and should not have been received into evidence. However, the State answers that "[t]he purchase agreement (Ex. 7) was a business record made and kept in the regular course of business pursuant to Neb.Rev.Stat. §27-803 (5)(Reissue 1985). It was not hearsay. It was properly admitted into evidence." Brief for appellee at 5.

Neb. Rev. Stat. § 27-803(5) (Reissue 1985) states:

> A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, *made at or near the time of such acts, events or conditions, in the course of a regularly conducted activity*, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, *as shown by the testimony of the custodian or other qualified witness* unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight.

(Emphasis supplied.)

The sales contract did not qualify as a business record under § 27-803(5) as an exception to the hearsay rule. The trial court should have excluded the sales contract offered by the State.

The record fails to show that the sales contract was made in the regular course of the business activity of Superior Honda and that the sales contract, as a memorandum or record, was made at or near the time of the sale of the Blazer. Also, the record does not show that Purcell, who did not sign the contract on behalf of Superior Honda, was the custodian of the business records of Superior Honda.

In *Chalupa v. Hartford Fire Ins. Co.*, 217 Neb. 662, 665, 350 N.W.2d 541, 543 (1984), this court stated the rule for admissibility of a document as a business record under § 27-803(5):

> First, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made as a part of a regular business practice at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness.

See *Crowder v. Aurora Co-op Elev. Co.*, 223 Neb. 704, 393 N.W.2d 250 (1986).

The copy of the sales contract was hearsay and was not admissible as an exception to the hearsay rule. It was prejudicial error for the trial court to admit the copy of the sales contract into evidence.

As this court stated in *State v. Reed*, 228 Neb. 645, 651-52, 423 N.W.2d 777, 781-82 (1988):

> By statute, crimes are classified between serious and minor offenses, all distinguished by the possible penalties that may be imposed. Neb. Rev. Stat. § 28-105(1) (Reissue 1985) describes six classes of felonies; Neb. Rev. Stat. § 28-106(1) (Reissue 1985) describes seven classes of misdemeanors. Neb. Rev. Stat. § 28-518 (Reissue 1985) grades theft offenses into four different classes dependent upon the value of the thing (property) involved. For example, theft of property valued at over $1,000 is a Class III felony and theft of property valued at $100 or less is a Class II misdemeanor. In the event of a defendant's conviction in theft cases, the sentencing judge must know the value of the property as a guide to the possible maximum and minimum sentences. In jury trials, the jury

must find the value of the property taken and convey that fact to the judge in its verdict. § 29-2026.01.

In *State v. Redding*, 213 Neb. 887, 892, 331 N.W.2d 811, 814 (1983), this court discussed the grades of larceny or theft: "We presently have four grades of larceny, or theft: Class III felony, Class IV felony, Class I misdemeanor, and Class II misdemeanor, all having common elements except for the value of the goods stolen. § 28-518."

In the appeal now before us, the jury was presented with inadmissible hearsay evidence bearing on the value of the stolen Blazer. Based on that inadmissible evidence, the jury's verdict contained an implicit finding that the value of the Blazer was more than $1,000, which meant that Wright's conviction for theft was punished as a Class III felony as stated in § 28-518(1): "Theft constitutes a Class III felony when the value of the thing involved is over one thousand dollars."

Due to the inadmissible evidence against Wright on the issue of the value of the stolen property, we vacate the jury's finding that the value of the stolen Blazer was over $1,000. Since the jury's finding on value was used as a basis for the sentence imposed on Wright, we vacate the felony sentence imposed on Wright for his conviction of theft in violation of § 28-517. While we have affirmed Wright's conviction for theft, we remand this cause to the district court for a new trial on the issue of the value of the Blazer stolen by Wright. Further, we affirm Wright's conviction and sentence for criminal mischief. Since we have set aside the sentence imposed on Wright for his conviction of theft, the sentence on the criminal mischief conviction is not consecutive to any sentence which may hereafter be imposed on Wright for the theft conviction. However, there is no prohibition to the sentence for theft being a sentence consecutive to the sentence for criminal mischief.

Therefore, we affirm Wright's convictions for theft and criminal mischief and the sentence imposed on Wright for the criminal mischief conviction, except for the provision that the sentence for criminal mischief was consecutive to the sentence for theft. We vacate the district court's sentence imposed for the theft conviction and remand this cause to the district court for a new trial on the issue of the value of property involved in the

theft conviction.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL E. NEAL, APPELLANT.
436 N.W.2d 514

Filed March 3, 1989. No. 88-328.

1. **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.
2. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant has the burden to present a record which shows counsel's deficient performance in representing the defendant.
3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
4. **Motions for Continuance: Appeal and Error.** A continuance is a matter for the discretion of the trial court, whose ruling on a motion for continuance will be upheld unless such ruling constitutes an abuse of discretion.

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

Jarve L. Garrett, of Garrett Law Office, for appellant.

Robert M. Spire, Attorney General, and Douglas J. Peterson for appellee.

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

SHANAHAN, J.

Michael E. Neal was convicted of robbery and use of a firearm in the robbery and, consequently, was sentenced for each conviction. In *State v. Neal*, 216 Neb. 709, 346 N.W.2d 218 (1984), we affirmed Neal's convictions and sentences. In a

postconviction proceeding, Neal appeals from the order denying him postconviction relief. We affirm.

Neal was charged with the March 30, 1982, armed robbery of a "Town & Country" store in Omaha and use of a firearm in the robbery. Michael Gutowski, a lawyer in the public defender's office, was appointed to represent Neal. On April 15, Neal was arraigned on the robbery and firearm charges, and, on his pleas of not guilty, Neal's cases were set for a jury trial. On September 8, the day before his jury trial was to begin, Neal apparently told the trial court that he had secured recently retained counsel and requested a continuance so that his retained counsel could prepare for trial. However, counsel whom Neal allegedly retained never made an appearance on Neal's behalf or otherwise confirmed representation of Neal.

Walter Bray, who had pled guilty to the same robbery charged against Neal, was sentenced the day that Neal's trial was scheduled to commence. At the commencement of Neal's trial and immediately after the jury had been impaneled, Neal requested to change his pleas from not guilty to guilty, which the district court allowed. The court found Neal guilty of robbery and use of a firearm in commission of the robbery, and thereafter sentenced Neal to consecutive sentences of 14 to 50 years' imprisonment for the robbery conviction and 5 to 20 years for the firearm conviction.

During the pendency of the direct appeal of his convictions, Neal filed an action for a writ of coram nobis in the district court, seeking a new trial on the ground of newly discovered evidence, namely, Neal's assertion that he had left the robbery site unaccompanied by Bray and other perpetrators of the robbery. At the coram nobis hearing, Gutowski testified that he had reviewed the evidence gathered by police in connection with the "Town & Country" robbery, including a statement given by Walter Bray, one of the robbers, who told police that Neal was not involved in the robbery. Gutowski further testified that he had attempted to interview Bray before Neal's trial, but learned through Bray's court-appointed lawyer that Bray refused to talk to Gutowski. Nevertheless, Gutowski obtained a subpoena for Bray's appearance as a witness in Neal's case. The district court, after a hearing, denied the requested coram nobis relief.

Neal's appeal to this court, seeking a review of the coram nobis proceeding, was summarily dismissed.

On December 16, 1987, Neal filed a motion for postconviction relief based on two grounds—ineffective assistance of counsel regarding the convictions for the robbery and firearm charges and denial of his right to counsel of his choice. The district court, after examining the record of Neal's hearing for the coram nobis writ, found that an evidential hearing was not required and, therefore, that Neal was entitled to no postconviction relief. See Neb. Rev. Stat. § 29-3001 (Reissue 1985) ("Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing . . ."). After the district court's denial of Neal's request for postconviction relief, this appeal followed.

Neal does not challenge the district court's refusal to hold an evidential hearing on the postconviction motion. Rather, Neal questions the district court's substantive and factual determination that Gutowski performed "at least as well as a lawyer with ordinary training and skill in the criminal law" in Neal's defense. Neal bases his postconviction claim on the sixth amendment to the U.S. Constitution and asserts that Gutowski's failure to interview Walter Bray constitutes ineffective assistance of counsel because Gutowski, uninformed concerning Bray's version of the getaway, erroneously recommended that Neal plead guilty to the robbery and firearm charges.

As expressed in *State v. Hawthorne*, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988):

> [T]o 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.

Further, "[t]o sustain a claim of ineffective assistance of

counsel, the defendant has the burden to present a record which shows counsel's deficient performance in representing the defendant." *State v. Uwanaka*, 230 Neb. 808, 809, 433 N.W.2d 540, 541 (1989).

Neal argues that if Gutowski had interviewed Bray, Gutowski would have learned facts which would have affected and possibly altered Neal's decision to plead guilty to the charges. Additionally, Neal argues that Bray's version of the departure from the robbery site, namely, Neal did not accompany Bray and the other robbers as they made their getaway, was material evidence for Neal's defense—evidence which, due solely to counsel's ineffectiveness, was not discovered. Neal makes this claim despite Gutowski's testimony that Bray's version of the getaway would have had no significant effect on Gutowski's advice given before Neal entered his guilty pleas. In Gutowski's opinion, the most likely outcome of the trial would have been a finding of Neal's guilt irrespective of Bray's version about the getaway from the robbery.

The record clearly demonstrates that Gutowski made numerous efforts to talk to Bray by first contacting Bray's court-appointed attorney, a procedure which must be followed under our disciplinary rules. See Canon 7, DR 7-104, of the Code of Professional Responsibility:

> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Bray refused to talk to Gutowski during preparation for Neal's trial. Nevertheless, Gutowski recognized that Bray might testify that Neal had no part in the robbery and, as evidenced by the issued subpoena for Bray, planned to call Bray as a witness. Moreover, if Neal actually did not accompany Bray in the departure or getaway from the robbery site, it is difficult to understand why Neal, himself, failed to tell Gutowski this fact. If true, Bray's version of the robbery and getaway was

information already possessed by Neal but apparently withheld from his lawyer, which may be ineffective assistance, but not on the part of counsel. We reject the contention that Gutowski was ineffective in representing Neal and find Neal's ineffective assistance of counsel claim to be unsupported by the record.

Neal's further attack on the effectiveness of trial counsel is directed to the validity of Neal's pleas of guilty, a matter resolved against Neal on direct appeal. *State v. Neal*, 216 Neb. 709, 346 N.W.2d 218 (1984). In essence, Neal contends that Gutowski concocted the factual basis which Neal gave in conjunction with his guilty pleas, a contention unsupported by the record and expressly contradicted and categorically denied by Gutowski, who testified that he never "concoct[ed] a story for Mr. Neal to tell" the judge who accepted Neal's pleas. Also, a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984). Neal's attacks on the validity of his pleas are meritless.

Neal next claims that the trial court erred in denying his motion for a continuance, made 1 day before his jury trial, so that Neal's allegedly retained counsel could familiarize himself with the record in Neal's case. As repeatedly expressed by this court, a continuance is a matter for the discretion of the trial court, whose ruling on a motion for continuance will be upheld unless such ruling constitutes an abuse of discretion. *State v. Fleming*, 223 Neb. 169, 388 N.W.2d 497 (1986).

Based on the record presented and inferences therefrom, Neal had ample time to secure new counsel during the nearly 5-month hiatus between his arraignment in April and his request for continuance made on the day before trial in September. Although Neal claims that he was dissatisfied with Gutowski immediately after counsel was appointed, Neal himself acknowledges that he had funds, or access to funds, to retain private counsel in mid-July 1982. Neal failed to obtain private counsel at that point, choosing instead to wait until the day before his trial to inform the court about his recently retained counsel. As noted in *State v. Keithley*, 218 Neb. 707, 708, 358 N.W.2d 761, 762-63 (1984), "A defendant will not be allowed to disrupt the orderly procedure of the trial court by

discharging his counsel on the eve of trial and demanding that all proceedings be stayed while he attempts to find other counsel." Similarly, in *State v. Eichelberger*, 227 Neb. 545, 557, 418 N.W.2d 580, 588 (1988), we held that "[w]here a criminal defendant is financially able to hire an attorney, he or she may not use his or her neglect in hiring one as a reason for delay." Under the circumstances, the trial court did not abuse its discretion in denying Neal's motion for a continuance, nor did the court's refusal to grant a continuance result in a violation of Neal's right to counsel.

Neal's pleas were validly entered and were not due to ineffectiveness of his court-appointed counsel. The decision of the district court, denying Neal an evidential hearing and dismissing Neal's motion for postconviction relief, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL A. COLE, APPELLANT.
436 N.W.2d 209

Filed March 3, 1989. No. 88-395.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a 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.
2. **Jury Instructions: Appeal and Error.** It is not error to refuse instruction on any issue which is not supported by evidence.
3. _____: _____. The failure to object to an instruction after it has been submitted to counsel for review precludes raising an objection on appeal.
4. _____: _____. Jury instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

CARLSON, D.J.

On July 30, 1987, defendant-appellant, Michael A. Cole, was charged in the Lancaster County Court with assault in the third degree in violation of Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1985), a Class I misdemeanor. Defendant entered a plea of not guilty. The case was tried to a jury, and a verdict of guilty was returned. Defendant was sentenced to pay a fine of $250 plus court costs. The Lancaster County District Court affirmed the judgment and sentence imposed by the county court. Defendant timely appealed to this court, contending that the trial court erred (1) in refusing to instruct the jury on the affirmative defense of justification in the use of force to protect property and in failing to instruct the jury that a material element of the crime was that defendant's use of force, if any, was not justified, and (2) in omitting the word "defendant" from the jury instruction on material elements. Defendant further claims the evidence was insufficient to support a verdict of guilty. We affirm.

In determining the sufficiency of the evidence to sustain a 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. Marrs*, 230 Neb. 977, 434 N.W.2d 336 (1989); *State v. Byrd, ante* p. 231, 435 N.W.2d 898 (1989).

Taking the view most favorable to the State, the record shows that this was a domestic dispute between defendant and Tina Cole over whether or not a seatbelt should be used for their 18-month-old child—Tina was for, the defendant against. The

dispute deteriorated from a verbal exchange to a "tug of war" over defendant's boots and a set of car keys. The parties struggled over these items. As a result, Tina claimed she sustained bruises and her finger was injured. The evidence was clearly sufficient to support a finding of guilt.

Defendant testified on his own behalf at trial. On direct examination, he stated that Tina had given him her car keys so that he could move her car. When he returned to the house, he demanded his boots in return for the keys. He testified, "I was stubborn in my ways for demanding to have my boots first I guess." Defendant further testified that Tina lost the tug of war, that he was mad, and that he did not think he even picked up the boots. Defendant testified on cross-examination that he "supposed" Tina wanted her car keys as much as he wanted his boots and that he did not believe she intended to destroy the boots.

Defendant also contends the trial court erred in refusing two proposed jury instructions regarding justification in the use of force to protect property. Neb. Rev. Stat. § 28-1411 (Reissue 1985) provides, in part:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable *when the actor believes that such force is immediately necessary*:
>
> (a) To prevent or terminate . . . the unlawful carrying away of tangible, movable property . . . .
>
> . . . .
>
> (3) The use of force is justifiable under this section only if the actor first requests the person against whom such force is used to desist from his interference with the property . . . .

(Emphasis supplied.)

The defendant's own evidence negates any requirement for a justification instruction. His testimony shows that force was not "immediately necessary," nor were requests made to desist prior to the use of force, as also required by the statute. It is clear, by the defendant's own testimony, that he did not believe force was immediately necessary to secure his property or to prevent damage thereto. Rather, he was being stubborn.

On this record, we find that the trial judge could conclude

there was not sufficient evidence to support a justification instruction. It is not error to refuse instruction on any issue which is not supported by evidence. *State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986). See, also, *State v. Canby*, 217 Neb. 461, 348 N.W.2d 900 (1984); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

In regard to defendant's other assignment of error, the instruction in question reads, in part, as follows:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are:
>
> A. That on or about the 30th day of June, 1987, in Lancaster County, Nebraska:
>
> B. Intentionally, knowingly, or recklessly cause bodily injury to another person.

The word "defendant" or words "defendant did" were left out in subsection B of the instruction. This was not prejudicial error because there was no objection or suitable alternate instruction presented. The failure to object to an instruction after it has been submitted to counsel for review precludes raising an objection on appeal. See, *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981); *State v. Siers*, 197 Neb. 51, 248 N.W.2d 1 (1976). More importantly, all of the instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987). We find no merit in this claim.

The judgment of the district court, affirming the decision of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. SNEED, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. MICHAEL V. SMITH, APPELLANT.
436 N.W.2d 211

Filed March 3, 1989. Nos. 88-415, 88-417.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion.
3. **Search Warrants: Probable Cause.** In determining probable cause for issuance of a search warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
4. _____: _____. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility, sufficient at least to support a finding of probable cause to search.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellants.

Robert M. Spire, Attorney General, and James H. Spears for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

HASTINGS, C.J.

Following a jury trial in the district court for Douglas County, the defendants, Michael V. Smith and Robert L. Sneed, were found guilty of four counts of receiving stolen property. The cases have been consolidated for briefing and oral argument. Assigned as the single error was the action of the district court in overruling defendants' motions to suppress physical evidence. We affirm.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial

court's findings of fact unless those findings are clearly wrong. *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989); *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988).

In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Nebraska Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion. *Texel, supra.*

On September 8, 1987, Omaha police officers interrogated Matthew Miller, a burglary suspect. At that time Miller admitted to being involved in four area burglaries.

The next day Officer James Haiar interviewed Miller "to get the information he gave the officers the previous night in regard to burglaries." Miller told Officer Haiar that he had taken the items he had stolen in the four burglaries to 1914 South 17th Street and exchanged them with the defendants for drugs. Miller informed Officer Haiar that he had been in the house at 1914 South 17th Street the morning of September 8 "partying" and had observed a large number of the items he had taken still on the premises.

After interviewing Miller, Officer Haiar independently determined from the burglary reports the specific items of personal property to be searched for in the house at 1914 South 17th Street. Haiar independently established that defendant Smith resided at the location to be searched and that defendant Sneed was using an address that corresponded to a vacant lot. Haiar also did some checking and determined that defendant Sneed has an extensive record with the Omaha Police Division for theft and receiving stolen items and that defendant Smith had an active criminal warrant on file. (The warrant on file for Smith related to a traffic offense.)

On September 9, 1987, Haiar prepared an affidavit requesting a search warrant for 1914 South 17th Street, obtained the search warrant, and assisted in the execution of the search warrant. While executing the warrant, police officers found numerous items of property listed in the warrant. Smith and Sneed were arrested, and the defendants were subsequently charged with four counts of receiving stolen property.

The defendants made motions to suppress physical evidence,

which were overruled by the trial court. Following a jury trial, the defendants were found guilty on all four counts of receiving stolen property. Defendants were thereafter sentenced to terms of imprisonment.

Defendants contend that Officer Haiar's affidavit requesting a search warrant was insufficient to establish probable cause for issuing the search warrant. Defendants allege that the affidavit was insufficient because the reliability of the informant (Miller) was not established by the affidavit and the affidavit failed to establish that the informant had a sufficient basis of knowledge for the facts set out in the affidavit.

This court has adopted the "totality of the circumstances" test articulated by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), to evaluate the sufficiency of an affidavit used to obtain a search warrant. See, *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987); *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987); *State v. Abraham*, 218 Neb. 475, 356 N.W.2d 877 (1984); *State v. Gilreath*, 215 Neb. 466, 339 N.W.2d 288 (1983); *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983). Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *Duff, supra*; *Hodge and Carpenter, supra*; *Abraham, supra*; *Arnold, supra*.

In determining probable cause for issuance of a search warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Duff, supra*; *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984); *Gilreath, supra*; *Arnold, supra*; *Illinois v. Gates, supra*. The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Duff, supra*; *Hodge and Carpenter, supra*; *Gilreath, supra*; *Abraham, supra*. Doubtful or marginal cases should be determined largely by the preference to be accorded to warrants. *Duff, supra*; *Gilreath, supra*.

The magistrate, in weighing the sufficiency of an affidavit to

support issuance of a search warrant, may credit in some circumstances statements of a declarant containing admissions of criminal conduct. *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). Regarding statements containing admissions of criminal conduct, the Court in *Harris* stated:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—*sufficient at least to support a finding of probable cause to search.* That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct. Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause to search.

(Emphasis supplied.) 403 U.S. at 583-84.

The reliability of Miller's statements was bolstered by information independently established by Officer Haiar, particularly the information that defendant Sneed has a record with the Omaha Police Division for theft and receiving stolen property. Additionally, the basis for Miller's information that some of the stolen property was still on the premises at 1914 South 17th Street was established in the affidavit by the statement, "MILLER further advised that on the morning of 8 SEP 87, he was in 1914 S. 17th St. (Omaha) 'partying' and had occasion to observe most of the items he had exchanged for drugs still in the residence."

Defendants cite *U.S. v. Jackson*, 818 F.2d 345 (5th Cir. 1987), to support their argument that the affidavit was insufficient to establish probable cause under *Illinois v. Gates, supra*. *Jackson* is cited because in that case the court reached a conclusion contrary to *Harris, supra*, regarding the reliability of an

informant making admissions of criminal conduct. Defendants' reliance on *Jackson* is misplaced because at issue was the sufficiency of an affidavit to establish probable cause for an arrest warrant which the court was required to evaluate under an independent standard of review. In the case at bar we review the findings of the trial court only to determine whether they were clearly erroneous.

The affidavit, under the "totality of the circumstances," was sufficient to establish to the magistrate probable cause for issuance of the search warrant. The decisions of the trial court overruling defendants' motions to suppress physical evidence certainly were not clearly erroneous, and its judgment is affirmed.

AFFIRMED.

DONALD H. RICE, APPELLEE, V. DORCAS E. RICE, APPELLANT.
436 N.W.2d 518

Filed March 3, 1989. No. 88-514.

Child Custody: Visitation: Appeal and Error. Determinations as to the custody of and visitation with minor children in a dissolution of marriage case are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

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

Margene M. Timm, of Legal Services of Southeast Nebraska, for appellant.

Karen B. Flowers, of McHenry & Flowers, for appellee.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

PER CURIAM.

The parties to this action were divorced in 1978. Respondent-appellant wife was given custody of the then

2-year-old son of the parties, with visitation rights given to the petitioner-appellee husband.

Appellant has not remarried since that divorce and has lived in the same house since that time. Appellee has remarried and has two sons in his second marriage. The child, now approximately 12 years old, visits his father, stepmother, and two half-brothers weekly, with extended visitation every other weekend. The child gets along well with all of them.

Appellant has not worked since 1981. She lives on child support payments, welfare payments, and assistance from her parents. She has refused help from appellee in the form of additional furniture for the child.

A guardian ad litem was appointed for the child. His report recommends a change of custody. The trial judge heard all the evidence, including testimony from the child in chambers, and ordered that, in the best interests of the child, custody should be changed to the appellee, with the same visitation rights the appellee has had to be granted to appellant. Appellant alleges on appeal that the trial court erred in changing custody and, if custody were to be changed, in improperly restricting her visitation.

We have held that determinations as to the custody of and visitation with minor children in a dissolution of marriage case are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988); *Delaney v. Delaney*, 222 Neb. 33, 382 N.W.2d 16 (1986); *Manewal v. Manewal*, 220 Neb. 867, 374 N.W.2d 39 (1985).

We have reviewed this case de novo, as we are required to do. We find no abuse of discretion, and we affirm the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR H. BARKER, APPELLANT.
436 N.W.2d 520

Filed March 3, 1989. No. 88-578.

Sentences: Appeal and Error. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

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

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

SHANAHAN, J.

Arthur H. Barker appeals from the sentence imposed for his conviction of manslaughter. In view of Barker's contention, we examine the background for Barker's conviction and sentence.

Barker and the victim lived in separate apartments in the same building. Approximately 1 week before the homicide, the victim's cat entered the apartment building's basement and destroyed some of Barker's property. On the day of the homicide, Barker, who had a night job, had been sleeping in the early afternoon and was awakened by a telephone call, when he heard a noise in the basement and "knew it was that damn cat."

With the intention of killing the cat, Barker went to the basement, picked up a piece of clothesline rope, and found the victim's cat. As Barker grabbed the cat and squeezed the animal, the victim entered the basement. An argument ensued concerning the cat and damage to Barker's property. When the victim approached Barker, who was still clutching the cat and rope, Barker struck the victim, who reeled backward. Recovering, the victim rushed at Barker, who dropped the cat and began struggling with the victim. In the course of the struggle, Barker, from behind the victim, wrapped the rope around the victim's neck. As the victim wrestled to free herself,

Barker kept pulling the rope "tighter and tighter" until the victim "went limp." Without any intervening attempt to revive the victim, Barker took the victim's body to her apartment, where he placed the body in a bathtub of water. Early the next morning, Barker took the victim's body to a lake and "dumped" the body in the water, where the floating corpse was later discovered by a passerby. An autopsy disclosed that the cause of the victim's death was asphyxial ligature strangulation of the neck. Police investigation led to Barker, who admitted that he had strangled the victim.

Concerning the victim's death, the State charged Barker with second degree murder, but the jury found Barker guilty of manslaughter. See Neb. Rev. Stat. § 28-305 (Reissue 1985). Barker appealed his manslaughter sentence. On account of a certain irregularity which occurred in conjunction with Barker's sentencing, in March of 1988 this court set aside Barker's sentence and remanded "this matter to the district court for further proceedings, namely, a sentence hearing to be conducted and sentence imposed by a judge other than the judge who imposed sentence on Barker." *State v. Barker*, 227 Neb. 842, 854, 420 N.W.2d 695, 702-03 (1988).

After remand, another district judge was selected to sentence Barker. On May 5, 1988, the sentencing court, "for the express purpose of being presented to the Court for its consideration in sentencing the Defendant," ordered that the Department of Correctional Services forward to Barker's lawyer various records regarding Barker's conduct during imprisonment, which included: "Records of the Defendant's involvement in educational programs [and any] other reports prepared by the Defendant's counselors or unit supervisors detailing his conduct while incarcerated."

At the sentence hearing on June 17, the court remarked: "I should say that as to a sentencing hearing, except that in capital cases, I don't think that there's any requirement for a sentencing hearing as such, but certainly at the sentencing, which this is, I'll give an opportunity to the parties to certainly present their positions." When Barker's lawyer offered the reports produced pursuant to the court's May 5 order, that is, records of Barker's classification and conduct at the state

penitentiary while in the custody of the Department of Correctional Services, the court commented:

> Well, Exhibit 1 [custodial reports and data], that's been proffered, will be received as part of the record and part of the PSI [presentence investigation]. . . . I should just indicate that it's the Court's opinion that the status and situation of the defendant and his good conduct or lack of good conduct is probably irrelevant to these proceedings here today, but it will become part of the record.

Later in the sentence hearing, the court stated: "I took considerable time in reviewing all facets of this case that the Court was privy to; and I feel that . . . the facts of this case . . . justify a substantial sentence." The court then sentenced Barker to imprisonment for a term of 6 $^{2}/_{3}$ to 20 years, the same sentence imposed before Barker's first appeal to this court. See *State v. Barker, supra*.

Barker contends that the district court erroneously ruled that the data from the Department of Correctional Services was irrelevant to imposition of a sentence and that such ruling implicitly expresses the court's disregard of relevant information pertinent to an appropriate sentence for Barker. Therefore, Barker argues that the court abused its discretion in the sentence imposed, which resulted in an excessive sentence.

Notwithstanding the sentencing court's gratuitous remark, "probably irrelevant," in reference to the data from the Department of Correctional Services, we disagree with Barker's view that the court ruled that the data was irrelevant to sentencing and, therefore, excluded the information from consideration in deciding what sentence to impose. While the sentencing court commented that the information in issue was "probably irrelevant," the court received the information as a "part of the record" and a supplemental part of the presentence investigation used in sentencing Barker. Also, the sentencing judge acknowledged that he had taken "considerable time in reviewing all facets of this case that the Court was privy to," which unquestionably included the record for Barker's case and the presentence report consisting of nearly 150 pages, all of which we have also reviewed in connection with Barker's appeal.

Contrary to Barker's assertion that the sentencing court disregarded the information in issue, the record requires our conclusion that the sentencing court, as expressly stated by that court, did receive and consider the information pertaining to Barker's conduct during incarceration. Even if the custodial reports were removed from consideration, the sentence imposed on Barker is justified on the basis of other information received by the sentencing court in Barker's case, namely, the record and presentence investigation report.

The sentence imposed for Barker's conviction of manslaughter is within statutory limits. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985). "[I]n the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal." *State v. Dillon*, 222 Neb. 131, 136, 382 N.W.2d 353, 357 (1986).

Barker has failed to show an abuse of discretion regarding the sentence imposed on him. We affirm the sentence imposed on Barker.

However, there remains a source of concern to this court. As previously mentioned and as the result of Barker's first appeal, we remanded "this matter to the district court for further proceedings, namely, a sentence hearing . . . ." *State v. Barker*, 227 Neb. 842, 854, 420 N.W.2d 695, 702-03 (1988). After remand, the district court expressed the sentiment: "I should say that as to a sentencing hearing, except that in capital cases, I don't think that there's any requirement for a sentencing hearing as such, but certainly at the sentencing, which this is, I'll give an opportunity to the parties to certainly present their positions." From the district court's remark, we infer that, were it not for our mandate in the first appeal, Barker, and any other defendant convicted in a noncapital case, would not be entitled to or receive a hearing to determine the appropriate sentence.

As the U.S. Supreme Court observed in *Bradley v. United States*, 410 U.S. 605, 609, 93 S. Ct. 1151, 35 L. Ed. 2d 528 (1973): "The term 'prosecution' clearly imports a beginning and an end. . . . In the legal sense, a prosecution terminates only when sentence is imposed." To state that sentencing is an important part of the criminal justice system and prosecution of a defendant is an expression of a truism.

The U.S. Supreme Court has held that the requirements of due process are not suspended by a conviction in a capital case, but continue throughout the sentencing process in cases involving the death penalty. See *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Also, the Supreme Court has held that due process allows a sentencing judge to receive information from persons who were not confronted or cross-examined by the defendant. See *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

Nevertheless, the U.S. Supreme Court has concluded that due process demands that a sentencing judge have relevant information as the basis for a sentence imposed in a noncapital case. For example, *Townsend v. Burke*, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948), involved Townsend's convictions for burglary and robbery, which were crimes not punishable by the death penalty. On the assumption that Townsend had prior convictions on charges of larceny and burglary, whereas, in fact, Townsend had been acquitted on those charges, the judge sentenced Townsend to imprisonment. The Supreme Court stated in *Townsend*:

> [I]t savors of foul play or of carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty. . . .
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> . . . [Townsend] was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.

334 U.S. at 740-41. As another illustration of requisite due process in the sentencing, *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972), involved a noncapital charge of armed robbery. Relying on in-court sentencing information from an FBI agent concerning Tucker's prior but constitutionally invalid convictions, the sentencing judge gave explicit attention to the unconstitutional convictions in determining the sentence for Tucker. In affirming the circuit court's order to resentence Tucker, the Supreme Court noted:

> It is surely true . . . that a trial judge . . . generally has

> wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come. . . .
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> But these general propositions do not decide the case before us. For we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. . . . The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of those convictions were wholly unconstitutional
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> . . . .

404 U.S. at 446-47. Cf. *Roberts v. United States*, 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980) (essentially undisputed facts do not constitute misinformation affecting a sentence). From the foregoing U.S. Supreme Court decisions, one gleans that a convicted defendant, even in a noncapital case, has a due process right to inquire into an incorrect assumption by the sentencing judge, untrue information materially affecting a prospective sentence, or other misinformation which a court may use in determining what sentence will be imposed.

This court has recognized the necessity of due process in sentencing a defendant. In *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969), which involved a burglary conviction, this court remarked:

> The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue.

183 Neb. at 811, 164 N.W.2d at 648-49.

The requirement of relevant information for sentencing was reaffirmed in *State v. Porter*, 209 Neb. 722, 723-24, 310 N.W.2d 926, 927 (1981): "We have gone so far as to say that the

latitude allowed a sentencing judge in such instances is almost without limitation as long as it is relevant to the issue." See, also, *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983).

Two Nebraska statutes, pertaining to a defendant's right of allocution, are germane to the sentencing process: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him," Neb. Rev. Stat. § 29-2201 (Reissue 1985); and "If the defendant has nothing to say, or if he shows no good and sufficient cause why judgment should not be pronounced, the court shall proceed to pronounce judgment as provided by law," Neb. Rev. Stat. § 29-2202 (Reissue 1985). As one commentator has observed: "Today the most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence . . . ." A. Campbell, Law of Sentencing § 72 at 232 (1978).

A convicted defendant must be afforded more than a mere opportunity to express an attitude, disposition, or view toward a prospective sentence. Consequently, if only constitutionally acceptable and relevant information may be the basis for a judge's determination concerning an appropriate sentence to be imposed, a defendant must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information on which the judge may rely in determining the sentence to be imposed. Without a hearing at which a defendant may exercise those rights, the sentencing process deteriorates into illusory due process.

If any court, as a matter of policy or rule, does not provide a convicted defendant with a sentence hearing to achieve due process and assure relevant information as the basis for sentencing, we exhort that court to incorporate a sentence hearing into the process for imposition of a sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEAN A. KRAMER, APPELLANT.
436 N.W.2d 524

Filed March 3, 1989. No. 88-585.

1. **Convictions: Sentences: Final Orders: Appeal and Error.** A finding of guilty is a conviction, but the judgment is not final for appeal purposes until after sentence has been pronounced.
2. **Sentences: Probation and Parole.** Probation is a sentence.

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

W. Randall Paragas 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, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Claiming that being placed on probation in 1985 for driving while under the influence of alcohol was not a conviction and therefore could not be used for enhancement purposes, the defendant, Dean A. Kramer, appeals his conviction for driving while under the influence of alcohol, second offense. We affirm.

On December 23, 1987, the defendant entered a plea of no contest to and was found guilty of driving while under the influence of alcohol. At an enhancement hearing on January 14, 1988, the State introduced a transcript of the 1985 proceedings in the Omaha Municipal Court wherein Kramer entered a plea of no contest to a charge of driving while under the influence of alcohol. He was placed on probation on that charge. The 1985 order of probation stated: "Having been found guilty as charged, sentence is suspended and defendant is placed on probation for a period of 180 days, under the charge and supervision of the Municipal Court Probation Office."

At the January 1988 enhancement hearing, the defendant objected to the court's using the 1985 proceedings as a conviction for enhancement purposes. Kramer claimed there was not a valid conviction in 1985 because no sentence was

imposed. The trial court, in 1988, held the 1985 no-contest plea was a valid conviction and supported sentence enhancement on the second-offense DWI charge under Neb. Rev. Stat. § 39-669.07(b) (Supp. 1987). The court then sentenced Kramer to 365 days' probation and ordered him to pay a $200 fine. As special restrictions, the court required Kramer to serve 48 hours in the Douglas County Correctional Center, to obtain an alcoholism evaluation at an accredited agency within the first 15 days of the probation term, and to attend weekly AA meetings. Additionally, Kramer's motor vehicle operator's license was impounded for the first 180 days of the probationary period.

Defendant appealed to the Douglas County District Court, claiming the county court erred in enhancing the penalty based on the 1985 Omaha Municipal Court proceedings. The district court affirmed the county court's conviction and sentence. Thereafter, the defendant appealed to this court.

Kramer argues that the 1985 municipal court proceedings did not result in a conviction upon which enhancement can be based because no sentence was imposed. He relies upon (1) the language used in the probation order ("sentence is suspended and defendant is placed on probation"), (2) a statute authorizing municipal court judges to suspend sentences, and (3) our holdings in *State, ex rel. Hunter, v. Jurgensen*, 135 Neb. 136, 280 N.W. 886 (1938), and *State v. Mosley*, 194 Neb. 740, 235 N.W.2d 402 (1975).

Neb. Rev. Stat. § 29-2219 (Reissue 1979) authorized municipal court judges to suspend a sentence and place a defendant on probation for crimes less than felonies. This statute was repealed by 1984 Neb. Laws, L.B. 13. It was still in effect at the time Kramer was placed on probation on May 2, 1985, in the Omaha Municipal Court. The repeal did not take effect until July 1, 1985.

In *Jurgensen* and *Mosley, supra*, we held that a conviction consists of a finding of guilty *and* an imposition of sentence. More recent cases have held a finding of guilty constitutes a conviction. See, *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980), and *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980), which make a distinction between a

conviction and a judgment of conviction. Those cases hold that while a finding of guilty is a conviction, the judgment is not final for appeal purposes until after sentence has been pronounced. Quoting from *West v. United States*, 346 A.2d 504 (D.C. 1975), the *Wolkow* court held at 515, 293 N.W.2d at 853: " 'To create finality in a criminal case, it is necessary that there be a judgment of conviction followed by a sentence.' " By implication, the holdings of *Jurgensen* and *Mosley, supra*, that to constitute a conviction there must be not only a finding of guilt but also a sentence, have been overruled. See, also, *State v. Schulz*, 221 Neb. 473, 378 N.W.2d 165 (1985). The distinction between conviction and judgment of conviction is also recognized in § 39-669.07(b):

> If such person (i) has had one *conviction* under this section in the ten years prior to the date of the current *conviction* . . . such person shall be guilty of a Class W misdemeanor, and the court shall, as part of the *judgment of conviction*, order such person not to drive any motor vehicle for any purpose for a period of one year from the date ordered by the court and shall order that the operator's license of such person be revoked for a like period. . . .
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> . . . .
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> For each *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 under this section . . . .

(Emphasis supplied.) Under the terms of the statute, the conviction takes place prior to the imposition of sentence. Therefore, the fact that defendant's sentence to the original conviction was suspended does not invalidate the use of the original conviction for enhancement purposes.

Defendant's argument also ignores statutory and case law declaring that probation is a sentence. Neb. Rev. Stat. § 29-2246 (Reissue 1985); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986); *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984). The earlier version of § 29-2246 (Reissue 1979) specifically applied the statutory definition of probation as a sentence to § 29-2219, the repealed statute which permitted municipal court judges to suspend sentence and place an

offender on probation.

For the foregoing reasons, the trial court's determination that the 1985 conviction for driving while under the influence of alcohol was a valid conviction for enhancement purposes was correct.

AFFIRMED.

SIDNEY R. HENDERSON AND PEGGY S. HENDERSON, HUSBAND AND WIFE, APPELLANTS, V. EDWARD P. FORMAN AND BARBARA J. FORMAN, HUSBAND AND WIFE, APPELLEES.

436 N.W.2d 526

Filed March 10, 1989. No. 87-188.

1. **Contractors and Subcontractors: Construction Contracts: Real Estate: Warranty.** A contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner and in accordance with good usage and accepted practices in the community in which the work is done.
2. **Construction Contracts: Real Estate: Vendor and Vendee: Warranty.** The implied warranty in connection with the construction of a building is not applicable to the sale of the building by an owner who is not the builder.
3. **Judgments: Directed Verdict: Appeal and Error.** On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, this court must accept plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence.
4. **Fraud.** To constitute a false representation, a statement must be made as a statement of fact, not merely the expression of an opinion.
5. _____. To recover for fraud based upon misrepresentation, the plaintiff seeking recovery has the burden of proving that (1) the defendant made a representation of material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage.
6. _____. If a party, without knowing whether his or her statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded, in a proper case, will be entitled to relief.
7. **Actions: Fraud: Contracts.** The fact that a plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is not, as a matter of law, a defense to a fraud action. Assuming all other ingredients of liability are

present, a plaintiff is entitled to relief if the representations were a material inducement to the contract, although the plaintiff may have made efforts to discover the truth thereof and did not rely wholly upon the veracity of the defendant.

8. **Appeal and Error.** As a general rule, this court will dispose of cases on appeal on the theory on which they were presented to and disposed of by the trial court.

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

Francis L. Winner, of Winner, Nichols, Douglas, Kelly and Arfmann, P.C., for appellants.

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

HASTINGS, C.J., GRANT, and FAHRNBRUCH, JJ., and HENDRIX and OLBERDING, D. JJ.

HASTINGS, C.J.

Plaintiffs, Sidney R. and Peggy S. Henderson, appeal from the judgment of the district court which directed a verdict against them at the close of all of the evidence in a case brought for damages alleging breach of warranty and misrepresentation. Although plaintiffs assign seven separate errors, including misapplication of the statute of frauds and misapplication of the law with respect to both misrepresentation and breach of warranty, the only viable claim is that the court erred in finding that the evidence was insufficient to support the pleaded theories of recovery.

The Candlelight Inn and Lounge, a motel in Scottsbluff, was purchased by the defendants, Edward P. and Barbara J. Forman, in 1974. They operated the motel until 1980, when they decided to sell it. The plaintiffs expressed an interest, and negotiations between the parties culminated in the sale of the property to the Hendersons on June 29, 1980.

Before buying the motel, Mr. Henderson visited the premises several times. On one occasion, Henderson and Mr. Forman went up on the roof for Henderson to see what shape the roof was in. Henderson testified that Forman told him the roof "was in good shape, there were no problems." During the

continuation of the recitation of the facts, because all of the negotiations and inspections were conducted by Mr. Henderson and Mr. Forman, we will refer to the parties either as Henderson or Forman.

Forman told Henderson that he had had some minor repairs made, and Henderson then called the roofer who had done the repairs to ask him his opinion about the roof. The roofer, Forrest Rose, told Henderson the roof needed "a lot of work." He also told Henderson the roof was old and probably needed to be replaced. When Henderson told Forman what Rose had said, Forman replied (according to Henderson) that the roof was in good shape and Rose was just looking for work.

Henderson then called another roofer, Charlie Schank, to inspect the roof. Schank told Henderson that the roof looked good. Henderson testified that he "had a lot of confidence" in what Schank and Forman had told him about the roof's condition. A friend of Forman's who "knew something about roofs" also looked the roof over and told Henderson "it looked okay." Forman's realtor told Henderson he assumed the roof was all right.

Henderson also inspected the interior of the building before he signed the contract. On the lower level of the motel, Henderson noticed that wallpaper was coming off and there was "moisture" or "wetness" on the wall. Forman told him that the wetness was caused by a leak from the ice machine and that the problem had been solved. Forman also told him that the wallpaper glue was probably inferior.

While further surveying the lower level, Henderson noticed that one of the sumps was full of water. Forman told him to be careful when he backflushed the swimming pool, but told him he should not have any problem. During further conversations about the basement, Forman assured Henderson that the drain around the outside of the building would keep any moisture out. Henderson, in testifying as to his conversation with Forman, said, "At that point he told me about the drain around the building to keep the basement dry. . . . He just said, 'You shouldn't have any moisture because that drain will keep the moisture out.' " Henderson testified that he believed Forman's statement that the drain would keep the basement dry.

Forman's testimony was that he had never had a water problem in the basement. He also said that he had told Henderson the roof was "marginal" and needed work. He stated that he also informed his realtor that the roof was marginal because he wanted to make sure that the Hendersons were aware of that.

The Hendersons signed the contract for the purchase of the motel in June 1980. The agreement contained the following language:

> Seller hereby warrants that the property is and will be in operating condition on the date of possession; that the roof, heating, air conditioning, plumbing and swimming pool will be in operating condition on the date of possession; and that the items of personal property being sold hereunder will be in usable and workable condition on such date. . . .
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> . . . .
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> . . . All understandings and agreements heretofore had between the parties hereto are merged in this agreement which alone wholly and completely expresses the agreement of the parties, and this agreement is entered into after full investigation, neither party relying upon any statement or representation not embodied herein made by the other.

That year, the lounge in the lower level was flooded when the sump overflowed as Henderson backflushed the pool. The next year, Henderson put a new pump in the sump after he experienced water problems while draining the sink in the lounge.

In 1983, Henderson began experiencing severe water problems in the motel. In July, water began seeping into the lower-level lounge and soon was so bad that the lounge had to be closed. Because of that problem, the lounge was closed from July until the next January. Henderson had to have wells drilled to keep up with the problem. He also contacted several experts in an effort to solve the problem. In May 1984, the water reappeared. Henderson had a bentonite seal done in the basement, which was completed in November. However, in 1985, Henderson again found water, the basement had to be

resealed, and the pumps were again necessary. Water reappeared in 1986, and Henderson had to operate his pumps into 1987. The water seeping in through the floor caused much damage. The basement floor buckled when the basement was sealed, the carpet was ruined, Sheetrock on the walls had to be removed, and tile needed to be replaced.

Henderson also observed water coming into the building through the roof. There was leakage and discoloration on the ceilings in the upper level of the motel.

Experts testified at the trial as to the cause of the leaks. Meredith Schaff, a civil engineer, described the drain that was installed around the periphery of the building when it was built in 1967. The pipes that were installed around the outer wall of the motel at that time, had they been properly placed, would have been at a level below the floor and below the footings of the motel. In that way, gravity would pull ground water into the pipes and away from the motel's foundation. The pipes, according to Schaff, should have sloped so that water in them would run to a drain, where it could be disposed of by a sump pump. However, the pipes were improperly placed. They had been installed at a level below the floor, but above the footings. The pipes were placed only 1 foot lower than the floor level, and they should have been placed 3 feet below the floor level. The engineer further testified that if the pipes had been placed even 1 foot below the exterior wall, there would not have been the water problem that existed. He also testified that it would not be economically feasible or practical to correct the problem.

Henderson testified that he first learned of the design defect in the drain system in December 1985 or January 1986 and that if he had known about it, he would not have bought the motel at the price he paid for it, or maybe not at all.

The evidence regarding the roof came from a structural engineer. In short, the roof was not designed to withstand the weight it is required to support. The joists should have been larger or placed closer together in order to support the roof properly, and the beams supporting the joists are undersized. Additionally, a design feature of the roof as installed allowed snow to drift on the roof, which added to the weight problem. Also, the scuppers (openings) through which water was

supposed to drain off the roof were actually built up higher than the roof, so that water has to rise to a certain level before it will spill into the roof's drain system. The structure of the roof also does not allow for any ventilation, according to the witness, so that eventually moisture will cause the joists and sheathing to rot.

According to the trial testimony, the roof has always had problems with water "ponding" on it. In 1979, Rose (the roofer) recommended to Forman that he replace the roof. He gave Forman an estimate based on replacing the roofing surface, but not the underlying structure. This was because there was no way of knowing if there was damage to the joists and beams unless the surface was removed. Forman decided to "nurse it along."

Forman later testified that he had no knowledge of structural defects in the roof until the lawsuit was filed, although he admitted that he thought there were problems with the roofing surface. Henderson first learned of the design defect in the roof in April 1984, when his insurance company denied coverage because the roof was defectively designed. He stated that he would not have bought the motel, at least not at the price he had paid, had he known of the design defect.

The petition filed in this case on April 3, 1986, alleged that Forman breached express and implied warranties, failed to disclose known defects, and made fraudulent misrepresentations, thereby causing the resulting damages.

As previously stated, at the close of the plaintiffs' evidence, the trial court sustained the defendants' motion for a directed verdict and dismissed the case. The court first stated that it was the court's job to construe the meaning of the contract. The court then cited the contractual provisions, noting that nowhere was there an express warranty that the building was free from design defects and that there was only a clause providing that the building was in operating condition on the *date of possession*. The court also found that implied warranty requirements are only applicable to original builders, not second sellers, as Forman was. Lastly, according to the court, since Forman did not know about the design defects, and since he did truthfully tell Henderson the roof *surface* needed work

and that he had had no water problems in the basement, the court found that the misrepresentation claim was also baseless. Although the trial judge commented in court on the statute of limitations, his order only specified that the claims were dismissed because of "insufficiency of the evidence to support the pleaded theories of recovery . . . ."

Although Hendersons alleged breach of both express and implied warranty in the petition, on appeal it is argued only that the court erred in finding no breach of express warranty. In any event, the doctrine of implied warranty is inapplicable here. In *Henggeler v. Jindra*, 191 Neb. 317, 318-19, 214 N.W.2d 925, 926 (1974), we said, "[A] contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner and in accordance with good usage and accepted practices in the community in which the work is done." The court in *Bernstein v. Ainsworth*, 220 Neb. 670, 371 N.W.2d 682 (1985), declined to apply the general rule in every factual situation, stating, "The implied warranty in connection with the construction of a building, as discussed in *Henggeler v. Jindra, supra*, is not applicable to the sale of the building by the owner who is not the builder." *Bernstein, supra* at 677, 371 N.W.2d at 688.

As to the claim regarding an express warranty, Hendersons argue that the language of the contract that "[s]eller hereby warrants that the . . . roof [and] plumbing . . . will be in operating condition on the date of possession" was breached.

On the other hand, Formans contend that both the roof and the drain were fulfilling their intended purposes on the date that Hendersons took possession. The roof, on the date of possession, was protecting the occupants from the elements, and the drain, on the date of possession, was adequately carrying water away. Formans urge the court to follow the contract's plain language and to *not* construe the contract as guaranteeing that the roof and drain would be in operating condition for any amount of time *after* the purchase.

The issue is controlled by this court's holdings in *Gunset v. Mossman*, 196 Neb. 529, 243 N.W.2d 783 (1976), and *Rosenberry v. Beck*, 205 Neb. 664, 289 N.W.2d 523 (1980).

In *Gunset*, the plaintiffs purchased a home from the

defendant. The purchase agreement contained a provision stating, " 'Seller agrees to maintain, until delivery of possession, the heating, air conditioning, water heater, sewer, plumbing and electrical systems and any built-in appliances in working condition.' " (Emphasis omitted.) *Gunset, supra* at 530, 243 N.W.2d at 784. Shortly after taking possession, plaintiffs had the furnace boiler inspected, whereupon it was discovered that the boiler had a leak. Plaintiffs filed suit, claiming that defendant had breached the above provision in the contract.

The court ignored the expert testimony to the effect that the boiler was not in working condition on the date of possession, and held that the parties' understanding of the term "working condition" was more important than the expert's opinions.

> The only reasonable interpretation of the words "working condition" under the facts of this case is that the defendant agreed to deliver possession of the furnace in the same operating condition existing at the time the agreement was signed. The clause in dispute was not a warranty. Since no allegation is made that the boiler's condition worsened from the date the agreement was signed to the date the plaintiffs obtained possession, the plaintiffs received all they bargained for.

Id. at 532, 243 N.W.2d at 785.

In *Rosenberry v. Beck, supra*, the court reaffirmed its holding in *Gunset*. The purchase agreement in *Rosenberry* also contained the clause providing that the heating system would be maintained in working condition until delivery of possession. Three months after plaintiffs took possession, an employee of the gas company informed them the furnace had a crack, making it unsafe for operation. The evidence indicated that the furnace had worked adequately while the seller lived in the house and that the seller had no knowledge of the crack.

The court relied on *Gunset* in determining that the plaintiffs had failed to show breach of contract. The court once again placed no importance on the expert's testimony that the defect most likely existed at the time the purchase agreement was executed. The court quoted from *Gunset* in concluding that the plaintiffs had received all that they had bargained for.

Thus, according to relevant pronouncements by this court, the provision in Hendersons' contract that the roof and plumbing would be in operating condition on the date of possession only provided Hendersons with a promise that the roof and drain would be in the same condition on the date of possession as they were on the date of purchase. There was no express warranty that the roof and drain would continue to work to Hendersons' expectations after delivery was accomplished. The trial court's finding that this provision was not breached was correct.

Plaintiffs contend that Forman fraudulently misrepresented to Henderson that both the roof and the drain system were good. On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, this court must accept plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Russell v. Norton*, 229 Neb. 379, 427 N.W.2d 762 (1988).

In accordance with that rule, we must find that Forman represented to Henderson that the roof "was in good shape, there were no problems"; that minor repairs had been made to the roof; and that the roofer said the roof needed replacing merely to create work for himself.

It is true that to constitute a false representation, a statement must be made as a statement of fact, not merely the expression of an opinion. *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988). In *Kliewer*, the defendant's statement, " 'Well, we've been up that ladder before and a lot of other people have been up and down that ladder, so I guess it's safe,' " was found by this court to be "nothing more than his opinion that it was safe to climb the ladder." *Id.* at 876-77, 429 N.W.2d at 379-80. However, in this case the statement was more than a guess. Forman said the roof "*was in good shape* [and] *there were no problems*," and this in the face of his knowledge that one of the roofing experts had said that the roof needed replacing. (Emphasis supplied.)

To recover for fraud based upon misrepresentation, Hendersons had the burden of proving that (1) Forman made a representation of material fact; (2) the representation was false; (3) the representation, when made, was known to be false or

was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the intention that Hendersons would rely on it; (5) Hendersons reasonably relied on the representation; and (6) as the result of such reliance, Hendersons suffered damage. See *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 421 N.W.2d 766 (1988).

The representations as to the water problem in the basement fall into a similar category. The crucial representations made by Forman were that the moisture on the wall was from an ice machine, that Henderson must be careful in backflushing the swimming pool, and that "[y]ou shouldn't have any moisture because that drain *will keep the moisture out*." (Emphasis supplied.)

The evidence indicated that the sole cause of the water problem in the basement was the misdesign and inadequacy of the drain system. As in the case of the roof, where Forman stated that it was in good shape and there were no problems, the statement that the drain would keep the moisture out was false.

Even assuming that Forman did not know that his statements were false, having said that the roof was in good shape and there were no problems and that the drain would keep the moisture out, a question of fact was presented as to whether such statements were made "recklessly as a positive assertion without knowledge concerning the truth of the representation." As this court said in *Edwin Bender & Sons v. Ericson Livestock Comm. Co., supra* at 166-67, 421 N.W.2d at 772: " 'And if a party, without knowing whether his statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded in a proper case will be entitled to relief.'. . ." "On the record presented, Bender was entitled to have the questions about Ericson's warranty and misrepresentation of a material fact submitted to the jury." *Id.* at 167, 421 N.W.2d at 772. Such is the case here.

Also of importance is the question of whether Henderson reasonably relied on the representations allegedly made by Forman. Henderson testified that he did. It may be argued that

as to the roof, he did not so rely because he sought expert advice. The fact that a plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is not, as a matter of law, a defense to a fraud action. Assuming all other ingredients of liability are present, a plaintiff is entitled to relief if the representations were a material inducement to the contract, although the plaintiff may have made efforts to discover the truth thereof and did not rely wholly upon the veracity of the defendant. *Foley v. Holtry*, 43 Neb. 133, 61 N.W. 120 (1894). See, also, *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955).

The questions as to whether the statements were representations as to fact or merely opinion, and whether Henderson did rely on them, were properly questions for the jury to decide.

The parties argue the question of the statute of limitations. However, no finding in this regard was included in the court's order of dismissal. As a general rule, this court will dispose of cases on appeal on the theory on which they were presented to and disposed of by the trial court. *Obermeier v. Bennett*, 230 Neb. 184, 430 N.W.2d 524 (1988).

The judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

K. C. PETERSON, APPELLANT, V. JOE CISPER ET AL., APPELLEES.

436 N.W.2d 533

Filed March 10, 1989. No. 87-598.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pleaded and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader.
2. **Constitutional Law: Statutes: Presumptions.** The unconstitutionality of a statute must be clearly established. All statutes are presumed constitutional, and

the party challenging the constitutionality of the statute has the burden of showing the statute is unconstitutional.

3. **Constitutional Law: Legislature.** It is the law of Nebraska that the Legislature is free to create and abolish rights so long as no vested right is disturbed.
4. _____: _____. The Constitution of the State of Nebraska, as a general rule, does not forbid the creation of new rights nor the abolition of old rights recognized by the common law to attain a permissible legislative object.
5. **Constitutional Law.** A person has no property, no vested interest, in any rule of the common law. Neither is there such a thing as a vested right in any particular remedy.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

James E. Schneider, of Schneider & Griffin, P.C., for appellant.

Ronald F. Krause, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

HASTINGS, C.J.

Plaintiff has appealed from the order of the district court which dismissed his petition as to certain defendants when he elected to stand on his first amended petition to which a demurrer had been filed and sustained. This action arose out of a work-related injury in which plaintiff sought recovery in tort against several of his fellow workers, alleging their negligence in causing plaintiff's injuries.

The action of the district court was based on Neb. Rev. Stat. § 48-111 (Reissue 1988), which provides that in all cases covered under the Nebraska Workers' Compensation Act, "[t]he exemption from liability given an employer and insurer by this section shall also extend to all employees, officers, or directors of such employer or insurer . . . ." Plaintiff assigns as error the failure of the district court to declare § 48-111 unconstitutional as being in violation of Neb. Const. art. I, § 13. That section provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

In reviewing an order sustaining a demurrer, the Supreme Court accepts the truth of facts well pleaded and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader. *Weiner v. Hazer*, 230 Neb. 53, 430 N.W.2d 269 (1988). Applying that rule, absent the exempting statute, it would appear that plaintiff's petition would not be subject to a demurrer.

The unconstitutionality of a statute must be clearly established. All statutes are presumed constitutional, and the party challenging the constitutionality of the statute has the burden of showing the statute is unconstitutional. *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987).

It is plaintiff's contention that prior to the amendment of § 48-111 in 1975, an injured employee had a common-law right to sue a negligent coemployee, and therefore article I, § 13, of the Constitution rendered the Legislature powerless to grant coemployee immunity. The gist of plaintiff's argument is that the Legislature cannot deprive an injured employee of his or her common-law right to sue a negligent coemployee unless the Legislature provides a quid pro quo or an adequate substitution for the abrogated common-law right, and this the Legislature failed to do when it amended § 48-111.

Plaintiff's argument as to unconstitutionality is based primarily upon *Grantham v. Denke*, 359 So. 2d 785 (Ala. 1978), and *Estabrook v. American Hoist & Derrick, Inc.*, 127 N.H. 162, 498 A.2d 741 (1985), two cases in which it was held that coemployee immunity from suit is unconstitutional.

Grantham was a 7-to-2 decision. In a later case, *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334 (Ala. 1980), although the principle of *Grantham* was upheld, this time by a 6-to-3 decision, one of the justices from the former majority dissented in *Coleman*. In doing so, he wrote:

> The continuing necessity for explaining that opinion [*Grantham*] and the explanations themselves have convinced me that the time has come for this Court to recognize and candidly admit that it erred in *Grantham v. Denke, supra*, in holding that immunity provisions of the Workmen's Compensation Act are unconstitutional under Section 13 [similar to article I, § 13, of Nebraska's

Constitution] of the Alabama Constitution of 1901. (Beatty, Justice, dissenting.) *Coleman, supra* at 355.

Additionally, *Estabrook* has been overruled in part by *Young v. Prevue Products, Inc.*, 130 N.H. 84, 534 A.2d 714 (1987). In *Young*, a wife brought suit against her husband's employer for loss of consortium resulting from her husband's work-related injury. The trial court dismissed the action on the basis of a statute that granted employers immunity from such actions. On appeal the wife, basing her argument on the rationale of *Estabrook*, argued that the statute was unconstitutional because no quid pro quo had been provided when the right to bring an action for loss of consortium was taken away. The New Hampshire Supreme Court upheld the constitutionality of the statute and indicated that the quid pro quo rationale of *Estabrook* was no longer favored. The court said:

> To the extent that the holding in *Estabrook* may be interpreted as requiring that a restrictive amendment to the workers' compensation law must be supported by a contemporaneously enacted provision for a new benefit, it is overruled. To require that the legislature always increase benefits to a particular group of individuals whenever it takes other benefits aways [sic] could result in unfairness and lead to anomalous results where the purpose of the deprivation is to restore the balance of the general *quid pro quo*.

Young, supra at 88, 534 A.2d at 717.

Plaintiff also left the impression during oral argument that in *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987), the Ohio Supreme Court had declared coemployee immunity unconstitutional on the basis of an "open court" provision in the Ohio Constitution. That case involved a medical malpractice statute that barred claims brought more than 4 years after the act or omission constituting alleged malpractice occurred. The court held the statute unconstitutional under the "open court" provision insofar as the statute was applied to bar claims of those plaintiffs who did not know or could not have known of their injuries. The court reasoned that the statute thus applied operated to deprive such a plaintiff of any remedy for bodily injury because the claim was extinguished before he or

she even knew of the injury or reasonably could have discovered it.

Forty states have statutory provisions granting coemployees immunity from suit. In addition, Mississippi has judicially granted such immunity. 2A A. Larson, The Law of Workmen's Compensation § 72.21 (1988). The courts of at least seven states have held coemployee immunity not to be an unconstitutional deprivation of the common-law rights of injured workers. See, *Lowman v. Stafford*, 226 Cal. App. 2d 31, 37 Cal. Rptr. 681 (1964); *Perez v. Continental Cas. Co.*, 367 So. 2d 1284 (La. App. 1979), *cert. denied* 369 So. 2d 157 (La.); *Oliver v. Travelers Insurance Co.*, 103 Wis. 2d 644, 309 N.W.2d 383 (1981); *Iglesia v. Floran*, 394 So. 2d 994 (Fla. 1981); *Meyer v. Kendig*, 641 P.2d 1235 (Wyo. 1982); *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982); *Seivert v. Resnick*, 342 N.W.2d 484 (Iowa 1984).

The Florida Supreme Court, in *Iglesia v. Floran, supra*, upheld a lower court ruling to the effect that the coemployee immunity provision was constitutional and did not bar access to courts contrary to Fla. Const. art. I, § 21, which provides: "The courts shall be open to every person for redress of any injury . . . ."

Similarly, in *Meyer v. Kendig, supra*, the Wyoming Supreme Court upheld the Wyoming version of a coemployee immunity statute despite the provisions of Wyo. Const. art. 1, § 8, which provides in part: "All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay." In upholding the constitutionality of the statute, the court stated:

> The services of the district court and of this court have been utilized in this case. The fact that the courts are required to be open and to afford justice for injury done does not mean that a party is assured of success in a legal action, or that standards cannot be set for, and limitations cannot be placed upon, causes of action—all in the interest of justice. The court was open to appellee. She has availed herself of its services. The administration of justice in this case is the process in which we are now involved. [The statute] only sets a standard to be applied

> by the courts in an action by an employee against a co-employee for negligence resulting in a work-related injury. Such is not violative of Art. 1, § 8 of the Wyoming Constitution.

641 P.2d at 1241.

In *Oliver v. Travelers Insurance Co., supra*, coemployee immunity was held to be constitutional despite a provision in the Wisconsin Constitution providing: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character . . . ." Wis. Const. art. I, § 9.

The Iowa Supreme Court, in *Seivert v. Resnick, supra*, held that coemployee immunity did not violate the due process and equal protection clauses of the Iowa Constitution. The court said:

> Whatever views reasonable persons might hold concerning the merit of the challenged classification in terms of social policy, it does not appear to be wholly irrelevant to the legislative scheme of workers compensation benefits. Ordinarily, a co-employee is working under the direction of the employer in comporting his conduct to the employer's directions, a circumstance which supports a legislative decision to grant the co-employee at least a partial share of the employer's immunity from common law tort suits. Generally, the argument supporting co-employee immunity or limited immunity is set forth in 2A A. Larson, *Workman's Compensation Law* section 72.22 at 14-86 (1982): "It is possible, within the bounds of compensation theory, to make out a case justifying this legislative extension of immunity to the co-employee. The reason for the employer's immunity is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to commonlaw verdicts. This reasoning can be extended to the tortfeasor co-employee; he, too, is involved in a compromise of rights. Perhaps, so the argument runs, one of the things he is entitled to expect in return for what he has given up is the freedom of the commonlaw suits based

> on industrial accidents in which he is at fault." We find the foregoing rationale adequate to sustain the challenged legislation.

Seivert, supra at 485.

It has long been the law of Nebraska that the Legislature is free to create and abolish rights so long as no vested right is disturbed. *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). This court has declared that article I, § 13, of the Constitution "is merely a declaration of a general fundamental principle." *Prendergast v. Nelson*, 199 Neb. 97, 103, 256 N.W.2d 657, 663 (1977).

In *Prendergast*, this court addressed the constitutionality of the Nebraska Hospital-Medical Liability Act. In responding to the contention that the provisions of the act creating a medical review panel violated article I, § 13, the court quoted the following from *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976):

> "Basically the contention is that the Legislature is powerless to alter a common law right. The law itself as a rule of conduct may be changed at the will or even at the whim of the Legislature unless prevented by constitutional limitations. . . . The Constitution does not forbid the creation of new rights, nor the abolition of old ones recognized by the common law, to attain a permissible legislative object. . . ."

(Citations omitted.) *Prendergast, supra* at 104, 256 N.W.2d at 663-64.

Under plaintiff's view, the Legislature would be powerless to ever alter the common law of the state. This court heard a similar argument in *State v. Heldenbrand*, 62 Neb. 136, 87 N.W. 25 (1901), wherein the defendant argued that a statute changing the rules of evidence violated the due process provision of the Nebraska Constitution. The State argued that the law could be amended, otherwise the Legislature could make no new laws. This court said:

> Manifestly, this can not be the law. The constitution did not have the effect, on its adoption, to petrify the social structure. The purpose or intent of its adoption was not to preclude legislation, except in certain specified instances,

> where the power of the legislature for harm is expressly and impliedly restricted. It was not intended that the common law should thenceforth continue to the end of time, unaltered by legislative action. If such had been the intention, a legislative branch of the state government would have been a superfluity. One of the main purposes for which that branch of government is created is that the common law may from time to time be changed or abrogated in those instances wherein, by reason of changed social conditions, or other reasons, it may become ineffectual for the preservation of public or private rights. "A person has no property, no vested interest, in any rule of the common law." *Munn v. Illinois*, 94 U.S. 113, 134. Neither is there such a thing as a vested right in any particular remedy.

Heldenbrand, supra at 139-40, 87 N.W. at 26.

It is clear that the Nebraska Legislature has the power to abolish rights so long as no vested right is disturbed. Plaintiff's contention that article I, § 13, of the Constitution deprives the Legislature of power to abrogate his common-law right to sue negligent coemployees for work-related injuries is wrong. No one has a vested interest in any rule of the common law or a vested right in any particular remedy. *State v. Heldenbrand, supra.*

Despite his inability to bring suit against coemployees to recover for his injuries, an injured employee is not left without any remedy whatsoever. The injured employee will receive workers' compensation. If the injury was the result of a coemployee's willful and unprovoked physical aggression, § 48-111 provides that in such a case the injured employee can sue a coemployee.

As for the plaintiff's quid pro quo argument, the quid pro quo an injured worker receives for losing his ability to sue a coemployee is freedom from suit by coemployees he may negligently cause injury to in the course of his employment. See 2A A. Larson, The Law of Workmen's Compensation § 72.22 (1988).

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LESLIE R. ANDERSEN, APPELLANT.

436 N.W.2d 537

Filed March 10, 1989. No. 88-087.

1. **Convictions: Appeal and Error.** In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
2. **Sexual Assault: Corroboration.** In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
3. _____: _____. After the victim has testified to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged assault, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made, especially if the victim is afraid and ashamed of what has happened.
4. **Trial: Rules of Evidence.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Neb. Rev. Stat. § 27-403 (Reissue 1985).

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Robert C. Wester, Assistant Sarpy County Public Defender, for appellant.

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

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and CARLSON, D.J.

PER CURIAM.

The defendant, Leslie R. Andersen, was convicted of sexual assault on his 12-year-old stepdaughter and two counts of third degree assault on his wife. He was sentenced to imprisonment for 2 years for the sexual assault and to 6 months on each of the assault charges, the latter sentences to run concurrently with each other but consecutively to the sexual assault sentence. He

has appealed and contends that the evidence was not sufficient to sustain the sexual assault conviction and that the trial court erred in failing to sustain the objections to certain testimony concerning the sexual assault.

Since the errors assigned and discussed by the appellant concern only count I, the sexual assault count, the evidence concerning counts III and IV, the third degree assault counts, will not be discussed.

The record shows that the sexual assault occurred sometime in April 1987. The victim testified that while she was in her bed, she awoke to find the defendant had his hands on her "private area" and was rubbing up and down. The defendant had raised her nightgown and was rubbing her privates up and down on the outside of her underwear. The defendant then pulled down her underwear and rubbed her vaginal area and, while doing so, penetrated her vagina. Then, the defendant pulled her panties back up and kissed her on her vaginal area, through the panties. The victim did not let the defendant know she was awake, because she was scared, but rolled over so the defendant would stop. During the incident the defendant was "breathing funny." After the defendant had left, the victim got into bed with her sister and told her what happened.

The next morning, the victim told her brother about the incident. At the trial the brother testified that the victim had told him about the incident the morning after it occurred. The victim also told her sister and mother about the incident. She told her mother that the defendant had touched her in her private area, and pointed out where she had been touched. According to the victim, she, her mother, and the defendant had a conversation in which the defendant admitted that the incident had happened.

The mother testified that in April of 1987, the victim told her that the night before the defendant had come into her room and touched her private area. The mother went on to testify that the victim said that the assault had not occurred but that the victim wanted her and the defendant to stop fighting. She further testified that she did not remember telling a juvenile court employee assigned to the case that the defendant had admitted to the assault, and testified that the employee's testimony that

she, the mother, had said that the defendant had gone into the victim's bedroom and touched the victim's stomach was not the truth.

On June 10, 1987, the victim's mother called the police because she and the defendant were fighting. Officer Catherine Glesmann was one of the police officers who responded to the call. The victim told Officer Glesmann about the sexual assault but did not relate specific details of the assault. She merely indicated to Glesmann the area of her body which the defendant had touched.

With regard to the delay in reporting the incident, the victim testified that her mother had said that the mother would be "thrown in jail" along with the defendant for not reporting the assault immediately.

After the June 10 assault on Mrs. Andersen, all three children were taken to the police station for questioning. Officer Geraldine McWhirt testified that when she interviewed the victim, she was told the details of the assault. When Robin Gabriel, a sexual assault investigator with the Sarpy County sheriff's office, interviewed the victim on June 11 or 12, the victim told Gabriel the details of the assault but said that it had occurred in June.

Officer Timothy C. Estes testified that he interviewed the victim on the 10th of June and that the victim said she had been assaulted, but was having difficulty talking to him because he was a man. Estes interviewed the victim about a week later, at the request of Mrs. Andersen, who had called Estes to tell him that she thought the children were not telling the whole truth about the sexual assault. Estes then testified that the brother had told him that Mrs. Andersen asked the children to lie about the sexual assault and tell the police that the defendant had touched the victim above the panty line, in an effort to wake the child. Later, the victim told Officer Estes that the sexual assault had not occurred in June when the police were called, but had happened 2 or 3 months earlier. The victim testified that her mother kept telling her that she was lying and to tell the police to drop the charges, that they wanted the defendant home.

A physician, Susan Sucha, examined the victim on June 11, 1987, and testified that the victim said that while she was

sleeping, she awakened to find that her stepfather had his hand down her panties, touching her. Sucha testified that she did not find any signs of injury to the victim but that she would not have expected to find signs of injury with the kind of allegation the child was making—that she was touched or fondled.

The evidence which has been summarized was sufficient, if believed, to sustain a finding of guilty beyond a reasonable doubt on the sexual assault charge.

> "In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it."

State v. Hurlburt, 218 Neb. 121, 123, 352 N.W.2d 602, 603 (1984); *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986).

> "In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue." . . . *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980). After the victim has testified to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged assault, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made, especially if the victim is afraid and ashamed of what has happened.

State v. Schon, 227 Neb. 482, 484, 418 N.W.2d 242, 244 (1988). See, *State v. Stone*, 228 Neb. 389, 422 N.W.2d 568 (1988); *State v. Polyascko*, 224 Neb. 272, 397 N.W.2d 633 (1986). Under the circumstances in this case, the complaints made by the victim were made within a reasonable time after the assault.

An important issue in the case was the credibility of the victim. Although the victim testified directly concerning the assault, she originally stated that it had occurred in June rather

than in April of 1987. The mother testified that the victim had said that the defendant "hadn't done anything" and that her daughter "just wanted to stop us fighting, she didn't like the way he was smacking me." The mother further testified that if the victim testified that the defendant had "admitted doing it," the victim would not be telling the truth.

Alex David Schwarz, an officer in the Papillion Police Department, was the first policeman to arrive at the defendant's residence on June 10, 1987, after the victim's mother had called the police and reported a sexual assault. When Schwarz asked the victim's mother about the report of a sexual assault, she replied that "something had happened to her daughter, Jennifer." Schwarz then asked Officer Glesmann to interview the victim.

After Schwarz had interviewed the victim's mother about the assaults upon her, he arrested the defendant. Before taking the defendant to jail, he advised the defendant as to his *Miranda* rights. The defendant then made a statement about what had happened that day and said that the victim's mother had accused him of molesting her daughter, the victim. At that time the defendant became upset and said, "she knows not to say things of that nature because it gets him very upset, knowing what's happened previously before to his father." Schwarz was then asked:

> Q. And just a point of clarification. What did Mr. Andersen say about his father? What he said, what did he say about his father?
>
> A. Mr. Andersen stated that his father was currently in the Nebraska state pentiteniary [sic] for sexual assaulting a child.
>
> MR. GARVEY: I'd object, move to strike, relevance.
>
> THE COURT: Overruled, it's received.

Before trial, the defendant had made a motion in limine in an effort to prevent any reference to the fact that the defendant's father had been convicted of a similar offense. The trial court had sustained the motion except as to any statement by the defendant.

The defendant argues that the statement was not relevant and was highly prejudicial. Although the statement may have

tended to explain why the victim's mother had testified that the victim was not telling the truth and why she had asked the children to lie about what had happened, it had no direct relevance as to whether the sexual assault charged had taken place. It was a collateral matter, its prejudicial effect far outweighed its probative value, and it should have been excluded under Neb. Rev. Stat. § 27-403 (Reissue 1985).

Officer Estes testified concerning his interviews with the victim and her brother, John. Estes testified that after June 10, 1987, he received telephone calls from the victim's mother almost daily, requesting that he reinterview the children. On June 17, 1987, the victim and her mother came to the LaVista Police Department and were interviewed by Estes. According to Estes, the victim's mother

> informed me that she thought that everything that the children had said was not totally correct. She indicated that the children had not told the truth, that I should reinterview them to find out what the real truth was. She even at one point indicated that the children, Jennifer in particular, was more of a perpetrator with regard to sexual activity occurring between herself and Mr. Andersen.

He further testified that

> she'd overheard the children via a stairwell in their house talking about — I believe John accusing his sister, Jennifer, that "You're at fault," that "You were the one who caused all this trouble," that "Dad," referring to Mr. Andersen, "would not be in this trouble had it not been for you. You lied."

He then testified that he had talked with the victim's brother, John, on June 15, 1987. According to Estes,

> A. John came to me in the evening at my residence and told me that his mom wanted he —
>
> MR. GARVEY: Objection, hearsay.
>
> THE COURT: Overruled.
>
> Q. (By Mr. Irwin) You can go ahead, Officer.
>
> Q. John came to me and told me that his mother was telling both himself, his sister Jennifer, and Debbie, the littler sister, to lie about the incident.
>
> MR. GARVEY: Move to strike, Judge, it's hearsay.

THE COURT: Overruled.

Q. (By Mr. Irwin) Did John tell you anything else that day on the 15th?

A. Yes, he told me that she wanted Mrs. — Mrs. Andersen wanted the children to lie about the incident, stating that everything that had been said previously was not the truth, that, in fact, the touching that had occurred that night was — or that morning was Mrs. — Mr. Andersen touching Jennifer on the stomach above the panty line in an attempt to wake her up.

MR. GARVEY: I'd object, Your Honor, and move to strike.

THE COURT: Overruled.

The testimony concerning the interview with John on June 15, 1987, was clearly hearsay and not admissible under any of the exceptions to the hearsay rule.

The errors in the admission of evidence concerning the conviction of the defendant's father and the interview with the victim's brother require that the judgment as to count I be reversed and that count be remanded for a new trial. As to counts III and IV, the judgment is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

DALE GARDNER, APPELLANT, V. BEATRICE FOODS COMPANY, APPELLEE.

436 N.W.2d 542

Filed March 10, 1989. No. 88-392.

1. **Workers' Compensation: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the compensation court, the

evidence must be considered in the light most favorable to the successful party. Factual determinations by that court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the compensation court, Neb. Rev. Stat. § 48-185 (Reissue 1988) precludes this court's substituting its view of facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court. As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given testimony.

2. **Workers' Compensation: Words and Phrases.** Earning power is synonymous neither with wages nor with loss of physical function. Nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted. Thus, while there is no numerical formula for determining one's earning power following an injury to the body as a whole, the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.
3. **Workers' Compensation.** When a worker has reached maximum recovery, the remaining disability is permanent and such worker is no longer entitled to compensation for temporary disability.
4. _____. The compensation court may prescribe the procedure to be followed if an injured worker desires to obtain the benefit of rehabilitation services under the statute. Where such a procedure has been prescribed, the right to rehabilitation services, including the right to compensation for temporary total disability while undergoing rehabilitation, depends upon compliance with the procedure prescribed.
5. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Gordon Peterson, of Oglesby, Brown, Thomas, Peterson & Orton, for appellant.

Richard M. Dustin, of Gaines, Mullen, Pansing, Hogan & Cotton, for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and FUHRMAN and WHITEHEAD, D. JJ.

HASTINGS, C.J.

The plaintiff has appealed from an award on rehearing from the Nebraska Workers' Compensation Court which ordered payment to him of $216.45 per week for 31 6/7 weeks'

temporary total disability compensation, and thereafter the sum of $25.97 per week for 268 1/7 weeks for a 12-percent permanent partial disability; ordered that plaintiff was entitled to vocational rehabilitation services upon the plaintiff's cooperation with and the development by the department of vocational rehabilitation services of a specific vocational objective and a plan for rehabilitation; and failed to award attorney fees to the plaintiff.

The plaintiff assigns as errors that (1) the court failed to find the plaintiff was temporarily disabled beyond and after March 5, 1987; (2) the court failed to find that plaintiff suffered permanent partial disability based on a loss of earning power of between 48 and 100 percent; and (3) the court failed to award plaintiff attorney fees because plaintiff did not receive an increase in benefits on rehearing. We affirm.

The procedure to be followed on an appeal from the compensation court to this court is governed by Neb. Rev. Stat. § 48-185 (Reissue 1988), which provides in part:

> The findings of fact made by the compensation court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the compensation court may be modified, reversed, or set aside *only* upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

(Emphasis supplied.)

In testing the sufficiency of the evidence to support findings of fact made by the compensation court, the evidence must be considered in the light most favorable to the successful party. Factual determinations by that court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the compensation court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the compensation court if the record contains evidence to

substantiate the factual conclusions reached by the compensation court. As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given testimony. *McLaughlin v. McLaughlin*, 230 Neb. 460, 432 N.W.2d 45 (1988).

Plaintiff is a 50-year-old man who quit school in the 11th grade and received his GED in 1960. He began working for the defendant in October of 1959. All of his work involved repeated heavy lifting of milk products.

In June of 1986, plaintiff was working in the cooler, picking up boxes containing 6 gallons of milk from the conveyor belt, and stacking them on wood pallets in stacks approximately chest high. This involved lifting approximately 50 pounds and some bending and twisting. He worked in this position for 3 or 4 days and then went on vacation for 15 days. Before he left on vacation, he had stiff and sore muscles, which he attributed to the new job. When he returned from his vacation on July 1 or 2, he "felt fine." Roughly 2 weeks after returning to work, however, his back got "progressively worse," until it got to the point where plaintiff had to see a doctor.

Plaintiff saw Dr. Wilbur Wiedman, who advised him to stay home for 4 or 5 days and rest. Plaintiff claimed he could not afford to do so, and therefore he went back to work, where he was allowed to do lighter work for a period of time, but then plaintiff returned to his former position of stacking 6-gallon boxes. Three days later, on July 25, 1986, plaintiff claimed he could not stand his back pain any longer, and he has not worked since that day.

Dr. Wiedman referred plaintiff to Dr. Lewiston Birkmann, a neurologist. Dr. Birkmann first saw plaintiff on August 20, 1986, and continued seeing him until March 5, 1987. Testing of plaintiff revealed that everything was normal, and Dr. Birkmann diagnosed plaintiff's condition as a lower back strain with spasms. His treatment of plaintiff included medications, physical therapy courses, and a "work hardening program" designed to build up muscle strength.

The physical therapy began in January of 1987 under the guidance of William Barnes, a physical therapist to whom Dr. Birkmann referred plaintiff. According to Barnes, although

plaintiff was "somewhat stubborn" and needed frequent and repeated instructions in the proper technique of the workout, he initially made good progress. However, plaintiff claimed his pain increased throughout the 6-week program. Upon plaintiff's discharge from the program he was able to lift 55 to 60 pounds repetitively for two 15-minute periods and could lift 143 pounds once. Test results showed that he would be able to perform at a "medium heavy" work level, meaning that he could lift 75 pounds infrequently and up to 35 pounds frequently. Barnes testified that plaintiff was at the borderline limit of the lifting requirements of his job.

Plaintiff obtained a release from Dr. Birkmann to go back to work, effective March 5, 1987, with a permanent disability rating of 12 percent of the body as a whole.

Plaintiff also saw an orthopedic surgeon, Dr. Michael Morrison, in December of 1986. A neurological examination yielded normal results. Dr. Morrison's diagnosis was that plaintiff had a strain of the soft tissues and muscles of the lower back, and he recommended that plaintiff strengthen those muscles through exercise.

After plaintiff had completed the physical therapy "work hardening program," he returned to Dr. Morrison for a final examination. The doctor found no evidence of the lower back strain other than the plaintiff's subjective complaints, and stated that there was no objective evidence of physical impairment.

Defendant's general manager, Bruce Williamson, testified that he understood plaintiff had been cleared to lift 35 to 50 pounds, but that there were no "light duty" jobs available at defendant's plant.

Daniel Roth, who owned a temporary-help business, testified that plaintiff would not qualify for placement in a heavy-lifting job. He further stated that the only jobs plaintiff would qualify for with his educational background and physical limitations would have a starting pay of $3.75 to $4 per hour.

Dr. Birkmann had also referred the plaintiff to Roger Glawatz, a vocational rehabilitation counselor. Glawatz testified that when he first saw plaintiff in October of 1986,

plaintiff was quite difficult to work with, but that his attitude had improved. However, the plaintiff does not at this time have a vocational goal, according to Glawatz. As a matter of fact, plaintiff has told Glawatz that "he would like to wait for the outcome of his [workers'] compensation case before he determines on any future job goals."

Following a hearing before one judge of the Workers' Compensation Court, plaintiff was awarded rehabilitation services, temporary total disability until April 12, 1987, and permanent partial disability benefits based on a 12-percent disability to the body as a whole.

Following a rehearing, plaintiff was again awarded rehabilitation services, his temporary total disability benefits were reduced by 5 3/7 weeks, and he was awarded permanent partial disability of 12 percent. The court declined to award attorney fees because plaintiff had failed to secure an increase in the amount of the award on rehearing.

Dealing first with the issue of permanent partial disability, plaintiff claims the trial court erred in determining his loss of earning capacity on the basis of his functional disability. However, this court has said in *Thom v. Lutheran Medical Center*, 226 Neb. 737, 740, 414 N.W.2d 810, 814 (1987):

> Earning power is synonymous neither with wages . . . nor with loss of physical function . . . . Nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted. Thus, while there is no numerical formula for determining one's earning power following an injury to the body as a whole . . . the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.

(Citations omitted.)

The evidence was sufficient to support a finding by the Workers' Compensation Court that the plaintiff was suffering from a 12-percent loss of earning capacity. Factual determinations made after rehearing in the Workers' Compensation Court will not be set aside on appeal unless such

determinations are clearly erroneous. *McLaughlin v. McLaughlin*, 230 Neb. 460, 432 N.W.2d 45 (1988).

The same rule supports the compensation court's determination as to the end of plaintiff's temporary total disability. Such a finding was based on Dr. Birkmann's determination that plaintiff was released to return to work with a 12-percent disability, permanent in nature, and that there was nothing further by way of treatment that he, Dr. Birkmann, could offer. "When a worker has reached maximum recovery, the remaining disability is permanent and such worker is no longer entitled to compensation for temporary disability." *Kleiva v. Paradise Landscapes*, 227 Neb. 80, 81, 416 N.W.2d 21, 22 (1987).

Plaintiff argues, however, that because he was awarded rehabilitation benefits, he was entitled to temporary total disability. There is no question but that Neb. Rev. Stat. §§ 48-121(5) and 48-162.01 (Reissue 1988) provide that an employee is entitled to temporary total disability benefits and, where appropriate, travel and living expenses *while undergoing rehabilitation*. However, the problem with plaintiff's situation is that he has not undergone rehabilitation. The award of the compensation court conditioned its order for rehabilitation upon the "formulation of a specific vocational objective and a plan" to be submitted to the court. We are not informed as to whether that was done. The plaintiff was quoted as saying that he wanted to await the outcome of his compensation case before he determined any future job goals. Under the terms and conditions of the compensation court's award, plaintiff would waive any further entitlement to vocational rehabilitation benefits absent the formulation of the plan. Thus, we are unable to determine plaintiff's entitlement to further temporary total disability, if any.

> The compensation court may prescribe the procedure to be followed if an injured workman desires to obtain the benefit of rehabilitation services under the statute. . . . Where such a procedure has been prescribed, the right to rehabilitation services, including the right to compensation for temporary total disability while undergoing rehabilitation, depends upon compliance with

the procedure prescribed.
(Citations omitted.) *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 131, 375 N.W.2d 150, 153 (1985).

Plaintiff argues that he was entitled to an attorney fee. He argues the unconstitutionality of Neb. Rev. Stat. § 48-125(1) (Reissue 1988) because it provides that where the employer appeals and fails to secure a reduction in the award, the employee *shall* be awarded attorney fees, whereas if the employee files for rehearing and secures an increase, he *may* be awarded attorney fees. In the first place, plaintiff admits that this issue was raised for the first time in this court; second, it was not assigned in his brief as an error; and, third, he failed to notify the Attorney General's office that he intended to challenge a statute on constitutional grounds. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988).

In any event, plaintiff did not secure an increase in his award. Following his hearing before one judge of the compensation court, he was awarded rehabilitation services under very similar conditions to those contained in his final award. There is no merit to his contention in this regard.

The judgment of the Workers' Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FERNANDO SALAS, APPELLANT.
436 N.W.2d 547

Filed March 10, 1989. No. 88-619.

1. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.
2. **Circumstantial Evidence.** In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt.

3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance.
5. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence is sufficient to support a finding of guilty of possession of a controlled substance with intent to distribute, deliver, or dispense.
6. **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.
7. _____. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough to constitute one an accomplice. Neither is knowledge, without more, generally sufficient to constitute one an accomplice.
8. **Sentences: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
9. **Sentences.** The seriousness of the offense is one of the important factors in setting a sentence.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Chris M. Arps, of Arps & Schirber Law Offices, for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

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

HASTINGS, C.J.

Defendant has appealed from his convictions, following a jury-waived trial, of possession of marijuana with intent to deliver, possession of cocaine with intent to deliver, and delivery of cocaine. He assigns as error the insufficiency of the evidence to support his convictions and the excessiveness of the

sentences. We affirm.

In the early morning hours of January 12, 1988, Omaha and Sarpy County law enforcement officers executed a "no knock" search warrant at 7105 South 80th Street in LaVista. The premises searched were occupied by the defendant's ex-wife, the defendant, and four children of the two. Items seized included a locked plastic box and its contents, a police scanner, a small mirror and straw with cocaine residue, and two bags of marijuana weighing approximately 17.3 ounces. The contents of the locked box included approximately 2.6 ounces of cocaine, a small amount of marijuana, plastic baggies, a purse containing $277, and a small letter scale. All of the above-mentioned items were found in the master bedroom, which was occupied by defendant and his ex-wife when officers entered the house.

Defendant and his ex-wife were placed under arrest, transported to the Sarpy County jail, and charged with possession of controlled substances with intent to deliver. During the booking procedure, a search of the defendant produced $1,500 in cash, found in a pocket of swimming trunks the defendant was wearing underneath his jeans.

The defendant told officers that the cocaine was his, but that he was working as a Crime Stoppers informant for the Hawaii police department. According to defendant, he had been sent to Pittsburgh to purchase the cocaine and was to return to Hawaii, where he lived, and deliver the cocaine to authorities there, who would then return to Pittsburgh to arrest the supplier of the cocaine. He said that he was spending a few weeks at the home of his ex-wife to see his children before returning to Hawaii.

The ex-wife testified that the defendant brought the marijuana with him when he came to visit her and the children. She further testified that the cocaine belonged to the defendant and that she had accompanied him to Pittsburgh and New York when he purchased the cocaine.

Count III of the amended information, delivery of cocaine, arose out of an incident that occurred prior to execution of the search warrant. On December 4, 1987, an undercover narcotics officer with the Sarpy County sheriff's office met with defendant's ex-wife at a grocery store parking lot. According to

the officer, during the meeting with the ex-wife, she was in the driver's seat, the defendant was in the front passenger seat, and the officer was in the back seat. The ex-wife opened her purse, took out two packets of cocaine, and handed them to the officer. The officer handed her $200, which she then gave to the defendant.

Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Wiggins*, 230 Neb. 632, 432 N.W.2d 824 (1988); *State v. Jones*, 230 Neb. 528, 432 N.W.2d 523 (1988). In a criminal case established by circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt. *Jones, supra*; *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *Wiggins, supra*; *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988).

Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance. *State v. Bustos*, 230 Neb. 524, 432 N.W.2d 241 (1988); *State v. Britt*, 228 Neb. 201, 421 N.W.2d 791 (1988).

Circumstantial evidence of the defendant's proximity to the drugs at the time of arrest was sufficient to establish his constructive possession of the drugs. The defendant was residing in the home of his ex-wife while he was visiting his children. He arrived in Nebraska on November 20, 1987. When officers entered the home to conduct the search, the defendant was occupying the master bedroom with his ex-wife. The marijuana and cocaine were found within the master bedroom.

The defendant's ex-wife testified that he brought the marijuana with him from Hawaii. She also testified that she

accompanied him on a trip to Pittsburgh and New York, during which he purchased the cocaine. The defendant himself had told several officers that the cocaine was his. He had also given the officers a story about his purchasing the cocaine for the Hawaii police department.

However, defendant's response in his testimony was that everyone else was lying and only he was telling the truth. He testified that the marijuana belonged to his ex-wife and that he had accompanied her on a trip to Pittsburgh and New York during which she picked up the cocaine from friends of one of her lovers. According to defendant, he never told the local enforcement agents that the cocaine was his or that he was an informant for the Hawaii police.

Apparently, the trial court found the testimony of the ex-wife and the law enforcement officers to be more credible than the testimony of the defendant, a finding this court cannot disturb on appeal.

Circumstantial evidence is sufficient to support a finding of guilty of possession of a controlled substance with intent to distribute, deliver, or dispense. *Britt, supra*; *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987); *State v. Hunt*, 224 Neb. 594, 399 N.W.2d 806 (1987). Possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute. *Lee, supra*.

The amount of drugs found during the search, in addition to packaging material and a small scale commonly used for weighing drugs for sale, provided sufficient circumstantial evidence of possession with intent to deliver or distribute to support defendant's convictions on the first two counts of the information.

It is apparent that the trial court found defendant guilty of delivery of cocaine, charged in the third count, as an aider and abettor of his ex-wife.

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." One who participates with another in committing an unlawful act is as responsible for the act as the

one who actually performed it. *McDonald, supra.*

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. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988); *State v. Schreck*, 224 Neb. 650, 399 N.W.2d 830 (1987).

Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough to constitute one an accomplice. Neither is knowledge, without more, generally sufficient to constitute one an accomplice. *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985). However, if a reading of the record demonstrates that the individual's involvement went beyond mere presence and passivity, there may be sufficient evidence to sustain a conviction for aiding and abetting. See *Morrow, supra.*

The record here reflects that the defendant's involvement in the sale of cocaine to the undercover agent went beyond mere presence and passivity. It is reasonable to infer from the evidence that defendant was aware of the fact that his ex-wife was selling cocaine. Defendant's participation in this sale went beyond mere presence, acquiescence, or silence. The defendant participated in the crime when he accepted without protest the money paid for the cocaine sold by his ex-wife. From this the trial judge could reasonably infer that the defendant encouraged the sale, and the evidence is sufficient to support the defendant's conviction for delivery of cocaine.

Defendant complains that the sentences were excessive. He was sentenced to terms of imprisonment of 15 to 45 months, 30 to 90 months, and 30 to 90 months, all to run concurrently. Pursuant to Neb. Rev. Stat. §§ 28-105(1) (Reissue 1985) and 28-416 (Cum. Supp. 1988), possession with intent to deliver marijuana is a Class III felony, punishable by imprisonment for not less than 1 nor more than 20 years. Possession of cocaine with intent to deliver and delivery of cocaine are each Class II felonies, punishable by imprisonment for not less than 1 nor more than 50 years.

All three sentences in this case were within the statutorily prescribed limits. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988); *State v. Jones*, 230 Neb. 528, 432 N.W.2d 523 (1988).

The trial court found that imprisonment was necessary for the protection of the public because of the substantial risk that the defendant, if placed on probation, would engage in additional criminal activity, and found that a lesser sentence would depreciate the seriousness of the defendant's crimes and promote disrespect for the law. These are two of the three principal considerations provided for in Neb. Rev. Stat. § 29-2260 (Cum. Supp. 1986) in determining whether to place a defendant on probation. Furthermore, the seriousness of the offense is one of the important factors in setting a sentence, as is evidence of a defendant's character or previous conduct. *State v. Antillon*, 229 Neb. 348, 426 N.W.2d 533 (1988). We find no abuse of discretion on the part of the trial court. The judgment of the district court as to each count is affirmed.

AFFIRMED.

GARDEN DEVELOPMENT COMPANY, A PARTNERSHIP, APPELLEE, V. CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

436 N.W.2d 832

Filed March 17, 1989. No. 87-009.

1. **Special Assessments: Appeal and Error.** The Supreme Court reviews the validity of a special assessment de novo on the record made in the district court.
2. **Special Assessments: Municipal Corporations: Appeal and Error.** The power and authority delegated to municipalities to construct improvements and to levy special assessments for their payment is strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner

of exercise thereof is resolved in favor of the taxpayer.

3. **Municipal Corporations: Statutes.** Water extension districts established pursuant to Neb. Rev. Stat. § 19-2402 (Reissue 1987) must consist of territory beyond the existing municipal water system.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Michael E. Sullivan for appellant.

Arthur R. Langvardt for appellee.

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

MORAN, D.J.

The City of Hastings, defendant, appeals a decision of the Adams County District Court invalidating a special assessment levied by the Hastings city council for improvements made in a water extension district created under Neb. Rev. Stat. § 19-2402 (Reissue 1987) against real property owned by Garden Development Company, a partnership, plaintiff. On Garden Development's appeal of the assessment, the district court, after a trial de novo, found Garden Development's property was served and benefited by the municipal water system as it existed prior to the creation of the water extension district and, further, the benefits from the water extension district were general to a large area in northeast Hastings, not special to the property in the district. Defendant appeals, assigning two errors: (1) the action of the trial court in finding that plaintiff's real estate was already benefited and that the assessments were void under *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340 (1975), *overruled on other grounds, First Assembly of God Church v. City of Scottsbluff*, 203 Neb. 452, 279 N.W.2d 126 (1979); and (2) the action of the trial court in determining that the improvements were general in nature and did not specially benefit the plaintiff's real estate. We affirm.

The Supreme Court reviews the validity of a special assessment de novo on the record made in the district court. See *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988).

Ordinance No. 2936, creating water extension district No.

1985-207, was adopted May 13, 1985. The district was composed of real property with front footage totaling 2,086.55 feet to abut a 10-inch water main constructed pursuant to the ordinance. The district, located in northeast Hastings, was bounded on the south by 22d Street and a tract on which there is a Holiday Inn, on the west by new U.S. Highway 281, on the north by South Shore Drive, and on the east by old U.S. Highway 281. The water main begins at the intersection of 22d Street and St. Joe Avenue, runs east on 22d Street to Kansas Avenue, then north on Kansas Avenue to the east right-of-way line of new Highway 281, and then northeasterly along the west side of the east right-of-way line to South Shore Drive, where it connects to a 10-inch feeder line. This feeder line, constructed in 1980, runs along the north side of Garden Development's property to old Highway 281 and then south along the east side of the old highway to 22d Street. Two 6-inch water mains connect to the 10-inch feeder north of Garden Development's property. The first main runs west along South Shore Drive through a platted area south of Lake Hastings and then south, connecting to an existing 6-inch main on 22d Street at Burlington Avenue. The other main runs north from South Shore Drive along North Shore Drive through a subdivision north of Lake Hastings.

Before district No. 1985-207 was created, the area north of 22d Street received water from a well north of Lake Hastings and from a 6-inch main that ran north up Kansas Avenue to 22d Street and then east along 22d Street, where it connects to the 10-inch feeder line running under old Highway 281 to South Shore Drive. The feeder line was never part of a water district.

At the time of trial, Garden Development's property was undeveloped land outside the city limits, but was surrounded by property within the city limits, including the Lake Hastings residential development north of Garden Development's property. The tract contains roughly 3 to 4 acres and has a generally triangular shape. It is bounded on the east by old Highway 281, a north-south road, on the north by South Shore Drive, an east-west road, and on the south by land it earlier sold to subsequent owners of the Holiday Inn. The hypotenuse of the triangle to the west is the east right-of-way line of new

Highway 281 that runs from northeast to southwest. This tract has never been connected to the municipal water system, nor has it been part of a water district. Garden Development's predecessor was a corporation whose stockholders are now the partners in Garden Development. The corporation constructed the Holiday Inn and purchased the existing Garden Restaurant, and obtained water for the project by paying for the construction of a 6-inch main in 22d Street west to Kansas Avenue. The land where the restaurant and motel are located was sold in 1980. The new owners of the Holiday Inn later installed a lawn sprinkling system and, in May of 1985, connected it to the 10-inch feeder line in old Highway 281.

After the district was completed, a 12-inch feeder line was installed under old Highway 281, running north to connect to the 10-inch feeder line in the highway at 22d Street.

The power and authority delegated to municipalities to construct improvements and to levy special assessments for their payment is strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved in favor of the taxpayer. *Turner v. City of North Platte*, 203 Neb. 706, 279 N.W.2d 868 (1979).

Water district No. 1985-207 was established under the authority granted in § 19-2402. That statute states, "Whenever the mayor and council of any city . . . shall deem it necessary and advisable to extend municipal water service . . . to territory beyond the existing systems, such municipal officers may, by ordinance, create a district or districts to be known as . . . water extension districts . . . ." The statute was construed in *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340 (1975), applying the statute to districts that included territory previously served by the existing municipal water service systems.

Both parties devoted considerable effort to bring this case within or outside the *Matzke* rule defining a water extension district as "an area of land or contiguous tracts of land located apart and outside any area served and benefited by an existing municipal water service system, wherein water extension mains are to be constructed and municipal water service is extended." *Matzke, supra* at 219, 226 N.W.2d at 345.

The facts in this case do not meet the threshold requirement of the statute. The Garden Development property is not "territory beyond the existing systems." It is bounded on the west by new Highway 281, to the west of which is an existing water system. On the north and east, the property is bounded by an existing system of water mains.

The City of Hastings could not use § 19-2402 to create a water district which included Garden Development's property.

Having determined that water extension district No. 1985-207 is invalid, the special assessment is void. *Matzke v. City of Seward, supra.* It is not necessary to reach the question of whether the benefits of the district were general to northeast Hastings and not special to the property in the district.

The decision of the district court finding the special assessment invalid is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VELMA BATISTE, APPELLANT.
437 N.W.2d 125

Filed March 17, 1989. No. 87-1153.

1. **Speedy Trial: Time.** The time between the dismissal and refiling of a charge is not includable in calculating the 6-month time period set forth in Neb. Rev. Stat. § 29-1207 (Reissue 1985).
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.
3. **Homicide.** A person commits murder in the first degree if he kills another purposely and with deliberate and premeditated malice.
4. _____. When it is claimed that a killing was upon a sudden quarrel, there are three elements of the crime of manslaughter: (1) the killing of another, (2) upon a sudden quarrel, and (3) without malice. Neb. Rev. Stat. § 28-305 (Reissue 1985).
5. **Intent: Words and Phrases.** "Malice," in a legal sense, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
6. **Homicide: Intent.** To constitute manslaughter, the slayer must have no intention

of doing the wrongful act of killing another without just cause or excuse.

7. **Words and Phrases.** "Purposely" means intentionally.
8. **Intent: Proof: Evidence: Circumstantial Evidence.** Intent, like any mental process or other state of mind of a defendant, may be proved not only by direct but also by circumstantial evidence and the inferences to be drawn therefrom.
9. **Intent: Evidence.** The law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
10. **Convictions: Juries: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
11. **Homicide: Words and Phrases: Intent.** "Premeditated" means to have formed a design to commit an act before it is done. A person kills with premeditated malice if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification.
12. **Homicide: Juries: Intent: Time.** The question of premeditation is for the jury to determine. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. The time needed for premeditation may be so short as to be instantaneous; the intent to kill may be formed at any moment before the homicide is committed.
13. **Criminal Law: Trial: Evidence.** A motion to reopen a criminal case to allow introduction of further evidence is addressed to the discretion of the trial court.
14. **Motions for New Trial: Appeal and Error.** A motion for new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed.
15. **Criminal Law: Motions for New Trial.** In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions, or oral testimony, that the defendant has discovered new evidence material to his or her defense which he or she could not with reasonable diligence have discovered and produced during the term within which the verdict upon which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial. Neb. Rev. Stat. § 29-2103 (Reissue 1985).
16. **Motions for New Trial: Evidence.** New evidence in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would *probably* result in a different verdict. The new evidence must be relevant and credible, and not merely cumulative.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

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

FAHRNBRUCH, J.

Velma Batiste appeals her first degree murder conviction resulting from the strangulation death of Patty Wolzen in Hastings, Nebraska. She was sentenced to life imprisonment. We affirm the defendant's conviction and sentence.

In her appeal to this court, Batiste's seven assignments of error may be summarized as follows: The trial court erred in failing to (1) grant her a speedy trial, (2) find there was insufficient evidence to convict her, (3) permit the defendant to reopen her case before the close of the trial, and (4) grant a new trial based on newly discovered evidence.

On Sunday morning, December 5, 1982, Patty Wolzen's 4-year-old daughter found her mother's lifeless body in the first floor bathroom of their apartment. The daughter alerted a neighbor. An ambulance was called, and the victim was taken to a hospital. After a pattern of contusions and abrasions was discovered on the dead woman's neck, the police were contacted. An autopsy disclosed that Wolzen had been manually strangled and had died from asphyxia.

Law enforcement officials immediately began an extensive murder investigation, but had no suspect for over 3 years. It was in February 1986, that Leonard Batiste, a brother-in-law of the defendant's, contacted the Adams County sheriff's office. He told authorities that Velma Batiste admitted to him that she had killed Wolzen. Leonard Batiste also said that the defendant, on more than one occasion, told him "she [Wolzen] got what she deserved" for having a sexual relationship with the defendant's husband.

Leonard Batiste further told law enforcement officials that a Geraldine Wallace was present when Wolzen was killed. Law enforcement officers, who had previously interviewed Wallace, reinterviewed her. At the second interview, she was known as Geraldine Wallace McGhee. She admitted being present at the beginning of the strangulation of Wolzen. McGhee said she lied during earlier interviews about the killing because she was afraid of Velma Batiste. McGhee was charged with, and

convicted of, false reporting, and thereafter was charged with failure to appear for her sentencing.

Velma Batiste was arrested and charged with killing Wolzen "purposely and with deliberate and premeditated malice," in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985). An initial information setting forth the first degree murder charge was filed March 18, 1986, in the Adams County District Court. On October 27, 1986, the defendant filed a motion for discharge, claiming that she had not been brought to trial within 6 months from the filing of the information on March 18, 1986. On October 29, 1986, the State dismissed the case without prejudice because McGhee could not be found for the scheduled December 1, 1986, trial. Batiste was released from jail.

McGhee was apprehended on February 23, 1987. The first degree murder charge against Velma Batiste was refiled in the Adams County Court on June 18, 1987. On August 3, 1987, the defendant waived her right to a preliminary hearing and was bound over to the Adams County District Court for trial. A second information charging Batiste with murder in the first degree was filed in the Adams County District Court on August 11, 1987. On October 1, 1987, the defendant again filed a motion for discharge, claiming she had not been brought to trial within 6 months from March 18, 1986, the date when the first information was filed. The motion was denied.

Following a 5-day trial, the jury, on November 2, 1987, returned a verdict finding the defendant guilty of murder in the first degree. On December 16, 1987, she was sentenced to life imprisonment.

The defendant first complains that she was not given a speedy trial and, therefore, should have been set free. Neb. Rev. Stat. § 29-1207 (Reissue 1985) provides that a defendant must be brought to trial within 6 months from the date the information setting forth the charge is filed. In the computation of the 6-month period, the statute permits exclusion of any delay attributable to the defendant. Attributable to the defendant in this case were those times she used to depose witnesses and to process motions to suppress evidence, motions in limine, and motions to continue.

According to the trial court, the State was chargeable with 81 days from the time the first information was filed until it was dismissed. The court found that an additional 48 days were chargeable to the State for the period between when the second information was filed and the commencement of the trial. Thus, the State used a total of 129 days before bringing the defendant to trial, well within the allotted 6-month period.

The defendant does not complain that the court's time computations are inaccurate but, rather, that at least a portion of the time between the dismissal of the first information and the filing of the second information should be included in calculating the 6-month period. Batiste argues that once the witness McGhee was located, the information should have been refiled. She claims that the time between locating the witness and the filing of the second information should be included in the 6-month period.

In *State v. Torrence*, 192 Neb. 720, 224 N.W.2d 177 (1974), *cert. denied* 420 U.S. 928, 95 S. Ct. 1127, 43 L. Ed. 2d 399 (1975), the defendant, on March 6, 1972, was charged with possession of heroin. On March 15, 1972, following a preliminary hearing, the charges were dismissed. Thereafter, this court, in *State v. McElroy*, 189 Neb. 376, 202 N.W.2d 752 (1972), decided December 8, 1972, clarified the law regarding possession of controlled substances. The charge against Torrence was refiled on April 9, 1973. He was convicted at a trial that began October 22, 1973. On appeal, Torrence claimed he was denied a speedy trial. This court found that the period between the dismissal of the original charges and the refiling of the charges was not includable, even though the State waited 4 months from the *McElroy* decision before refiling the charges.

In Batiste's case, the time between the dismissal and refiling of the charge is not includable in calculating the 6-month time period set forth in § 29-1207. The defendant's first assignment of error is without merit.

Next, we address whether there was sufficient evidence to support a first degree murder conviction. Section 28-303(1) (Reissue 1985) provides that murder in the first degree is committed when a person kills another person purposely and with deliberate and premeditated malice.

The defendant claims that the record lacks sufficient evidence to convict her of killing Wolzen. She further claims that if the evidence is sufficient to prove her guilty of killing Wolzen, there is insufficient evidence to show it was accompanied by deliberate and premeditated malice. The defendant argues that the most the evidence shows is that the killing was a result of a sudden quarrel, and, therefore, she could only be convicted of manslaughter.

> 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. Tatara, 230 Neb. 279, 280, 430 N.W.2d 692, 694 (1988); *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988).

Taking the view most favorable to the State, the evidence justified the jury's finding beyond a reasonable doubt that the defendant killed Wolzen. McGhee, a friend of the defendant's, testified she was present and witnessed the beginning of Wolzen's strangulation by Batiste in the bathroom where Wolzen's body was found. McGhee left Wolzen's apartment and went to her own apartment in the same complex. Later, Batiste joined her. When the defendant left McGhee's apartment, McGhee returned to the Wolzen apartment and found Wolzen dead on the bathroom floor.

Velma Batiste admitted to her brother-in-law, Leonard Batiste, that she had killed Wolzen. Leonard testified that when he displayed shock and said, "Don't be saying things like that if you didn't do it. That's nothing to be joking about," Velma Batiste declared, "I swear to God I did it."

Some of Wolzen's neck injuries were caused by a person with long fingernails, according to the pathologist who performed the autopsy on Wolzen. At the time of the killing, Velma Batiste wore long fingernails. Scientific examination also disclosed there were no dissimilarities between a hair found on the robe Wolzen was wearing when she died and the hair of the

defendant. There were seven similarities.

Batiste's motive for killing Wolzen, although not an element of murder in the first degree, was established by the evidence beyond a reasonable doubt. McGhee testified that shortly before the victim was killed, Batiste accused Wolzen of having a sexual relationship with the defendant's husband. When Wolzen denied it, Batiste became upset. After Wolzen's death, Batiste told at least two people that Wolzen got what she deserved. Terrence Batiste, the defendant's husband, testified that he had been sexually intimate with Wolzen in the months prior to her death. From this and other evidence that will be related later, it is obvious that Wolzen was killed because of her sexual relationship with Batiste's husband.

McGhee testified that on the evening of the killing, while she was visiting with Wolzen in Wolzen's kitchen, Batiste appeared outside of some sliding doors. Wolzen let her into the kitchen. McGhee further testified that the three women were seated at the kitchen table talking when the victim got up and went into the bathroom. The defendant followed Wolzen into the bathroom. According to McGhee, "Velma asked Patty why she was denying it [sleeping with Velma's husband]." Then Batiste said she "was going to kill her," meaning Wolzen, McGhee testified. McGhee walked down the hallway and looked into the bathroom.

McGhee saw Batiste standing in front of Wolzen, who was facing the defendant. The witness testified that Batiste had her hands in the area of Wolzen's neck. McGhee said Wolzen was "gasping for air" and that Batiste appeared upset and was calling Wolzen a liar. It was at that point, McGhee testified, she left Wolzen's apartment. As previously recited, McGhee returned to Wolzen's apartment and found the victim dead on the bathroom floor.

Contrary to Batiste's claim, there was sufficient evidence from which a jury could find beyond a reasonable doubt that the defendant killed Wolzen.

The defendant argues that even if the evidence shows beyond a reasonable doubt that she killed Wolzen, the evidence is only sufficient to prove her guilty of manslaughter, i.e., killing Wolzen without malice upon a sudden quarrel, and not murder

in the first degree.

Section 28-303 provides in part that "[a] person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice."

Under the homicide statutes, whether a killing constitutes manslaughter or murder in the first degree depends upon the state of mind of the killer. When it is claimed that the killing was upon a sudden quarrel, there are three elements of the crime of manslaughter: (1) the killing of another, (2) upon a sudden quarrel, and (3) without malice. Neb. Rev. Stat. § 28-305 (Reissue 1985). The third element of manslaughter concerns the state of mind of the killer. "Malice," in a legal sense, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. See, *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983); *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982); *Sall v. State*, 157 Neb. 688, 61 N.W.2d 256 (1953). Thus, to constitute manslaughter, the slayer must have no intention of doing the wrongful act of killing another without just cause or excuse. In the present case, Batiste does not argue that there was any legal just cause or legal excuse for the killing of Wolzen.

If the facts of a killing establish beyond a reasonable doubt that the killing is done intentionally without legal cause or excuse, then there is malice, and the degree of killing is greater than manslaughter because malice is involved. The facts developed by direct and circumstantial evidence concerning Wolzen's death clearly justified the jury in finding beyond a reasonable doubt a higher degree of homicide than manslaughter.

The evidence is overwhelming that Batiste killed Wolzen "purposely," one of the elements required to be proved beyond a reasonable doubt to convict a person of murder in the first degree. "Purposely" means "intentionally." *Pembrook v. State*, 117 Neb. 759, 222 N.W. 956 (1929). See *State v. Schott*, 222 Neb. 456, 462, 384 N.W.2d 620, 624 (1986), where, citing *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983), we held: "*Intentionally* means willfully or purposely and not accidentally or involuntarily."

Whether intent, premeditated malice, or deliberate malice is

present when the actor kills another depends upon the actor's state of mind and mental processes. Intent, like any mental process or other state of mind of a defendant, may be proved not only by direct but also by circumstantial evidence and the inferences to be drawn therefrom. See *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). The law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

McGhee testified that before committing the act of killing Wolzen, Batiste had declared she "was going to kill" the victim. It was after that statement that Wolzen was killed. A babysitter for Batiste's children testified that a few days after Wolzen was killed, Batiste told her that on the day before the killing, the defendant had gone to Wolzen's apartment with a knife. The babysitter quoted Batiste as saying that the victim "was lucky she wasn't there or didn't answer the door."

The babysitter further testified that about a week before the killing, the defendant had appeared "really mad" because the defendant and her husband "wanted to try and get things back together and that Patty was in the way." The babysitter said Batiste told her that "[s]he [Wolzen] had better keep her white ass out of it, or she would keep it out for her." Wolzen was of the white race. The defendant and her husband are of the black race. Deborah Kuhlman Kruse, a friend of Wolzen's, testified that a couple of weeks prior to her death, Wolzen said she told Terry Batiste to stay away, but he kept coming to see her. Wolzen said, "I don't want her [Batiste] to come in and knock me around my kitchen no more."

While Velma Batiste and Wolzen were in the bathroom, McGhee testified, she heard "a hit, like skin hitting flesh." The autopsy revealed a hemorrhage on the right side of the scalp tissue and in the muscle overlying the bone in the right temple. It was caused by blunt force being applied to the area, according to the pathologist.

In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences

that may be drawn therefrom. *State v. Zemunski*, 230 Neb. 954, 434 N.W.2d 520 (1989); *State v. Jones*, 230 Neb. 968, 434 N.W.2d 333 (1989). Therefore, the length of time it takes to strangle another may be considered significant in determining the intent of the killer.

The testimony of the pathologist, Dr. Jerry Jones, who performed the autopsy on Wolzen, is illuminating on this point. He testified in part:

> The time frame from the time that strangling began, until the episode or assault would end, would be a period of many minutes. You can't strangle someone in a short period of time. A person may become unconscious, perhaps within 30 seconds or so, but they will not be killed in this period of time. It takes many minutes in order to kill somebody.
>
> People who have admitted to strangling people have indicated that three or four minutes later, if they have released the pressure, that person will begin to breathe again and the heart rate is still going.
>
> So pressure has to continue to be applied for perhaps up to ten to thirteen minutes or more, continually, in order to effectively kill somebody. During this period, again, the heart will be beating so that although there is nothing absolutely as far as a time frame in my opinion, from my experience, and knowing the medical-legal literature, that it would take a period of many minutes. At least four to five minutes, and perhaps up to nine, ten or thirteen minutes or more in order to effectively strangle somebody and to kill them.

The pathologist also testified:

> It would take a person with a great deal of intent and anger, and continual pressure, to produce the injuries present. These are extraordinary in the sense that they are also so extensive on the surface of the skin, and also in the tissues underneath. So, again, in my opinion, this would indicate a great deal of pressure. It would not indicate necessarily the size of the individual.

Batiste's statements that "Patty [Wolzen] was in the way," that "[s]he [Wolzen] had better keep her white ass out of it, or

she would keep it out for her," that the victim "got what she deserved" for having a sexual relationship with the defendant's husband, and that she (Batiste) was going to kill Wolzen, together with the defendant's prior acts of knocking Wolzen around and of going to Wolzen's apartment with a knife the day before the killing and then stating that the victim "was lucky she wasn't there or didn't answer the door," are words and conduct from which a jury could conclude beyond a reasonable doubt that Batiste intentionally killed Wolzen.

The type and severity of the injuries to Wolzen's neck, the injuries to the victim caused by blunt force, and the length of time it takes to kill a person by strangulation leave no doubt that Batiste intended to kill her victim.

Having found there was sufficient evidence to convict the defendant of intentionally killing Wolzen, we now focus on whether there was sufficient evidence for a jury to determine beyond a reasonable doubt that Batiste had the deliberate and premeditated malice required to convict her of murder in the first degree.

To constitute murder in the first degree, there must have been an unlawful killing done purposely and with deliberate and premeditated malice. § 28-303.

"Deliberate malice" and "premeditated malice" are separate and distinct elements of the crime of murder in the first degree. *Pembrook v. State*, 117 Neb. 759, 222 N.W. 956 (1929).

"Deliberate" means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. See NJI 14.10. Cf. *Pembrook v. State, supra* (for origin of language). A person kills with "deliberate malice" when he or she, without just cause or excuse, kills another not suddenly or rashly, but after considering the probable consequences of doing the act.

"Premeditated" means to have formed a design to commit an act before it is done. See Neb. Rev. Stat. § 28-302 (Reissue 1985). A person kills with "premeditated malice" if before the act causing the death occurs, he or she has formed the intent or determined to kill the victim without legal justification. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). In *State v. Benzel*,

220 Neb. 466, 470, 370 N.W.2d 501, 506-07 (1985), this court stated:

> The question of premeditation was for the jury to determine. *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984). No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. *Jones, supra*; *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975); *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901). The time needed for premeditation may be so short as to be instantaneous; the intent to kill may be formed at any moment before the homicide is committed. *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975); *Nokes, supra*.

See, also, *State v. Kern, supra*.

Batiste's prior statements, her prior acts, and her declared intent to kill Wolzen immediately before committing the act show that Batiste had consciously formed the intent or determined to kill Wolzen without legal justification. The facts show that Batiste did not suddenly or rashly kill Wolzen. The facts show that before Batiste killed Wolzen, she considered the probable consequences of doing the act. From the evidence, the jury could find beyond a reasonable doubt that Batiste acted with deliberate malice and premeditated malice in killing Wolzen.

The defendant next argues that the court erred by refusing to reopen the case to allow additional testimony. A motion to reopen a criminal case to allow introduction of further evidence is addressed to the discretion of the trial court. See, *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980); *State v. Crouch*, 205 Neb. 781, 290 N.W.2d 207 (1980); *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977).

The testimony the defendant wished to present was that of DeAnn Patterson Ginn, who had previously testified in the State's case in chief. The purpose of recalling Ginn was to clarify whether her earlier testimony related to threats or advice from Batiste. The State objected to recalling Ginn for the purposes stated by defense counsel, and the objection was sustained.

Additional testimony by Ginn would have been repetitive of evidence already in the record. Ginn's original testimony gives no indication that she perceived Batiste's comments to her to be threats. Therefore, the trial court's refusal to reopen the case to allow Ginn's testimony presents no abuse of discretion.

The defendant's final assignment of error alleges that the trial court erred in overruling a motion for a new trial based upon newly discovered evidence.

Denial of a motion for new trial based on newly discovered evidence is controlled by our holding in *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985), that a motion for new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed. See, *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987); *State v. Todd*, 226 Neb. 906, 416 N.W.2d 13 (1987).

Neb. Rev. Stat. § 29-2103 (Reissue 1985) provides:

> In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict upon which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial....

This court has stated that new evidence in support of such motion " ' "must be so potent that, by strengthening evidence already offered, a new trial would *probably* result in a different verdict." ' " *State v. Bideaux, supra* at 726, 365 N.W.2d at 835; *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981). See, also, *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980). The newly discovered evidence must be relevant and credible, and not merely cumulative. *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980); *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979).

At the hearing on the motion for a new trial, Sherrie Thaut, a neighbor of Wolzen's, testified that during the evening of December 4, 1982, she saw a blue pickup truck leave the front

of Wolzen's apartment complex and back into a driveway across the street. Thaut also testified that after Wolzen's funeral she saw Terry Wolzen, the victim's estranged husband, driving a blue pickup. Thaut said Terry Wolzen's pickup looked like the one she had seen turning around in the driveway on December 4, 1982.

During cross-examination, the witness admitted that she had merely seen the pickup turn around on the night of December 4, 1982, but had never observed it parked in front of Patty Wolzen's apartment. Thaut did not identify the driver or passengers of the pickup. Additionally, Thaut testified that she did not know whether the pickup truck that she saw on December 4, 1982, was the same one that she saw driven by Terry Wolzen. Thaut admitted that she did not know much about pickups.

Prior to Batiste's trial, Thaut had been interviewed by investigating officers. A report of that interview provided, in part, that "Cherie [sic] also stated that she had seen, once in a while, a light blue pickup. She had seen it leave Saturday night after 0100 hrs." An investigator for the public defender testified that he had reviewed the law enforcement reports concerning Thaut's testimony and had interviewed Thaut at one time, but there had been no further followup regarding Thaut's knowledge of any relevant events.

Clearly, the defendant was aware of Thaut's report of seeing a blue pickup in the area of Wolzen's apartment. That information was not acted upon until after trial. After reviewing the evidence which Thaut presented to the court at the hearing on the motion for new trial, we cannot see how this evidence would be relevant to the defendant's case or is of such probative value that its introduction would be likely to change the result. The ruling of the trial court is well within the limits of its discretion and consequently will not be disturbed.

We have reviewed all of defendant's assignments of error and find them to be without merit. The conviction and sentence of the district court are affirmed.

AFFIRMED.