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REPORTS OF CASES

DECIDED BETWEEN

JULY 28, 1989 and DECEMBER 7, 1989

IN THE

Supreme Court of Nebraska

VOLUME CCXXXIII

STEVEN R. SCHROEDER

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By Steven R. Schroeder, 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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JOSEPH C. STEELE ..... State Court Administrator

[1]Appointed September 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
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		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
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		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
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		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	William H. Norton	Osceola
		Bryce Bartu	Seward
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		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
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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
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		Gale Pokorny	Lincoln
		Janice L. Gradwohl	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
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		Walter H. Cropper	Omaha
		John J. McGrath	Omaha
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		Robert C. Vondrasek	Omaha
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		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark 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	Stephen P. Finn Philip R. Riley	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	Lloyd G. Kaufman Kristine R. Cecava James M. O'Rourke	Lexington Ogallala North Platte
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
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 85-610: **Lincoln Production Credit Assn. v. Brauer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-787: **The Federal Land Bank of Omaha v. Walker.** Stipulation allowed; appeal dismissed.

No. 87-224: **Hardin v. Rierden.** Stipulation to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. 87-428: **Witherspoon v. Sides Construction.** Stipulation allowed; appeal dismissed.

No. 87-510: **Production Credit Assn. v. Hoeting.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-981: **Loos v. Department of Social Services.** Stipulation allowed; appeal dismissed.

No. 87-1099: **King v. Plunkett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-043: **K N Energy v. City of Edgar.** Stipulation allowed; appeal dismissed.

No. 88-106: **Krolikowski v. Krolikowski.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-260: **Scottsbluff National Bank v. Foos.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-370: **Terry v. Terry.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-518: **LaChateau de Coshons v. Jacobs.** Stipulation allowed; appeal dismissed.

No. 88-546: **In re Estate of Driskell.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-553: **Van Valkenburg v. Pioneer Land Improvement, Inc.** Stipulation allowed; appeal dismissed.

No. 88-568: **Andelt v. Beasley.** Stipulation allowed; appeal

dismissed; each party to pay own costs.

No. 88-596: **LaChateau de Coshons v. Jacobs.** Stipulation allowed; appeal dismissed.

No. 88-637: **Cottam v. Cottam.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-644: **Jacobs v. LaChateau de Coshons.** Stipulation allowed; appeal dismissed.

No. 88-670: **Corfield v. Emerson Electric Co.** Motion and stipulation to dismiss appeal sustained; appeal dismissed.

No. 88-773: **In re Estate of Watkins.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-846: **LaChateau de Coshons v. Jacobs.** Stipulation allowed; appeal dismissed.

No. 88-889: **Peterson v. Lopez.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-958: **Cidlik v. Cidlik.** Stipulation allowed; appeal dismissed.

No. 88-959: **Travelers Ins. Co. v. Nelson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-1010: **Brown v. Charles Sargent Irrigation.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 88-1071: **State v. Taylor.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 88-1083: **State v. Brown.** Affirmed. See Rule 7A(1).

No. 89-001: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-023: **State v. Brega.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-026: **West Town Homeowners v. Schneider.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-031: **State v. Burgess.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-033: **CVN Companies, Inc. v. Bob Cummins Enterprises, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-044: **Federal Land Bank v. Germer.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-057: **Jecha v. Vavra.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-068: **State v. Kitt.** By order of the court, appeal dismissed as moot.

No. 89-072: **Jacox v. Spivak.** Stipulation allowed; appeal dismissed.

No. 89-074: **State v. Mahlberg.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-092: **Ponec v. Ponec.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-098: **State v. Todd.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-118: **State v. Davenport.** Affirmed. See Rule 7A(1).

No. 89-128: **Swanson v. Swanson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-146: **Graber v. Graber.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-150: **City of LaVista v. Long.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-156: **Briarhurst West Neighborhood Assn. v. Boggs.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-158: **Burkey v. Burkey.** Motion sustained; appeal dismissed.

No. 89-177: **Thrasher v. Smith Laboratories, Inc.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-180: **Byars v. CNA-Fruehauf.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-184: **State v. Peterson.** Affirmed. See Rule 7A(1).

No. 89-188: **State v. Hartmann.** By order of the court, appeal dismissed as moot.

No. 89-193: **Brott v. Simon.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-197: **State v. Peterson.** Affirmed. See Rule 7A(1).

No. 89-201: **State v. Rabago.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

Nos. 89-210, 89-211, 89-212, 89-213: **State v. Bean.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-223: **State v. Golle.** Affirmed. See Rule 7A(1).

No. 89-238: **Troia v. Steak & Ale.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-304: **State v. Conatella.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-307: **State v. Myre.** Motion of appellee for summary affirmance sustained; jugment affirmed; see Rule 7B(2).

No. 89-311: **State v. Atkinson.** Affirmed. See Rule 7A(1).

No. 89-314: **State v. Clark.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-315: **Mark v. Green.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-319: **State v. Keck.** Affirmed. See Rule 7A(1).

No. 89-320: **State v. Nottlemann.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-325: **State v. Achziger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-326: **State v. Beck.** Affirmed. See Rule 7A(1).

No. 89-332: **Stanko v. Stanko.** Stipulation to remand cause to district court for further action sustained.

No. 89-333: **Stanko v. Stanko.** Stipulation to remand cause to district court for further action sustained.

No. 89-342: **Hulac, Inc. v. Ueding.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-344: **State v. Hubbard.** Affirmed. See Rule 7A(1).

No. 89-346: **State v. Vrtatko.** Affirmed. See Rule 7A(1).

No. 89-348: **State v. Williamson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-349: **State v. Williamson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-350: **Bode v. James E. Simon Co.** Motion of

appellant to dismiss appeal sustained; appeal dismissed.

No. 89-355: **State v. Griffin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-356: **State v. Porter.** Affirmed. See Rule 7A(1).

No. 89-365: **State v. Yager.** Affirmed. See Rule 7A(1).

No. 89-372: **State v. Thulin.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-374: **Norwest Bank Nebraska v. Friborg.** Stipulation allowed; appeal dismissed with prejudice.

No. 89-375: **State v. Humphrey.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-378: **Department of Health v. Engen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-379: **State v. Goings.** Affirmed. See Rule 7A(1).

No. 89-383: **Studebaker v. Studebaker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-386: **State v. Hicks.** Appeal dismissed. See Rule 7A(2).

No. 89-390: **State v. Sheldon.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-392: **Burton v. United of Omaha Life Ins.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

Nos. 89-396, 89-397: **State v. Graham.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-404: **In re Estate of Sim.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-407: **State v. Johnson.** Affirmed. See Rule 7A(1).

No. 89-408: **State v. Brothwell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-417: **State v. Jenkins.** Affirmed. See Rule 7A(1).

No. 89-419: **State v. Bicking.** Appeal dismissed. See Rule 7A(2).

No. 89-420: **State v. Rogers.** Motion of appellee for

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

No. 89-421: **State v. Kennedy.** Affirmed. See Rule 7A(1).

No. 89-422: **State v. Broadstone.** Affirmed. See Rule 7A(1).

No. 89-423: **Myers v. Lewis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-430: **State v. Trejo.** Affirmed. See Rule 7A(1).

No. 89-431: **State v. Alire.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-432: **State v. Ritter.** Motion of appellee for summary affirmance sustained; jugment affirmed; see Rule 7B(2).

No. 89-433: **State v. Uecker.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-438: **Thomas v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-441: **State v. Wagner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-443: **In re Estate of Morgan.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-446: **State v. Bittner.** Stipulation allowed; appeal dismissed.

No. 89-449: **Keane v. Keane.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-450: **Hobbs v. Schaffer.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-459: **State v. Little Thunder.** Affirmed. See Rule 7A(1).

No. 89-460: **State v. Little Thunder.** Affirmed. See Rule 7A(1).

No. 89-461: **Ecabert v. Ecabert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-467: **Madden v. List.** Stipulation allowed; appeal dismissed.

No. 89-468: **State v. Baustian.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-470: **State v. Hamburger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 89-471: **Heritage of Bridgeport v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-474: **Cole v. Tussing.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-476: **Nwoke v. Brannon.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-480: **State v. McBride.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-493: **State v. Campbell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-497: **Burhoop v. Burhoop.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-504: **State v. Sheeks.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-505: **In re Interest of Dedrick.** Stipulation allowed; appeal dismissed.

No. 89-509: **State v. Tankersley.** Affirmed. See Rule 7A(1).

No. 89-510: **Cloverlodge Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-511: **Terrace Hill Manor v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-512: **Fremont Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-513: **Kinder Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-514: **Heritage of Bel-Air v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-515: **Milder Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-516: **Sprague Nursing Home v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-517: **Heritage of David City v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-518: **Heritage of Fairbury v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-519: **Heritage Health Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-520: **St. Joseph Gerontology Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-521: **Archbishop Bergan Mercy Hospital v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-522: **Hooper Care Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-523: **County of Lancaster v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-524: **Memorial Hospital v. Department of Administrative Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-525: **Heritage Living Center v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-526: **Colonial Acres Nursing Home v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-527: **Our Lady of Lourdes Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-528: **Beatrice Community Hospital and Health Center, Inc. v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of

a final order.

No. 89-529: **Good Shepherd Lutheran Home v. Department of Administrative Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-530: **Lutheran Community Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-531: **Community Memorial Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-532: **Tri-County Area Hospital District v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-533: **The Community Hospital Association v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-534: **Cheyenne County Hospital Association, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-535: **Perkins County Community Hosp. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-536: **Henderson Community Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-537: **Bishop Clarkson Memorial Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-538: **Nebraska Psychiatric Institute v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-539: **The University Hospital Hillcrest Nursing Home v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-540: **Richard Young Memorial Hospital v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-541: **Lutheran General Hospital v. Department of**

Social Services. No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

Nos. 89-542 to 89-553: **Bethesda Foundation v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 89-554 to 89-578: **Evangelical Lutheran Good Samaritan Society v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-579: **Bryan Memorial Hospital v. Department of Social Services.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-580: **Arbor Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-581: **Platte Valley Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-582: **Platte Valley Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-583: **City of Bayard v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-584: **Matney's Colonial Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-585: **City of Laurel v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-586: **Crowell Memorial Home v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-587: **Heritage of North Platte v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-588: **Tabitha, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-589: **St. Joseph's Nursing Home, Inc. v. Department**

of Social Services. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-590: **Golden Five, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-591: **City of Lincoln v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-592: **Immanuel Medical Center v. Department of Social Services.** No cause having been shown, by order of the court, appeal dismissed for lack of a final order.

No. 89-593: **Martin Luther Home Society, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-594: **City of Imperial v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-595: **City of Crawford v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-596: **Village Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-597: **The Lutheran Home v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-598: **American Baptist Homes of the Midwest v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-599: **Frenchman Valley Development Corporation v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-600: **Mid America Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-601: **Sarah Ann Hester Memorial Home v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-602: **Slack Nursing Home, Inc. v. Department of**

Social Services. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-603: **Elms Health Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-604: **Village of Verdigre v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-605: **Blue Valley Lutheran Home Society, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-606: **Christian Homes, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-607: **Pawnee Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-608: **Pierce Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-609: **Village of Bemer v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-610: **Village of Coleridge v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-611: **Bethphage Mission, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-612: **Bethphage Mission, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-613: **City of Fairmont v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-614: **Village of Greeley v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-615: **City of Wilber v. Department of Social Services.**

Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-616: **City of Oakland v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-617: **City of Madison v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-618: **County of Kimball v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-619: **City of Rushville v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-620: **City of Stanton v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-621: **Methodist Memorial Homes, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-622: **Valley View of North Platte, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-623: **Hillcrest Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-624: **Papillion Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-625: **Logan Valley Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-626: **Nebraska Nursing Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-627: **Ketter Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-628: **Sutton Community Home Corporation v.**

Department of Social Services. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-629: **Village of Stuart v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-630: **County of Garden v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-631: **County of Garden v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-632: **Friendship Villas Ltd., Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-633: **Heritage of Geneva, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-634: **North Bend Senior Citizens Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-635: **K.S.R.C., Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-636: **Mother Hull Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-637: **Regal Care Center, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-638: **Beatrice Manor, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-639: **Midland Villa Nursing Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-640: **Village of Trenton v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-641: **County of Red Willow v. Department of Social**

Services. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-642: **Crete Nursing Home, Inc. v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-643: **Schmalenbach v. Allied Insurance Group.** Motion sustained; appeal dismissed.

No. 89-644: **Rosberg v. Jacob.** By order of the court, case dismissed for want of prosecution.

No. 89-645: **Kossack v. Kossack.** Stipulation allowed; appeal dismissed.

No. 89-646: **State v. Eucker.** Affirmed. See Rule 7A(1).

No. 89-648: **Miller v. Millerville Ranch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-652: **State v. Synowiecki.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-654: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-659: **State v. Garrett.** Affirmed. Grant, Judge.

No. 89-662: **State v. Brewer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-666: **State v. Proctor.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-667: **J.D. Partnership v. County of Douglas.** Joint motion for dismissal sustained; appeal dismissed with prejudice.

No. 89-668: **Liesche v. County of Douglas.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-669: **State v. Moss.** Affirmed. See Rule 7A(1).

No. 89-671: **Stennis v. Nelson & Harding.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-674: **Kitt v. Clark.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 89-679: **State v. Robertus.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 89-683: **Bockhahn v. City of Grand Island.** Stipulation allowed; appeal dismissed.

No. 89-687: **State v. Friis.** Affirmed. See Rule 7A(1).

No. 89-688: **EMM Company v. H & H Transmissions.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-689: **Tucker v. Tucker.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-694: **Stanko v. Stanko.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 89-695: **Citizens State Bank v. KO Limited Partnership.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-696: **State v. Cook.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-699: **State v. Block.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-701: **Kostolich v. Sherwood Homes, Inc.** Stipulation allowed; appeal dismissed.

No. 89-702: **State v. Dack.** Affirmed. See Rule 7A(1).

Nos. 89-703, 89-704: **State v. Sterba.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-706: **State v. Little.** Affirmed. See Rule 7A(1).

No. 89-709: **First United Bank of Bellevue v. Pelton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-715: **State v. Cisneros.** Affirmed. See Rule 7A(1).

No. 89-717: **State v. Rodriguez.** Affirmed. See Rule 7A(1).

No. 89-718: **Kitt v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 89-720: **Kong-Boonrod v. Moon.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 89-723: **Feik v. Feik.** Stipulation allowed; appeal dismissed.

No. 89-726: **State v. Van DeMark.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-727: **State v. Colby.** Motion of appellee for summary

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

No. 89-741: **State v. Scott.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-742: **State v. Santee.** Affirmed. See Rule 7A(1).

No. 89-749: **State v. Jones.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-752: **State v. Messersmith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-757: **Hasselmann v. Hasselmann.** Stipulation allowed; appeal dismissed.

No. 89-760: **State v. Matthews.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-778: **State v. Hill.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-787: **State v. Gardner.** Affirmed. See Rule 7A(1).

No. 89-788: **State v. Strickland.** Affirmed. See Rule 7A(1).

No. 89-801: **State v. Royal.** Motion of appellee for summary affirmance sustained; see Rule 7B(2).

No. 89-813: **Bryant v. Owen.** Stipulation allowed; appeal dismissed.

No. 89-822: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-827: **Armstrong v. State of Nebraska.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-841: **Weiner v. Ancona Bros.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

Nos. 89-854, 89-855, 89-856: **In re Conservatorship of Parkos.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-884: **First National Bank v. Baker.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-1015: **First National Bank Holdrege v. Board of Equal.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1162: **Morrison v. The Seamless Raingutter Co.** Stipulation allowed; appeal dismissed.

No. 89-1176: **Adams Bank & Trust v. United Fire & Casualty Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-1190: **Wilson v. Wilson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1201: **Atlas Engineering Co. v. American National Bank.** By order of the court, appeal dismissed pursuant to order to show cause dated September 26, 1989.

No. 89-1216: **State v. Harbour.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-1237: **Kitt v. Lamb.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-1255: **Freezer Services, Inc. v. Waller.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-1261: **Mundt v. City of Alliance.** Stipulation allowed; appeal dismissed.

No. 89-1283: **Hogan v. Malashock.** Stipulation allowed; appeal dismissed.

No. 89-1319: **Ameritrade, Inc. v. Perelman-Carley & Assoc.** Stipulation allowed; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BERNARD ODDO, APPELLEE, V. SPEEDWAY SCAFFOLD COMPANY, APPELLEE, CONTRACTOR ASSOCIATES, INC., APPELLANT.

443 N.W.2d 596

Filed July 28, 1989. No. 87-875.

1. **Agency: Words and Phrases.** An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act.
2. **Principal and Agent.** The scope of an agent's authority is a question of fact.
3. **Principal and Agent: Words and Phrases.** In the relationship of principal and agent, an agent's actual authority is the power to act on the principal's behalf in accordance with the principal's consent to the agency.
4. **Contracts.** One who signs a document without reading it cannot later avoid the effect of the signed document by claiming lack of knowledge concerning the document's contents.
5. **Workers' Compensation: Liability: Contracts.** When an employer, liable to an employee under the Nebraska Workers' Compensation Act, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the Workers' Compensation Act does not preclude the third party's action to enforce the indemnity agreement with the indemnitor-employer.
6. **Contracts: Words and Phrases.** An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts.
7. **Contracts: Negligence: Intent.** An indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.
8. **Contracts: Negligence.** Neb. Rev. Stat. § 48-425 (Reissue 1988) does not preclude indemnification against a breach of the statutory duty concerning scaffolding.
9. **Contracts: Damages: Trial.** A factual question concerning damages recoverable in an action on an indemnity agreement, whether such question involves causation or amount of damages, is a matter for the fact finder.

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

Richard L. Walentine and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Michael F. Kinney, of Cassem, Tierney, Adams, Gotch & Douglas, and Michael E. Waldeck and Randa Rawlins, of Niewald, Waldeck, Norris & Brown, for appellee Speedway Scaffold.

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

SHANAHAN, J.

As the result of a bench trial, Speedway Scaffold Company (Speedway) recovered a judgment against Contractor Associates, Inc. (Contractor), for $1,114,989.10 based on an indemnity agreement. Contractor appeals and claims that the district court erred in finding that Speedway was entitled to contractual indemnity, and in finding that Contractor was liable to pay an attorney fee for counsel representing the insurance carrier for Speedway's excess coverage.

STANDARD OF REVIEW

In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the evidence in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988); *Alliance Nat. Bank v. State Surety Co., supra*; *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988).

FACTS

Since 1979, Contractor, a masonry contractor, periodically leased scaffolding equipment from Speedway. When Contractor needed scaffolding, its president, Jesse Sutton,

contacted Speedway and ordered scaffolding, which was delivered to the site of Contractor's work. On delivery of scaffolding, Speedway required the signature of a Contractor employee on a written lease and retained the signed original of the lease. Contractor received a copy of the signed lease. Although Speedway sometimes erected scaffolding for other customers, Contractor usually erected the scaffolding by itself.

If Contractor failed to return all the scaffolding at the end of the lease, Speedway continued to charge Contractor rent for the unreturned equipment. However, if Contractor informed Speedway that Contractor would keep the equipment, Speedway billed Contractor for the price of the equipment retained.

In October 1980, Speedway revised the form of its standard lease and used the new form in all lease transactions from that time. The front of the lease form reflected the lessee's name, the type and amount of scaffolding involved, the date when the scaffolding was ordered, and the location where the scaffolding was delivered. The front of the form also had a place for a signature underneath the words "Received Equipment In Good Order and Subject to Conditions of Rental By [blank line]." Immediately beneath the signature line the following was printed in bold uppercase letters: "NOTE: SEE REVERSE SIDE FOR TERMS AND CONDITIONS OF LEASE. ALL WARRANTIES DISCLAIMED." The reverse side of Speedway's revised form contained 18 numbered paragraphs expressing conditions of the lease. Most of the paragraphs were in standard type, with conventional upper and lowercase letters. However, at the center of the reverse side, in uppercase bold print, the following appeared:

> 11. INDEMNIFICATION: LESSEE SHALL INDEMNIFY AND DEFEND LESSOR AGAINST AND HOLD LESSOR HARMLESS FROM ANY AND ALL CLAIMS, ACTIONS, SUITS, PROCEEDINGS, COSTS, EXPENSES, DAMAGES AND LIABILITIES, INCLUDING ATTORNEY'S FEES WHICH:
>
> (1) RELATE TO INJURY OR TO DESTRUCTION OF PROPERTY, OR BODILY INJURY, ILLNESS, SICKNESS, DISEASE OR DEATH OF ANY PERSON

(INCLUDING EMPLOYEES OF LESSEE), AND;

(2) ARE CAUSED, OR CLAIMED TO BE CAUSED, IN WHOLE OR IN PART BY THE EQUIPMENT LEASED HEREIN OR BY THE LIABILITY OR CONDUCT (INCLUDING ACTIVE, PASSIVE, PRIMARY OR SECONDARY) OF LESSOR, ITS AGENTS OR EMPLOYEES, OR ANYONE FOR WHOSE ACTS ANY OF THEM MAY BE LIABLE. THE PARTIES AGREE THAT LESSOR SHALL ONLY BE LIABLE OR RESPONSIBLE FOR ACTIONS OF WILFUL MISCONDUCT.

LESSEE SHALL, AT ITS OWN COST AND EXPENSE, DEFEND LESSOR AGAINST ALL SUITS OR PROCEEDINGS COMMENCED BY ANYONE IN WHICH LESSOR IS NAMED A PARTY FOR WHICH LESSOR IS ALLEGED TO BE LIABLE OR RESPONSIBLE AS A RESULT OF OR ARISING OUT OF THE EQUIPMENT OR ANY ALLEGED ACT OR OMISSION BY LESSOR, AND LESSEE SHALL BE LIABLE AND RESPONSIBLE FOR ALL COST, EXPENSES AND ATTORNEY'S FEES INCURRED IN SUCH DEFENSE AND/OR SETTLEMENT, JUDGMENT OR OTHER RESOLUTION. IN THE EVENT THAT SUCH ACTION IS COMMENCED NAMING LESSOR AS A PARTY, LESSOR MAY ELECT TO DEFEND ACTION ON ITS OWN BEHALF AND LESSEE AGREES THAT IT SHALL BE LIABLE FOR ALL COSTS, EXPENSES AND ATTORNEY'S FEES INCURRED BY LESSOR IN SUCH DEFENSE.

PURPOSE OF THIS CLAUSE: IT IS THE PURPOSE OF THIS CLAUSE TO SHIFT THE RISK OF ALL CLAIMS RELATING TO THE LEASED PROPERTY TO THE LESSEE DURING THE ENTIRE TERM OF THIS LEASE.

Contractor kept all its copies of Speedway leases in a folder at Contractor's office, where the leases were available for review if needed or desired. On various occasions, Sutton had seen the Speedway leases and read some of the provisions on the back of the lease forms, although he did not recall having read

the indemnity provision contained in paragraph 11 on the reverse side of each Speedway lease. However, Sutton understood the concept and consequences of indemnity. All Contractor employees at the jobsite were authorized to sign the lease form which accompanied scaffolding deliveries from Speedway. Sutton never informed Speedway that Contractor would not accept the indemnity provision in Speedway's leases and never limited the authority of Contractor employees to sign a lease, which always accompanied scaffolding deliveries from Speedway.

After 2 years of periodic leasing from Speedway pursuant to the lease form revised in 1980, Sutton called Speedway on November 17, 1982, and ordered scaffolding under a lease, which was to be delivered by Speedway and erected by Contractor at its jobsite. Speedway delivered the scaffolding as requested. Although the signature on the lease form which accompanied the order is somewhat illegible, Sutton acknowledged that the signature "looks like it was Harvey Cowan," a mason tender for Contractor, who signed the lease bearing the acknowledgment that Cowan had received the scaffolding subject to the conditions on the reverse side of the form.

On November 18, 1982, some of Speedway's scaffolding, which was delivered on November 17, collapsed on account of a failure in the material brackets for the scaffolding and injured Bernard Oddo, one of Contractor's employees. Evidence indicated that Contractor, sometime after November 18, purchased from Speedway the material brackets which were found to be defective. Oddo sued Speedway for negligence and joined Contractor pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1988) to determine Contractor's subrogation interest as the result of workers' compensation benefits paid to Oddo. On the basis of the indemnity agreement in the scaffolding lease, Speedway cross-petitioned against Contractor and sought indemnification for any loss sustained as the result of Oddo's claim.

Two law firms participated in Speedway's defense to Oddo's action. Cassem, Tierney, Adams, Gotch & Douglas of Omaha represented Speedway's primary liability insurance carrier,

Western Insurance Company, which supplied coverage with a $500,000 limit. Niewald, Waldeck, Norris & Brown of Kansas City, Missouri, represented Speedway's excess insurance carrier, Stonewall Insurance Company. Expert testimony showed that separate representation by the two insurance companies was necessary because conflicts between the companies' interests might develop during the litigation. An expert testified that the effort expended on the case and the fees charged by the Niewald, Waldeck firm were fair and reasonable.

Eventually, Speedway settled with Oddo for $1,033,073.82 and incurred attorney fees and other expenses of $81,915.28, including Niewald, Waldeck's fee of $23,203.21, in defense of Oddo's claim. The district court awarded Speedway $1,114,989.10 in its cross-petition against Contractor, the combined amounts of the Oddo settlement and the costs of defense.

COWAN'S SIGNATURE AND AUTHORITY

Contractor argues that the court erred in finding that Cowan signed the lease for the scaffolding involved in the Oddo accident and in finding that Cowan had authority to bind Contractor to the indemnity provision in the Speedway lease.

Regarding the signature attributable to Cowan as an employee of Contractor, Sutton acknowledged that the signature appeared to be Cowan's. Contractor presented no evidence that Cowan did not sign the lease. The evidence supports the district court's factual conclusion that Cowan signed the Speedway lease.

"An agency is a fiduciary relationship, resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and, further, resulting from another's consent to so act." *Dunn v. Hemberger*, 230 Neb. 171, 180, 430 N.W.2d 516, 522 (1988).

The scope of an agent's authority is a question of fact. *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986); *T. S. McShane Co. v. Great Lakes Pipe Line Co.*, 156 Neb. 766, 57 N.W.2d 778 (1953). In the relationship of principal and agent, an agent's actual authority is the power to act on the principal's behalf in accordance with

the principal's consent to the agency. See *Farmers Union Coop Assn. v. Commercial State Bank*, 187 Neb. 376, 191 N.W.2d 168 (1971).

Sutton admitted that Cowan had authority to sign documents on behalf of Contractor. Speedway required that its lease form, accompanying any scaffolding ordered, be signed by the recipient when the scaffolding was delivered, which was a longstanding practice between Speedway and Contractor. Thus, evidence supports the factual conclusion that Cowan signed the lease with authority from Contractor. Moreover, Contractor, through Sutton, had ample opportunity to read Speedway's leases before Cowan signed the lease which is the subject of this litigation. One who signs a document without reading it cannot later avoid the effect of the signed document by claiming lack of knowledge concerning the document's contents. *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986); *Universal Surety Co. v. Jed Constr. Co., Inc.*, 200 Neb. 712, 265 N.W.2d 219 (1978). For that reason, the court did not err in its finding that Cowan signed the lease with authority to bind Contractor to the indemnity provision contained in the signed lease.

WORKERS' COMPENSATION AND INDEMNITY

Contractor claims that Neb. Rev. Stat. § 48-148 (Reissue 1988) of the Nebraska Workers' Compensation Act bars Contractor's liability under the indemnity agreement in the Speedway lease. Section 48-148 states:

> If any employee, or his or her dependents in case of death, of any employer subject to the Nebraska Workers' Compensation Act files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the Nebraska Workers' Compensation Court under such act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

In *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988), Union Pacific sued Kaiser to

recover under an indemnity agreement for Union Pacific's settlement of a negligence claim by a Kaiser employee, who had received workers' compensation benefits from Kaiser. Kaiser argued that the Nebraska Workers' Compensation Act precluded an employer's contractual liability for indemnification of a tortious third party (Union Pacific) on account of payments made to Kaiser's employee in settlement of the tort claim against Union Pacific. This court rejected Kaiser's argument:

> We find nothing in the Nebraska Workers' Compensation Act, by express provision or implication, and nothing in the public policy of the State of Nebraska, which prevents an employer's contractual obligation to indemnify a third party concerning a loss sustained through the third party's payments to the indemnitor's employee. Therefore, we now hold that when an employer, liable to an employee under the Nebraska Workers' Compensation Act, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the Workers' Compensation Act does not preclude the third party's action to enforce the indemnity agreement with the indemnitor-employer. The Union Pacific-Kaiser agreement contains no specific provision or language which excludes, exempts, or exonerates Kaiser from liability for indemnification or contribution as a contractual duty. We decline to rewrite the agreement between Union Pacific and Kaiser and insert a contractual provision precluding Kaiser's liability for indemnification or contribution concerning Union Pacific's settlement with Kaiser's employee, Blomenkamp. Kaiser's claim that the Nebraska Workers' Compensation Act provides exclusive liability and, therefore, immunizes Kaiser from Union Pacific's action to enforce the agreement for indemnification or contribution is without merit.

229 Neb. at 169-70, 425 N.W.2d at 879.

The indemnity agreement between Speedway and Contractor, expressed in paragraph 11 of the scaffolding lease,

contains no specific provision or language which excludes, exempts, or exonerates Contractor from indemnification as a contractual duty. See *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., supra.*

Nevertheless, Contractor maintains that the language in the indemnification clause of Speedway's lease is unclear and an ineffective circumvention of the exclusivity otherwise attendant to claims governed by the Nebraska Workers' Compensation Act, and which, Contractor argues, allows Speedway's indemnity recovery for its own negligence.

"An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts." *Union Pacific RR. Co., supra* at 170, 425 N.W.2d at 879. See, also, *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc.*, 191 Neb. 50, 213 N.W.2d 731 (1974); *First Trust Co. v. Airedale Ranch & Cattle Co.*, 136 Neb. 521, 286 N.W. 766 (1939). " 'An indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.' " *Omaha P. P. Dist. v. Natkin & Co.*, 193 Neb. 518, 522, 227 N.W.2d 864, 867 (1975) (quoting *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc., supra*).

The indemnity clause in the Speedway lease provided that Contractor would indemnify Speedway for claims arising out of Speedway's "CONDUCT (INCLUDING ACTIVE, PASSIVE, PRIMARY OR SECONDARY)." In addition, the clause stated that the "LESSOR SHALL ONLY BE LIABLE OR RESPONSIBLE FOR ACTIONS OF WILFUL MISCONDUCT." Finally, the lease declared that the purpose of the indemnity clause was "TO SHIFT THE RISK OF ALL CLAIMS RELATING TO THE LEASED PROPERTY TO THE LESSEE DURING THE ENTIRE TERM OF THIS LEASE." Although the lease's indemnity clause does not contain the word *negligence*, the intended consequence of indemnity is expressed clearly and unequivocally—Contractor was obligated to indemnify Speedway concerning claims arising from Speedway's conduct, including negligence, but excluding claims based on Speedway's willful misconduct.

STATUTORY LIABILITY FOR SCAFFOLDS

Contractor asserts that its agreement to indemnify Speedway is unenforceable to the extent that Contractor has agreed to indemnify Speedway for a breach of Speedway's duty under Neb. Rev. Stat. § 48-425 (Reissue 1988), which provides:

> All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner. Scaffolding or staging, swung or suspended from an overhead support and more than twenty feet from the ground floor, shall have, where practicable, a safety rail properly bolted, secured and braced, rising at least thirty-four inches above the floor or main portion of such scaffolding or staging, and extending along the entire length of the outside and ends thereof and properly attached thereto, and such scaffolding and staging shall be so fastened as to prevent the same from swaying from the building or structure.

As a result of § 48-425, one who erects, constructs, maintains, or supplies scaffolding must see that the scaffolding is erected and constructed in a safe, suitable, and proper manner. *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973). Breach of the duty imposed by § 48-425 constitutes negligence per se, not merely evidence of negligence. *Johnson v. Weborg*, 142 Neb. 516, 7 N.W.2d 65 (1942). See, also, *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N.W. 393 (1938); *Stevens v. Luther*, 105 Neb. 184, 180 N.W. 87 (1920).

Speedway, as a supplier of scaffolding, had a duty to supply scaffolding constructed in a "safe, suitable and proper manner." However, notwithstanding the duty imposed by § 48-425, Speedway could obtain indemnification against a breach of its duty, that is, Speedway may, and did, contract for indemnification against its own negligence regarding a scaffold which it supplied. See, *Omaha P. P. Dist. v. Natkin & Co.*, *supra*; *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc.*, *supra*. Under the circumstances of this case, nothing precludes

contractual indemnification simply because Speedway's loss, for which it sought indemnification from Contractor, may have arisen out of the breach of a statutory duty rather than breach of a duty at common law. Thus, § 48-425 does not preclude indemnification against a breach of the statutory duty concerning scaffolding.

LEASE OR SALE

Contractor argues that the defective material brackets which caused the Oddo accident were not covered by the lease agreement because Contractor eventually purchased the brackets. The uncontroverted evidence shows that the brackets were originally leased from Speedway and remained as parts of the leased equipment until Contractor informed Speedway that Contractor wished to purchase the brackets after the Oddo accident. There is no evidence that Contractor made any attempt to purchase the brackets before Oddo's accident. Contractor's argument regarding the defective material brackets has no support in the record and is entirely without merit.

ATTORNEY FEE

Finally, Contractor contends that it is not liable for the attorney fee of Niewald, Waldeck, which, Contractor argues, had no part in achieving the settlement with Oddo, since Speedway was already represented by the attorneys for Speedway's primary liability insurance carrier. Speedway's lease to Contractor states that, regarding defense of an action against the lessor, the lessee "SHALL BE LIABLE FOR ALL COSTS, EXPENSES AND ATTORNEY'S FEES INCURRED BY LESSOR IN SUCH DEFENSE." A factual question concerning damages recoverable in an action on an indemnity agreement, whether such question involves causation or amount of damages, is a matter for the fact finder. See *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976). See, also, *Bankers Surety Co. v. Cross*, 100 Neb. 98, 158 N.W. 457 (1916). Contractor's claim regarding the attorney fee in this case is without merit.

CONCLUSION

The judgment for Speedway Scaffold Company is supported by the evidence and is, therefore, affirmed.

AFFIRMED.

HEESE PRODUCE COMPANY, APPELLANT, V. ROBERT LUEDERS, APPELLEE.

HEESE PRODUCE COMPANY, APPELLANT, V. DAVID LUEDERS, APPELLEE.

443 N.W.2d 278

Filed July 28, 1989. Nos. 87-978, 87-979.

1. **Contracts: Compromise and Settlement.** A settlement agreement is subject to the general principles of contract law.
2. **Appeal and Error.** In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
3. **Contracts: Evidence.** Neb. Rev. Stat. § 7-107(2) (Reissue 1987) does not make an oral contract invalid, but only relates to the character of evidence by which it may be established.
4. **Evidence: Appeal and Error.** It is incumbent on one, not wishing to be bound by evidence made incompetent by statute, to make timely objection when it is offered. It is too late to raise the objection for the first time in the appellate court.
5. **Statute of Frauds: Debtors and Creditors: Consideration.** Where the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the promise is made on sufficient consideration, it will be valid although not in writing.
6. _____: _____: _____. The consideration to support an oral promise to pay the debt of another must operate to the advantage of the promisor and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.
7. **Court Rules: Waiver.** In appropriate circumstances where no injustice would result, the district court may exercise its inherent power to waive its own rules.
8. **Contracts: Compromise and Settlement.** To have a settlement agreement, there must be a definite offer and an unconditional acceptance.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed.

Daniel A. Smith, of Stanek & Smith, for appellant.

Charles W. Balsiger, of Jewell, Gatz, Collins, Dreier, Fitzgerald & Balsiger, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

GRANT, J.

These are consolidated appeals from the district court for Thurston County. Plaintiff-appellant, Heese Produce Company (Heese), filed these actions in the Thurston County Court to collect accounts allegedly due from defendants-appellees, Robert Lueders (case No. 87-978) and David Lueders (case No. 87-979). Defendants each filed a cross-petition, alleging breach of express and implied warranty, negligence, and product liability in an amount exceeding the jurisdictional limit of the county court. The cases were certified to the district court pursuant to Neb. Rev. Stat. § 24-302.01 (Reissue 1985) and were set for trial on April 14, 1987. The district court was informed of a settlement, and the cases were continued.

On April 20, 1987, defendants each filed a "Motion to Confirm Settlement and Enter Judgment Thereon." After an evidentiary hearing on September 2, 1987, the district court sustained defendants' motions and dismissed Heese's petitions and defendants' cross-petitions, with prejudice.

Heese timely appealed to this court, contending the district court erred as a matter of law in finding the parties had entered into an enforceable compromise and settlement agreement and, therefore, in sustaining defendants' motions to confirm settlement and enter judgment thereon. We affirm.

The record shows that these actions were filed by Heese in the Thurston County Court on November 19, 1984, to collect an account allegedly due from Robert Lueders in the amount of $3,202.28 and an account allegedly due from David Lueders in the amount of $4,878.20. The petitions further alleged that the defendants each purchased, on account, chemical and fertilizer

products from Heese and that to secure the indebtedness Heese filed "Notices of Fertilizer Lien on Crops" with the county clerks of Thurston, Cuming, and Wayne Counties.

On March 28, 1985, with the permission of the county court, both defendants filed cross-petitions alleging breach of express and implied warranty, negligence, and product liability in connection with certain herbicides sold to them by Heese. In the cross-petitions, Robert Lueders sought $22,346.80 and David Lueders sought $21,847.92 from Heese "for loss of income due to the decreased yields on [Lueders'] various tracts of real estate, and for incidental and consequential damages." Since the cross-petitions exceeded the jurisdictional limit of the county court, the cases were certified to district court.

On February 26, 1987, defendants filed motions to set the two actions separately for jury trial. On March 12, 1987, the district court set the cases for trial on April 14. The court was informed of a settlement by letter dated March 30, 1987. Each defendant's "Motion to Confirm Settlement and Enter Judgment Thereon" was filed on April 20.

A hearing on the motions was held September 2, 1987. Defendants were represented by Charles Balsiger, and Heese was represented by Stuart Mills and Eric Kruger. Kruger told the court that he also appeared "by a special appearance only" on behalf of Tri-State Insurance Company (Tri-State), Heese's insurance carrier. There was no ruling on this special appearance.

Correspondence regarding the attempted settlement of these matters was admitted in evidence at the September 2 hearing, without objection. Balsiger's March 6, 1987, letter to Kruger and Mills proposed that Heese "dismiss the respective petitions with prejudice and deliver a release of the alleged lien as to each case. In consideration for that action the defendants will dismiss their respective causes of action with prejudice." Balsiger's notes regarding a telephone call from Mills on March 12 indicate that Mills offered "to settle with Lueders jointly for $5000." That is, Heese would settle its claims against both defendants for a payment of $5,000.

Kruger's March 19, 1987, letter to Balsiger and Mills pertaining to defendants' cross-petitions states:

> So that there is no misunderstanding, I am of the opinion that the $5,000.00 offered by my client exceeds the value of the counterclaim. This offer is being made, in no small part, based upon the realities of legal expenses going forward.
>
> Accordingly, if Tri-State Insurance Company is required to expend any additional costs in getting this matter ready for trial, the offer will be withdrawn.

Kruger's letter also bears a notation that a copy of the letter was sent to a litigation supervisor at Tri-State regarding its insured, Heese, and the claimants Lueders. The record does not show any communication from Tri-State which pertains to the settlement of Heese's claims against the defendants.

Balsiger and Mills continued settlement negotiations. By letter dated March 25, 1987, Balsiger rejected Mills' March 12 "counterproposal to settle [Heese's claims] in the amount of $5,000," and "submit[ted] a counteroffer to settle for the sum of $2,500.00 payable to Heese Produce forthwith for and in consideration of a dismissal of all claims by both parties against the other, costs taxed to the parties as respectively incurred. Also we would require a release of your crop liens."

Balsiger's notes of March 28, 1987, reflect two telephone conversations with Mills. During the earlier conversation, Mills counteroffered to settle Heese's claims against defendants for $3,000. After advising Robert Lueders of the $3,000 counteroffer, Balsiger telephoned Mills. Balsiger's notes of this conversation indicate that Balsiger "offered to settle at $2800 he accepted, we are to draw the paperwork."

Balsiger's March 30, 1987, confirming letter to Mills and Kruger stated as follows:

> This letter will confirm my telephone conferences with Mr. Stuart Mills on the morning of March 28, 1987, concerning settlement of the above referenced cases.
>
> It is our understanding these cases will be dismissed by Heese Produce Company with Prejudice, as to the accounts, and that in consideration of such a dismissal Robert and Dave Lueders shall pay to Heese Produce the sum of $2,800.00 and shall dismiss their counterclaims. In addition Heese Produce will provide a release for the

fertilizer liens claimed against the Lueders [sic].

Enclosed with the March 30 letter were a check from Robert Lueders payable to "Heese Produce & Stuart Mills" in the amount of $2,800, drafts of the documents required to dismiss both cases with prejudice, and draft releases of the fertilizer liens.

Also enclosed with the March 30 letter was a copy of Balsiger's March 30, 1987, letter to the court advising that the cases had been settled.

On April 3, however, Kruger wrote to Balsiger enclosing new drafts of the dismissal documents, a release, and "Tri-State's claim draft in the amount of $5,000.00 which is payable to both of your clients, yourself, and to Heese Produce." The form of release enclosed with Kruger's April 3 letter provided that in consideration of the sum of $5,000, David and Robert Lueders would "forever release, acquit and discharge" Heese from any claims arising out of damage to the Luederses' real property. In other words, the release drafted by Kruger contemplated that the defendants would dismiss their cross-petitions for a settlement of $5,000.

Each defendant's "Motion to Confirm Settlement and Enter Judgment Thereon" was filed on April 20, 1987. In these documents, the defendants alleged that Mills orally accepted their offer "to settle at $2,800.00, payable to [Heese] with mutual dismissals with prejudice and releases of claimed fertilizer liens, each party to pay their respective costs, counsel for the defendants to prepare settlement documents." The motions further alleged that defendants' counsel confirmed the settlement by letter and commenced performance of the settlement by tendering settlement documents and "settlement payment proceeds" of $2,800 to Mills. The motions also alleged:

> 11. That contemporaneously with, and during the same time that settlement negotiations between plaintiff and defendants was [sic] proceeding, the plaintiff's attorney Stuart Mills, on behalf of the plaintiff Heese Produce, was negotiating a separate matter with Eric Kruger, resulting in substance in an agreement whereby the insurance company insuring plaintiff would pay to plaintiff,

> defendants, and defendants' counsel, the sum of $5,000.00 to be endorsed over to plaintiff for and in consideration of the release and discharge of any claim of defendants set forth in defendants' cross-petitions. These negotiations were never disclosed to the defendants or their attorney until after the defendants and plaintiff had reached the settlement previously described in . . . this Motion. Upon disclosure, the latter proposal was rejected by the defendants as beyond the scope of the settlement previously reached with plaintiff.

At the September 2 hearing, the trial court also took judicial notice of an "Application" filed by Mills on August 17. The application sought orders compelling Tri-State to pay into the court the sum of $5,000 and compelling defendants to pay into court the total sum of $2,800, "which sums then should be paid to [Heese] in compromise and settlement of these cases." The application alleged:

> 1. On or about March 28, 1987, Plaintiff's insurance carrier, Tri-State Insurance, acting through its attorney, Eric Kruger, agreed to pay Plaintiff the sum of $5,000.00 to avoid further exposure on Defendants' counter claims. Plaintiff has demanded that Tri-State Insurance pay the sum of $5,000.00 as agreed, but it has failed and neglected to do so.
>
> 2. On or about the same date, Plaintiff and Defendants entered into an oral agreement to compromise and settle these cases. It was agreed that Defendants should pay to Plaintiff the total sum of $2,800.00 in full settlement of both pending cases.

We note that Tri-State was never a party to this action.

On September 15, 1987, the district court entered orders finding that "the parties reached a settlement whereby the defendants . . . would pay to the plaintiff the sum of $2,800.00, that the plaintiff would dismiss the petition with prejudice, and the defendants would dismiss their respective cross-petitions with prejudice and the plaintiff would deliver certain crop releases to the defendants." The court also found that defendants had partially performed the settlement and that the settlement should be approved and the parties ordered to

perform the same. The court also ordered that the petitions and cross-petitions be dismissed with prejudice pursuant to district court rule 16. That rule provides:

> It shall be the duty of attorneys to immediately notify the court of the dismissal, settlement, or other final disposition of any case. Upon notice to the court or to the clerk that an action has been settled, counsel shall file within 30 days thereafter, unless otherwise directed by written order, such pleadings as are necessary to terminate the action; upon failure to do so, the court may order dismissal of the action without further notice and without prejudice to the right to secure reinstatement of the case within 60 days after the date of said order by making a showing of good cause as to why settlement was not in fact consummated.

A settlement agreement is subject to the general principles of contract law. *Fleming Co. of Nebraska v. Michals*, 230 Neb. 753, 433 N.W.2d 505 (1988); *Omaha Nat. Bank v. Mullenax*, 211 Neb. 830, 320 N.W.2d 755 (1982). In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Fleming Co. of Nebraska v. Michals, supra.*

In support of its assignments of error, Heese appears to argue that the correspondence offered as evidence of the oral settlement agreement reached by Mills and Balsiger was inadmissible under Neb. Rev. Stat. § 7-107(2) (Reissue 1987), which provides:

> An attorney or counselor has power . . . (2) to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court . . . .

See, also, *Simmons v. Murray*, 189 Neb. 695, 204 N.W.2d 800 (1973) (Newton, J., dissenting), *overruled, Omaha Nat. Bank v. Mullenax, supra.*

We note that no objections were made by any of the parties to any of the evidence admitted during the September 2 hearing.

In *Anderson v. Walsh*, 109 Neb. 759, 763, 192 N.W. 328, 329 (1923), this court held that the former version of § 7-107(2) "[did] not make an oral contract invalid, but only relate[d] to the character of evidence by which it may be established." The *Anderson* court further stated at 763, 192 N.W. at 329-30:

> All the evidence on the question was received in the district court without objection, and the attorney for plaintiff also testified concerning it, though his testimony did not coincide with that produced for defendants. Had plaintiff made timely objection, the evidence might have been excluded, but, in failing to object, she waived her right to have the contract established by only such evidence as the statute makes competent.
>
> It is incumbent on one, not wishing to be bound by evidence made incompetent by statute, to make timely objection when it is offered. It is too late to raise the objection for the first time in the appellate court.

Since no objection was made to any of the evidence offered during the hearing, Heese's argument is without merit.

Heese further contends the oral settlement agreement was unenforceable under *Omaha Nat. Bank v. Mullenax, supra* at 836, 320 N.W.2d at 758, a quiet title action, where we held:

> An alleged oral compromise and settlement agreement not made in open court is unenforceable where it is in violation of the statute of frauds or in violation of a court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or their attorneys.

In connection with this argument, Heese contends the oral settlement agreement was in violation of the statute of frauds, Neb. Rev. Stat. § 36-202(2) (Reissue 1988), which provides: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: . . . (2) every special promise to answer for the debt, default, or misdoings of another person . . . ."

We have held that where the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the

promise is made on sufficient consideration, it will be valid although not in writing. *Branham v. McGinnis*, 203 Neb. 664, 280 N.W.2d 47 (1979); *VSC, Inc. v. Lilja*, 203 Neb. 844, 280 N.W.2d 901 (1979); *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N.W. 233 (1883). The consideration to support an oral promise to pay the debt of another must operate to the advantage of the promisor (Robert Lueders) and place him under a pecuniary obligation to the promisee (Heese) independent of the original debt (David Lueders' account), which obligation is to be discharged by the payment of that debt. *VSC, Inc. v. Lilja, supra.*

We determine that even if we characterize this situation as a promise by Robert Lueders to Heese that he would pay the debt of David Lueders, such promise was supported by new consideration and does not fall within the statute of frauds. The record shows that the $2,800 check was tendered by Robert Lueders pursuant to an agreement with Heese to settle both his and David Lueders' accounts for that amount. In return, Heese was to dismiss both petitions with prejudice and release the fertilizer liens filed against both defendants' crops. The record supports a finding that Robert Lueders acted primarily to promote his own interests in settling his own account with Heese and procuring the release of liens filed against his own crops. The settlement agreement, therefore, was not within the statute of frauds.

In the alternative, Heese contends the oral settlement agreement was unenforceable under our holding in *Omaha Nat. Bank v. Mullenax*, 211 Neb. 830, 320 N.W.2d 755 (1982), because the oral agreement violated rule 5 of the Uniform Rules for the District Court of the State of Nebraska, adopted on December 2, 1985, by the Sixth Judicial District. That rule provides:

> All stipulations not made in open court or in chambers and recorded by the reporter and all agreements of counsel or parties to a suit, must be reduced to writing and signed by the parties making the same and filed with the clerk, or they will not be recognized or considered by the court.

A copy of the uniform rules was admitted in evidence at the September 2 hearing.

While noncompliance with rule 5 may render an oral settlement agreement unenforceable, *Omaha Nat. Bank v. Mullenax, supra*, such should not be the result in this case. In the application prepared by Mills and filed in the district court on August 17, 1987, Heese specifically alleged that Tri-State agreed to pay Heese $5,000 "to avoid further exposure on Defendants' counter claims." Heese then specifically alleged that it and defendants "entered into an oral agreement to compromise and settle these cases. It was agreed that Defendants should pay to Plaintiff the total sum of $2,800.00 in full settlement of both pending cases."

The following exchange took place at the close of the September 2 hearing:

> MR. MILLS: . . . . [I]t is plaintiff's contention that the settlement that the plaintiff understood it would be receiving, a total of $7,800, and that settlement because of the refusal on the part of Mr. Balsiger's clients, Dave and Robert Lueders to execute the appropriate drafts and releases cannot be made. Therefore, there was no settlement and plaintiff would ask that the matter be scheduled for trial.
>
> THE COURT: Mr. Mills, as between parties, Heese Produce and David Lueders and Heese Produce and Robert Lueders — as between those parties your agreements and your correspondence with Mr. Balsiger indicates [sic] and your pleadings indicate that it was settled upon payment by the Lueders to your client of $2,800. Is that not correct?
>
> MR. MILLS: . . . That's correct, Your Honor, but the assumption that his clients would execute whatever releases we felt appropriate we would obviously reciprocate by releasing whatever releases they felt deemed appropriate.

Upon receipt of Balsiger's March 30, 1987, letter and enclosures, neither Mills nor Kruger informed the district court that a settlement had not been reached. Instead, Heese made application to the court for the $2,800 settlement amount.

The record shows that Heese conducted separate negotiations with the defendants on the original petitions and

with Tri-State on the cross-petitions. Heese admitted in its application filed in the district court and Mills admitted at the September 2 hearing that Heese had agreed to settle its claims against the defendants for a total of $2,800.

In *Omaha Nat. Bank v. Mullenax, supra*, we recognized that court rules are related to statutes of fraud but also are based upon additional principles of efficient judicial administration. District court rule 27 provides, "Any of the foregoing rules shall be subject to such modification by the court as may be necessary in special instances to meet emergencies or to avoid injustice or great hardship." In appropriate circumstances where no injustice would result, the district court may exercise its inherent power to waive its own rules. See, e.g., *Raymond v. Ingram*, 47 Wash. App. 781, 737 P.2d 314 (1987).

We determine that the rule 5 requirement that "all agreements of counsel or parties to a suit, must be reduced to writing and signed by the parties making the same" was waived by the trial court and that no injustice resulted from this waiver.

To have a settlement agreement, there must be a definite offer and an unconditional acceptance. *Fleming Co. of Nebraska v. Michals*, 230 Neb. 753, 433 N.W.2d 505 (1988). The evidence presented, without objection, at the September 2 hearing supports a finding that the parties reached a settlement agreement whereby defendants would pay to Heese a sum of $2,800, that Heese would dismiss its petitions with prejudice, that defendants would dismiss their cross-petitions with prejudice, and that Heese would deliver certain releases of crop liens to the defendants. Heese's alleged separate negotiations with Tri-State regarding settlement of defendants' claims against Heese do not fall within the scope of this agreement. The findings of the trial court to this effect are not clearly wrong.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF GEORGE FARM CO.
GEORGE FARM CO., APPELLANT, V. NORTHEAST NEBRASKA TELEPHONE COMPANY, APPELLEE.

443 N.W.2d 285

Filed July 28, 1989. No. 87-1054.

Public Service Commission: Appeal and Error. In an appeal from an order of the Public Service Commission, this court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.

Appeal from the Nebraska Public Service Commission. Reversed and remanded with directions.

Kurt T. Rager, of Rager & Hohenstein, P.C., for appellant.

Robert G. Scoville, of Ryan & Scoville, for appellee.

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

PER CURIAM.

The applicant, George Farm Co., a farm corporation, appeals from an order of the Nebraska Public Service Commission denying its request to have its property removed from the service area of the Northeast Nebraska Telephone Company's Jackson exchange and to be placed within the service area of Northwestern Bell Telephone Company's South Sioux City exchange.

In an appeal from an order of the Public Service Commission, this court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary. If there is evidence to sustain the findings and action of the commission, this court cannot intervene. *In re Application of Overland Exp.*, 229 Neb. 524, 428 N.W.2d 166 (1988).

The applicant farm corporation is located on a parcel of land in northeast Nebraska consisting of approximately 2,200 to 2,300 acres. The land is divided approximately in half by the boundary line between the two telephone companies servicing the area. The land west of the boundary line is within

Northeast's Jackson service area, while the land east of the boundary line is within Northwestern Bell's South Sioux City service area.

There are three residences on the applicant's property. Leland George, president of the corporation, lives in one house, and Bradley Altena, a farmer and mechanic employed by the applicant, lives in a house just to the west, both of which are within the area designated for service by Northeast's Jackson exchange, but within one-fourth mile from the boundary line of Northwestern Bell to the south and east. A trailer home on the property, which at the present time is unoccupied but apparently still has a telephone line available, is within the South Sioux City exchange of Northwestern Bell.

The applicant does virtually all of its business within the South Sioux City service area, and does practically no business in the communities served by the Jackson exchange. In general, all of the business and social contacts of the applicant; Leland George; his son David George, who is an officer of the corporation; and Altena are in the South Sioux City area. Leland George's mailing address, which apparently also acts as the applicant's address, is in South Sioux City. Repairs to the farm equipment are generally made within the South Sioux City or Sioux City, Iowa, area. The school that Altena's children attend is within the service area of Northwestern Bell. In short, the applicant's only contact with Jackson is some property located there. One or fewer calls to Jackson per month are made by the applicant's employees, while the calls to the South Sioux City area average 15 to 20 per day. However, because the applicant has a Jackson phone, some mail is directed to it at a Jackson address, rather than the proper South Sioux City mailing address. As a result, some mail is misdirected and not received.

The calls made to locations outside the Jackson exchange do not require the payment of a long-distance fee. This is because, although the western half of the property is within the Jackson service area, the applicant has had a foreign exchange telephone service line (an "FX" line) through the Jackson exchange since the spring of 1987. The FX line enables the applicant's employees to make phone calls to South Sioux City without a

long-distance charge. Because of this fact, the applicant (actually, Leland George) also has a South Sioux City telephone number and is listed in the South Sioux City telephone directory. The charge for the FX hookup, which apparently is a flat charge for the extended service, is approximately $130 per month. That charge is in addition to the regular monthly charge for the Jackson telephone service.

The applicant applied with the Public Service Commission to be removed from the Jackson exchange and placed within the South Sioux City exchange. Parties potentially affected by the application were listed as Northeast and Northwestern Bell. After both of these parties failed to file a protest to the application, the applicant filed a motion before the Public Service Commission asking it to grant the relief requested in the application based on 291 Neb. Admin. Code, ch. 1, § 014.01 (1985). This section states that "failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding."

The application came before the commission for hearing August 27, 1987. The applicant renewed its motion, which the commission noted and took under advisement. The commission then proceeded with the hearing, during which both the applicant and Northeast presented evidence. Upon the applicant's motion pursuant to § 014.01, the commission held that despite the telephone companies' failure to protest, under Neb. Rev. Stat. §§ 75-612 and 75-613 (Reissue 1986), the applicant was nevertheless required to present evidence at a hearing to establish its case, and its motion was overruled. Following the hearing, the commission, relying on § 75-613, which states that before granting an application the commission must find that the applicant is not receiving reasonably adequate service, denied the application based on a statement by Leland George that the existing telephone service is "okay."

The applicant filed a motion for rehearing, which was resisted by Northeast. The motion was overruled.

The applicant has appealed, assigning as error that (1) since no timely protest was filed by any of the parties to the action, the commission erred in overruling the applicant's motion to grant the relief requested in its application; (2) Northeast

waived its right to participate in the proceedings by failing to timely file a protest to the application with the commission; and (3) the commission erred in finding that the applicant did not meet its burden of proof with respect to the allegations of its application.

We find it unnecessary to discuss appellant's first two assignments of error. Upon a consideration of the entire record, we find that the commission's order was arbitrary and unreasonable and must be reversed.

Sections 75-612 and 75-613 provide in part as follows:

> Any one . . . may file an application with the Public Service Commission to obtain the telephone service furnished in the exchange service area adjacent to the territory in which the applicant or applicants reside or operate.

§ 75-612.

> Upon the completion of the hearing on such an application . . . the Public Service Commission may grant the application, in whole or in part, if the evidence establishes all of the following:
>
> (1) That such applicant or applicants are not receiving . . . adequate exchange telephone service . . . . The fact that an applicant is required to pay toll charges for long distance telephone calls to an exchange service area adjacent to the territory in which the applicant resides or operates shall not be deemed to constitute inadequate exchange telephone service from the company furnishing such service;
>
> (2) The revision of the exchange service area or areas required to grant the application will not create a duplication of facilities, is economically sound and will not impair the capability of the telephone company or companies affected to serve the remaining subscribers in any affected exchanges;
>
> (3) The community of interest in the general territory is such that the public offering of each telephone company in its own exchange service area involved should include all the territory in its service area as revised by the commission's order; and

(4) The applicant or applicants are willing and will be required to pay such construction and other costs and rates as are fair and equitable and will reimburse the affected company for any necessary loss of investment in existing property as determined by the Public Service Commission.

§ 75-613.

From a consideration of the entire record, we find that it makes no sense for half of the applicant's property to be within one exchange and the other half to be within another exchange. Furthermore, forcing the applicant to bear the burden of paying for two phone services for the same property so that such property and its occupants may have full service to the general area comprising their community of interest is arbitrary and unreasonable.

It is true that "[t]he fact that an applicant is required to pay toll charges for long distance telephone calls to an exchange service area adjacent to the territory in which the applicant resides or operates shall not be deemed to constitute inadequate exchange telephone service from the company furnishing such service." § 75-613(1). However, we construe the additional $130 per month that the applicant must pay for the FX line to be a service fee, not a toll charge. We interpret a toll charge as contemplated in the statute as a charge for a single long-distance call, not a monthly flat fee for service. See, 18 The Oxford English Dictionary 202 (2d ed. 1989) (defining a toll as "[a] charge for a telephone call"); Webster's Third New International Dictionary, Unabridged 2405 (1981) ("a charge for a long-distance telephone call").

Therefore, the fact that the applicant is required to pay a monthly fee so that all of its property can be within the same telephone exchange strikes us as a justifiable reason for granting the relief requested. Had the residences in which Leland George and Altena live been built just one-fourth mile to the east, all of the residences on the property would have been within the same telephone exchange and within the exchange in which virtually all of the applicant's business is conducted.

We hold that the decision of the commission denying the

applicant's request to have all of its property placed within the service area of Northwestern Bell's South Sioux City exchange was unreasonable and arbitrary and should be reversed. The cause is remanded to the commission with directions to grant the application.

REVERSED AND REMANDED WITH DIRECTIONS.

BACK ACRES PURE TRUST ET AL., APPELLANTS, V. RAY J. FAHNLANDER ET AL., APPELLEES.

443 N.W.2d 604

Filed July 28, 1989. No. 88-074.

1. **Attorney and Client.** As a general rule, no person shall represent another through the practice of law unless he or she has been previously admitted to the bar by order of the Supreme Court.
2. **Trusts: Actions.** Generally, a trust is not a legal personality, and the trustee is the proper person to sue or be sued on behalf of such trust.
3. **Trusts: Attorney and Client.** A trustee's duties in connection with his or her office do not include the right to present argument pro se in courts of this state, because in this capacity such trustee would be representing interests of others and would therefore be engaged in the unauthorized practice of law.

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

E.L. Peister for appellants.

Michael V. Smith, of Smith and King, P.C., for appellees.

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

PER CURIAM.

This is a purported appeal by Back Acres Pure Trust and its trustees Larry Newman and Virginia K. Campbell from a judgment of the district court, which sustained the defendant Jack D. Carnahan's motion for summary judgment. The plaintiffs had sought to quiet title in themselves to portions of Section 19, Township 33 North, Range 47 West, and Section 24,

Township 33 North, Range 48 West, in Dawes County, Nebraska. E.L. Peister, a nonlawyer, who was not one of the original plaintiffs, was permitted to appear in this court pro se, as his interests might appear. It is now apparent that he should not have been permitted to argue.

The record discloses that although Peister stated to the trial court that he had been named a trustee and would furnish the court with a copy of the minutes showing his appointment and that he was now serving as such trustee together with Newman and Campbell, no such showing was ever made. He signed the brief of appellants on behalf of himself and appellants. In actuality, he had no authority to appear pro se as a trustee, and certainly not as a representative of appellants.

> Except as provided in section 7-101.01, no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state.

Neb. Rev. Stat. § 7-101 (Reissue 1987).

It is true that, as a general rule, a trust is not a legal personality, and the trustee is the proper person to sue or be sued on behalf of such trust. *Larson v. Sylvester*, 282 Mass. 352, 185 N.E. 44 (1933); *Williams v. Downing*, 185 Okla. 633, 95 P.2d 612 (1939). However, we agree with the holding of the Supreme Court of Hawaii that a trustee's duties in connection with his or her office do not include the right to present argument pro se in courts of the state, because in this capacity such trustee would be representing interests of others and would therefore be engaged in the unauthorized practice of law. See *In re Ellis*, 53 Haw. 23, 487 P.2d 286 (1971).

Because Peister had no authority to file a brief in this matter, either in his own behalf or on behalf of appellants, appellants' briefs are ordered stricken, and the appeal is dismissed.

APPEAL DISMISSED.

THE COLLECTION BUREAU OF LINCOLN, NEBRASKA, INC., ASSIGNEE, APPELLEE, V. KENNETH LOOS, APPELLANT.
443 N.W.2d 605

Filed July 28, 1989. No. 89-367.

Motions for New Trial: Courts. A motion for new trial is not properly presented to the district court after its decision affirming or reversing the judgment of the county court. In such an instance, the district court sits as an intermediate appellate court, not a trial court. A motion for new trial is proper only in the trial court.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Appeal dismissed.

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

PER CURIAM.

Kenneth Loos appeals an order of the Lancaster County District Court, which, acting in its appellate capacity, affirmed the Lancaster County Court in awarding judgment against Loos and in striking appellant's cross-petition.

In this court, The Collection Bureau of Lincoln, Nebraska, Inc. (CB), assignee and original plaintiff in the trial court, filed a motion for summary disposition under Neb. Ct. R. of Prac. 7B(1) (rev. 1989), claiming this court lacked jurisdiction. We do lack jurisdiction and dismiss Loos' appeal.

After the Lancaster County Court entered judgment against Loos and struck his cross-petition, Loos timely appealed to the Lancaster County District Court. On February 1, 1989, the district court affirmed the judgment of the county court. On February 8, Loos filed a motion for a new trial in the district court. After a hearing, the motion was overruled on March 21, 1989.

On April 18, 1989, 76 days after the district court affirmed the judgment of the county court, Loos filed a notice of appeal to this court. CB asserts that the notice of appeal was not filed in time to give this court jurisdiction. We agree.

The issue presented is whether a motion for a new trial in the district court is a proper pleading where the district court,

acting as an intermediate appellate court, affirms a county court judgment. *State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984), is determinative of the issue. There, we found that Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982) provided that,

> with certain exceptions not material here, the district court reviews appeals from the county court for error appearing on the record made in the county court. Consequently, a motion for new trial based on newly discovered evidence is to be presented to the county court as the fact finder, not to the district court which sat as an appellate court.

State v. Ferris, supra at 607, 344 N.W.2d at 669.

Loos argues (1) that *Ferris* is not applicable because it is a criminal case and (2) that the district court hearing in his case was a trial. Except in certain circumstances not relevant here, § 24-541.06 (Cum. Supp. 1988) applies equally to civil and criminal appeals.

Loos' argument that the hearing in district court was a trial has no support in fact or in law. The county court bill of exceptions was before the court pursuant to § 24-541.06(2). There was no other evidence and, in fact, no trial. Section 24-541.06(1) provides that the district court shall review the case for error appearing on the record made in county court.

A motion for new trial is not properly presented to the district court after its decision affirming or reversing the judgment of the county court. In such an instance, the district court sits as an intermediate appellate court, not a trial court. A motion for new trial is proper only in the trial court.

CB's motion for summary disposition is sustained and the appeal dismissed for this court's lack of jurisdiction, the notice of appeal having been filed out of time.

APPEAL DISMISSED.

GERALD L. GEHRE AND LEONARD D. GEHRE, COPERSONAL REPRESENTATIVES OF THE ESTATE OF LOIS IRENE GEHRE, DECEASED, APPELLANTS, V. GEORGE RICHARD COLEMAN AND CHARLES MESSBARGER, APPELLEES.

443 N.W.2d 606

Filed August 4, 1989. No. 87-066.

Pleadings: Negligence: Jury Instructions: Appeal and Error. Where contributory negligence is pleaded as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for a new trial.

O. William VonSeggern, of Grimminger & VonSeggern, for appellants.

Jeffrey H. Jacobsen and Daniel L. Lindstrom, of Jacobsen, Orr, Nelson & Wright, P.C., for appellees.

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

GRANT, J.

The copersonal representatives of the estate of Lois Irene Gehre brought a medical malpractice action against George Richard Coleman and Charles Messbarger, both certified registered nurse anesthetists (CRNA), claiming the defendants' negligence caused the death of decedent. After trial the jury returned a verdict in favor of defendants. Plaintiffs timely appealed, alleging a single error: that the trial court erred in submitting the issue of the decedent's contributory negligence to the jury. We reverse.

The record shows that the decedent was the mother of the copersonal representatives. She was born in 1908 and was 73 years old at the time of her death on July 1, 1982. The decedent was described as a registered nurse who last worked as an "industrial nurse" at Rockwell, a plant near Kearney, where she administered first aid. Her last year of work at the plant is not definitely known, but one of her friends testified that when the two became friends, 20 or 25 years before decedent's death,

decedent was primarily doing volunteer nursing work.

On the afternoon of June 8, 1982, the decedent entered Good Samaritan Hospital in Kearney, Nebraska, to undergo a hemorrhoidectomy. That evening Gerald Messbarger, CRNA and brother of defendant-appellee Charles Messbarger, visited decedent in her hospital room. While in the room, Gerald Messbarger had decedent complete a "Pre-anesthesia Patient Questionnaire." She completed the questionnaire as follows:

> PRE-ANESTHESIA PATIENT QUESTIONNAIRE
>
> The following questions have been designed for use by the Department of Anesthesia. They are to be completed before the operation. Please answer each question carefully and return the completed sheet to the nurse as soon as possible.
>
> ANSWER yes (Y) no (N) don't know (D)
>
> 1. Are you taking any prescription medicine for your: heart __n__ ? blood pressure __n__ ? breathing __n__ ? nerves __n__ ? other __none__ ? Give names of medicines: ___
>
> ---
>
> 2. Have you taken any cortisone or ACTH in the past six months other than into, joints or pain areas by injection __n__ ? Explain _____
>
> ---
>
> 3. Do you have: chronic cough __y__ ? irregular heart beat __n__ ? shortness of breath __n__ ? chest pain __n__ ? dizziness __n__ ? other _____ ? Explain _____
>
> ---
>
> 4. To the best of your knowledge, are you allergic to any medicines __y__ ? If yes, what?
> Codiene [sic]
>
> 5. Do you object to blood transfusions if they are deemed necessary during surgery __n__ ?
>
> 6. When was your last anesthetic or surgery? Date __none__
>
> 7. Other major surgical procedures done in the past 5 years and date. __none__
>
> 8. Have you ever had a reaction or other complication to an anesthetic of any kind: __n__ ? Explain _____
>
> ---

9. Has any member of your family had a complication to a general anesthetic _____? Explain _____

_____

10. Have you ever had "yellow jaundice" liver disease _____? pneumonia or TB __n__? diabetes __n__? other serious illnesses __n__? Explain _____

_____

11. Have you recently been exposed to large amounts of herbicides or insecticides _____?

12. Do you have your own teeth __y__? false __n__? partials __n__? loose teeth __n__? caps __n__? permanent bridge _____?

13. Do you smoke __n__? How much _____?

14. Do you wear contact lenses __n__?

15. How tall are you __5-3__? how much do you weigh __110__? any major recent loss __n__?

16. FOR OUTPATIENTS: When did you last drink or eat anything? _____

17. FOR FEMALES: Do you suspect that you may be pregnant _____?

_____ /s/ Lois Gehre

Date Signature of Patient

After decedent had completed the questionnaire, Gerald Messbarger explained the reason for the questionnaire and then went through each question sequentially with her. Gerald Messbarger also explained to decedent that she would be receiving a caudal anesthetic.

The following morning, June 9, 1982, decedent was given 50 milligrams of Demerol as a preoperative sedative, and an intravenous solution of dextrose and electrolytes. Defendant-appellee George Richard Coleman, CRNA, had decedent roll into a prone position with two pillows beneath her pelvis to elevate her buttocks. Coleman reviewed her electrocardiogram and noted that she had a left bundle branch block in her heart. Charles Messbarger, who had known decedent since 1962, talked to her at this time. Although Coleman was the assigned anesthetist for decedent's operation, Charles Messbarger had a few minutes, so he assisted Coleman.

Hospital records show the following, with great specificity as to times. Decedent was monitored by an electrocardiogram and an automatic blood pressure monitor. Decedent was given a 5-cubic-centimeter test dose of Marcaine. During this time, Charles Messbarger was at decedent's head, monitoring her vital signs. Coleman waited 3 minutes in order to determine whether the anesthesia would cause an adverse reaction. Then another 10 cubic centimeters of Marcaine was injected into decedent's lower back. Charles Messbarger reported that decedent's blood pressure was 130 over 82 at both 10:15 and 10:20 a.m., and upon her request for a sedative, Messbarger gave decedent 4 milligrams of Valium at 10:21 a.m.

At 10:25 a.m., Coleman removed his gloves and began to clean up. At this time, decedent's blood pressure had fallen to 110 over 60, and the surgeon began the hemorrhoidectomy. Charles Messbarger last spoke to decedent at 10:27 a.m. and left the operating room at 10:28 a.m. Decedent stopped breathing between 10:28 a.m. and 10:30 a.m. At 10:30 a.m., decedent's blood pressure had fallen to 95 over 45, her heart rate was approximately 56 beats per minute, and Coleman noticed that decedent was pale and cyanotic. Coleman called to decedent, but she did not respond. Coleman informed the surgeon. Oxygen was administered. The blood pressure monitor showed that decedent had no blood pressure, and the surgeon began a heart massage.

Decedent was given 10 cubic centimeters of epinephrine and .4 milligrams of atropine to restore her heartbeat, sodium bicarbonate to restore her blood pH level, and calcium chloride to increase the effectiveness of her heart. At both 10:36 a.m. and 10:41 a.m., she was given electric shock to restore her heartbeat, and at 10:40 a.m. she was given 3 milligrams of Levophed to increase her blood pressure.

At about 11 a.m., decedent was taken to intensive care. She never regained consciousness. A tracheostomy was performed, and decedent's thyroid was found to be abnormal. On June 21, 1982, decedent's tube feeding, antibiotics, and telemetry were discontinued. She died on July 1, 1982.

The plaintiffs alleged in their amended petition that defendants were negligent in not adequately obtaining and

evaluating decedent's medical history prior to the operation, in not properly monitoring her condition during the operation, and in not promptly notifying the attending physician of decedent's condition during surgery.

The defendants answered and alleged that decedent, as a registered nurse for many years, possessed sufficient knowledge to give an accurate history of her prior illnesses, conditions, or afflictions and her past use or nonuse of prescribed medications. The defendants further alleged decedent knew she was suffering from a thyroid condition when she entered the hospital for the operation and knew that medication for the condition had been prescribed in the past which she had not continued to take. Defendants also alleged that decedent should have been aware that this condition could place her at risk from the administration of anesthesia and that she failed to disclose the condition to the defendants. Defendants alleged that this conduct amounted to contributory negligence of a degree more than slight in comparison with any negligence on the part of the defendants, and barred recovery by plaintiffs in their wrongful death action.

The case was tried before a jury on November 19 and 21, 1986. During the trial, Reed Peters, M.D., an anesthesiologist, testified by videotape deposition. Peters testified that the defendant anesthetists were negligent and that their negligence was the proximate cause of decedent's death. Peters testified that decedent would have survived but for the following: (1) The defendants should have administered oxygen throughout the procedure; (2) the caudal anesthesia should have been administered in increments; and (3) the defendants failed to properly monitor decedent's vital signs during the operation. Peters also testified that hypothyroid patients do not tolerate anesthetics well.

Robert Sidner, M.D., a specialist in internal medicine, testified on behalf of the defendants. Sidner's opinion was that several factors contributed to decedent's death from hypoventilation. These factors included respiratory depression from medications, decedent's age, narcotic medication given prior to the operation, and the particular medication decedent received. In addition, decedent had a chronic pulmonary

condition, a diaphragmatic hernia, and trouble swallowing. Sidner also testified the decedent had a somewhat unusual anatomy, making it very easy for her to have an upper airway obstruction. Finally, Sidner testified, "[A]ll of these things plus we have her thyroid condition, I think is significant in this case because this would slow down the metabolism of the demerol."

Instruction No. 2, submitted to the jury, provided in part:

> Defendants deny that they were negligent whatsoever with regard to the care of Lois Irene Gehre. Defendants further allege that Lois Irene Gehre was contributorily negligent in that she failed to disclose her thyroid condition to the defendants at the time her pre-anesthesia history was taken. Defendants therefore pray that the plaintiffs' petition be dismissed.

The jury also received instruction No. 12, which provided in part:

> In connection with the defendants' claim that the decedent was herself negligent, the burden is on the defendants to prove by the greater weight of the evidence all of the following:
>
> 1. That Lois Irene Gehre had a thyroid condition at the time of the surgery;
>
> 2. That Lois Irene Gehre knew or should have known that she had a thyroid condition and that her thyroid condition could place her at risk for the administration of anesthesia;
>
> 3. That Lois Irene Gehre failed to disclose or advise the defendants concerning her thyroid condition;
>
> 4. That the failure of Lois Irene Gehre to disclose her thyroid condition to the defendants was a proximate cause . . . of the death of Lois Irene Gehre.

Both of these instructions were objected to by plaintiffs. In *Spath v. Coon*, 189 Neb. 822, 823, 205 N.W.2d 541, 542 (1973), we held: "Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence." We must determine whether there was any competent evidence to support the second of the four factors set out in instruction No. 12.

While the defendants' expert did testify that decedent had a thyroid condition in 1977, he also testified during his cross-examination that there was no evidence that she had been instructed to take any medication for the condition at any time after 1977. Additionally, there was no evidence offered to show that decedent's 1977 thyroid condition was chronic.

There was no evidence that decedent, as a registered nurse educated in the 1920s or 1930s and retired from active nursing for more than 20 years, knew or should have known that a thyroid condition would make the administration of a particular anesthesia dangerous. Nor was there any evidence that any of the drugs administered to decedent were in common use during the time she was a practicing nurse.

The defendants contend that decedent was contributorily negligent in that she failed to disclose her thyroid condition in her answers to the preoperation questionnaire. There was no evidence that decedent knew or should have known that she had a thyroid condition at the time her medical history was taken or that such condition was death-threatening in connection with her proposed surgery. Decedent was never asked whether she had a thyroid condition by Gerald Messbarger, and the preanesthesia questionnaire did not request such information, nor was there any evidence that decedent knew or should have known that a thyroid condition was a "serious illness."

Defendants contend that "the standard of care ascribed to a patient is that of a reasonably prudent person" and that "[i]n this case, because of Lois Irene Gehre's long history of professional experience as a registered nurse, her conduct must be considered in light of her specialized knowledge and expertise." Brief for appellees at 18. To support their contention that decedent had more knowledge than a nonnurse patient, defendants relied on the testimony of Gerald Messbarger that before he graduated as a certified nurse anesthetist in 1955, he received certain training which resulted in knowledge he had "concerning the function of the thyroid gland and its importance." There was no evidence as to the training in such areas received by a nurse who graduated from a college in Oberlin, Kansas, in the late 1920s or early 1930s and whose nurse's work during that 20 or 25 years before her death had

been on a volunteer basis. The evidence in this case is wholly lacking to impose a greater burden on the patient in this case than on the professionals seeking medical information from her. There is no evidence in this record on which sufficient knowledge can be attributed to decedent which would result in her being contributorily negligent. There is no evidence that decedent's answers to the questionnaire submitted to her were not truthful.

There was no evidence submitted to support a finding of contributory negligence; it was prejudicial error for the trial court to have submitted the issue to the jury. The judgment of the district court is reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

SANITARY AND IMPROVEMENT DISTRICT NO. 272 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. BERNARD MARQUARDT, AN INDIVIDUAL, ET AL., APPELLEES.

443 N.W.2d 877

Filed August 4, 1989. No. 87-761.

1. **Demurrer: Declaratory Judgments.** The use and determination of a demurrer in actions arising under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), are controlled by the same principles as apply in other cases.
2. **Demurrer: Pleadings.** When considering a general 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.
3. _____: _____. In ruling on a general demurrer, 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; nor may a court assume the existence of any facts not alleged, find facts in aid of the pleading, or consider evidence which may be introduced at trial.
4. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one the right to judicial relief.
5. **Sanitary and Improvement Districts: Warrants: Words and Phrases: Uniform Commercial Code.** Sanitary and improvement district warrants are investment

securities under article 8 of the Uniform Commercial Code.

6. **Sanitary and Improvement Districts: Municipal Corporations: Uniform Commercial Code: Words and Phrases.** A sanitary and improvement district is a municipal corporation and a political subdivision of the state and, as such, is a "government or governmental agency or unit" for the purposes of Neb. U.C.C. § 8-202 (Reissue 1980).
7. **Uniform Commercial Code: Warrants: Consideration: Notice.** None of the events which validate an otherwise defective governmental investment security under the provisions of Neb. U.C.C. § 8-202 (Reissue 1980) apply unless the warrants in question are in the hands of purchasers for value and without notice of the claimed defect.
8. **Pleadings: Actions: Parties: Joinder.** Causes of action involving different defendants cannot be joined unless each cause affects all the defendants and they have a joint or common liability or interest.
9. **Pleadings: Actions.** In determining whether more than one cause of action is stated, the main test is whether more than one primary right or subject of controversy is presented; other tests are whether recovery on one ground would bar recovery on the other, whether the same evidence would support different counts, and whether separate actions could be maintained for separate relief.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Steven J. Riekes, of Richards, Riekes, Brown & Zabin, P.C., for appellant.

Eugene L. Pieper, David J. Koukol, and Robert L. Homan, of Thompson, Crounse, Pieper, Wallace and Eggers, P.C., and Dennis E. Martin, of Martin & Martin, for appellees Eggert et al.

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

PER CURIAM.

Plaintiff-appellant, Sanitary and Improvement District No. 272 of Douglas County, challenges the trial court's dismissal of its operative petition for declaratory judgment following the sustainment of demurrers filed by certain of the defendants-appellees. We affirm in part, and in part reverse and remand for further proceedings.

The aforesaid petition names 2 corporate and 31 individual defendants, including "John Doe and Richard Roe, real and

true names unknown," alleging, in sum, that the corporate defendants, M & A Enterprises, Inc., and M & A Irrigation Supplies, Inc., and the three principals of these entities, defendants Bernard Marquardt, George Allison, Jr., and John Hoich, conspired together with defendant David Weyh, an irrigation contractor, and with the former chairman of the district's board of trustees, defendant Francis Sullivan, to defraud the district by devising a scheme to construct an in-ground green space irrigation system in circumvention of the statutory requirements for approval by various duly constituted public bodies of the city of Omaha and county of Douglas. The petition further asserts that the former attorney for the district, defendant Warren Zweiback, breached his fiduciary duty to the district by assisting the scheme; that former district trustees, defendants Rick Cushing, Patrick Kelley, Louise Scolaro, and David Ecklund, breached their fiduciary duties to the district by approving the contracts drawn pursuant to the scheme; that the remaining 21 individual named defendants hold warrants drawn on the district's accounts pursuant to the fraudulent scheme; and that these warrants are void because they were issued as a result of the scheme. The petition names as a defendant "Sam J. Howell, Treasurer of Douglas County," averring that he, as ex officio treasurer of the district, is the individual charged with the duty to pay the district's warrants as they come due.

For the sake of convenience, where appropriate, the various defendants will be referred to hereinafter as follows: defendants Marquardt, Allison, Hoich, M & A Enterprises, M & A Irrigation Supplies, and Weyh as the "contractor defendants"; defendants Sullivan, Cushing, Ecklund, Kelley, Scolaro, and Zweiback as the "board defendants"; and defendants Orville Eggert, Elinor Eggert, Donald W. Pederson, Philip W. Smith, Carol Ann Mellott, Barbara Jo Benson, Suzanne Kay Yost, Don W. Elliott, Jayne E. Eades, Arley A. Westendorf, Darrel Adamson, Marjorie A. Ward, Jacqulyn R. Bandiera, Phyllis L. Phalen, Gale V. Mares, Victor Mares, Walter J. Westendorf, William F. Ginn, Sara F. Ginn, and John Doe and Richard Roe, real and true names unknown, as the "holder defendants."

The petition prays, in essence, that the subject contracts and warrants issued pursuant to them be declared void; that certain of the contractor defendants and all of the holder defendants be enjoined from taking action for the payment of any warrant they own or hold; that defendant Howell be enjoined from paying the subject warrants; that certain of the contractor defendants and all of the board defendants be required to hold the district harmless from any liability it may be found to have with respect to any warrant "declared to be lawful in the hands of an innocent holder"; and that defendant Sullivan restore to the district the value of any favors or gratuities he received in connection with the scheme.

The holder defendants, except for Eades, Bandiera, the Ginns, and, of course, Doe and Roe, filed the demurrers referred to in the first paragraph of this opinion, which demurrers assert that the district's operative petition fails to state a cause of action against them and contains a misjoinder of parties and causes.

The district seems to argue for special relaxation of the rules of pleading in cases seeking relief under the provisions of the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985 & Cum. Supp. 1986). It has, however, long been the rule in this state that " '[t]he use and determination of the demurrer in actions arising under Declaratory Judgment Act is controlled by the same principles as apply in other cases.' " *Gottula v. Standard Reliance Ins. Co.*, 165 Neb. 1, 4, 84 N.W.2d 179, 182 (1957).

The rules with which we are first concerned are that when considering a general demurrer, that is, one which challenges the sufficiency of the allegations to state a cause of action, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989). More specifically, in ruling on a general demurrer, 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. Nor may a court assume the existence of any facts not alleged, find facts in aid of the pleading, or consider evidence which

may be introduced at trial. *Moore v. Grammer,* 232 Neb. 795, 442 N.W.2d 861 (1989); *Security Inv. Co. v. State,* 231 Neb. 536, 437 N.W.2d 439 (1989).

This court has recently observed that a cause of action consists of the fact or facts which give one the right to judicial relief. *Schoneweis v. Dando, supra.* The district maintains that the various holder defendants have in hand warrants it issued between June 13, 1984, and December 11, 1985, pursuant to fraudulent contracts, for which reason the warrants are void, and that these warrants, which represent capital expenditures, put the district's "public funds and property . . . in jeopardy." In this connection, we note that Neb. Rev. Stat. § 31-727(5) (Reissue 1988) provides in relevant part:

> (c) Capital outlay shall mean expenditures for construction or reconstruction of major permanent facilities having an expected long life, including, but not limited to, street paving and curbs, storm and sanitary sewers, and other utilities;
>
> (d) Warrant shall mean an investment security under Article 8 of the Uniform Commercial Code in the form of a short-term interest-bearing order payable on a specified date issued by the board of trustees or administrator of a sanitary and improvement district to be paid from funds expected to be received in the future, including, but not limited to, property tax collections, special assessment collections, and proceeds of sale of general obligation bonds.

The first import of the holder defendants' demurrers is that even if the facts are as the district alleges, its obligation to them on the warrants in their hands is unaffected; in short, that the district has no defense to its obligation to pay on the warrants in the holder defendants' hands. Our first task, then, is to examine the character of the subject warrants.

Sanitary and improvement district warrants are investment securities under article 8 of the Uniform Commercial Code. See, *Hollstein v. First Nat. Bank of Aurora,* 231 Neb. 711, 437 N.W.2d 512 (1989); *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983); § 31-727(5)(d).

The district is a municipal corporation, *In re Application of*

S.I.D. No. 65, 219 Neb. 647, 365 N.W.2d 456 (1985), and a political subdivision of the state, *Hollstein v. First Nat. Bank of Aurora, supra*, and, as such, is a "government or governmental agency or unit" which has identified itself as the "issuer" of the warrants in question. Neb. U.C.C. § 8-202 (Reissue 1980) provides in relevant part as follows:

> (2) (a) A security other than one issued by a government or governmental agency or unit even though issued with a defect going to its validity is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of constitutional provisions in which case the security is valid in the hands of a subsequent purchaser for value and without notice of the defect.
>
> (b) The rule of subparagraph (a) applies to an issuer which is a government or governmental agency or unit only if *either* there has been substantial compliance with the legal requirements governing the issue *or* the issuer has received a substantial consideration for the issue as a whole *or* for the particular security *and* a stated purpose of the issue is one for which the issuer has power to borrow money or issue security.
>
> . . . .
>
> (4) All other defenses of the issuer including nondelivery and conditional delivery of the security are ineffective against a purchaser for value who has taken without notice of the particular defense.

(Emphasis supplied.)

The foregoing statutory language makes clear that none of the events which validate an otherwise defective governmental investment security apply unless the warrants in question are in the hands of purchasers for value and without notice of the claimed defect. While the operative petition asserts that

> by reason of the fact that minutes of the District were improperly kept and were misleading, the citizens and taxpayers of said District, and the public in general, did not know, and could not have known, the true state of affairs regarding the transactions above-mentioned until after exposure thereof by the Omaha World Herald on

April 27, 1986,

it alleges nothing from which it can be inferred that each holder defendant gave value for the warrant or warrants he or she possesses. That being so, the district's petition presents a colorable defense to its obligation on the warrants in the hands of the holder defendants and therefore states a cause of action against them.

We thus turn our attention to the special demurrers, which assert the district has misjoined parties and causes of action. Neb. Rev. Stat. § 25-701 (Reissue 1985) provides that a plaintiff may "unite several causes of action in the same petition" if, so far as is relevant to this present case, the causes involve the "same transaction or transactions connected with the same subject of action" or concern "contracts, express or implied." However, Neb. Rev. Stat. § 25-702 (Reissue 1985) limits the foregoing by providing that, but for an exception not material to the inquiry now before us, "the causes of action so united must affect all parties to the action." Therefore, causes of action involving different defendants cannot be joined unless each cause affects all the defendants and they have a joint or common liability or interest. *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 391 N.W.2d 557 (1986). In determining whether more than one cause of action is stated, the main test is whether more than one primary right or subject of controversy is presented, other tests being whether recovery on one ground would bar recovery on the other, whether the same evidence would support different counts, and whether separate actions could be maintained for separate relief. *Brchan v. The Crete Mills*, 155 Neb. 505, 52 N.W.2d 333 (1952); *Sickler v. City of Broken Bow*, 143 Neb. 542, 10 N.W.2d 462 (1943).

There is nothing in the operative petition from which it can be inferred that all the holder defendants participated in the alleged acts of the board or of the contracting defendants, and thus nothing which creates in the holder defendants a joint or common liability with those other defendants. In addition, the petition before us presents numerous subjects of controversy, including the claimed fraud in entering into the contracts at issue, the alleged breach of various fiduciary duties, and whether each holder defendant is a purchaser for value without

notice. Nor does the district seek the same relief from all the defendants; it asks indemnity from some but not others and endeavors to enjoin some but not all. Thus, the conclusion that the petition before us misjoins both parties and causes of action is inescapable.

For the foregoing reasons, we affirm the ruling of the district court on the special demurrers and reverse its ruling on the general demurrers. Accordingly, the matter is remanded to the district court for further proceedings under the provisions of Neb. Rev. Stat. § 25-809 (Reissue 1985).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., dissenting in part.

I agree that the operative petition of Sanitary and Improvement District No. 272 of Douglas County misjoins parties and causes of action. I further agree with the majority's conclusion that Neb. U.C.C. § 8-202 (Reissue 1980) validates defective governmental investment securities only in the hands of purchasers for value and without notice. I part company with the majority only as to the burden of pleading, and ultimately the burden of proof, imposed by § 8-202 in a suit for declaratory judgment.

The majority reasons that as the petition "alleges nothing from which it can be inferred that each holder defendant gave value for the warrant or warrants he or she possesses," the district has alleged "a colorable defense to its obligation on the warrants" and has thus stated a cause of action. This approach overlooks the unique posture of this case, in which the district seeks a declaration that it is excused from paying the warrants in the hands of the holder, or demurring, defendants. It seems to me that because the district seeks such a declaration, it must affirmatively allege either that such defendants did not pay value for the warrants in their hands or that they had notice of the claimed defect in the issuance of the warrants.

By analogy, if an insurer seeks a judgment declaring that it has no duty to defend or indemnify an insured, the insurer has the burden of establishing that the event falls within the policy's exceptions to or exclusions from coverage. This is so because, in filing a petition for declaratory judgment relieving it of liability

on the policy, the insurer is relying on what would otherwise be an affirmative defense. See, *Concord Insurance Co. v. Miles*, 118 N.J. Super. 551, 289 A.2d 267 (1972); *Republic Casualty Company v. Obregon*, 290 S.W.2d 267 (Tex. Civ. App. 1956) (writ of error refused).

In so saying, I am not unmindful that Neb. U.C.C. § 8-105 (Reissue 1980) provides, in any action on a security after it is shown that a defense or defect exists, "the plaintiff has the burden of establishing that he or some person under whom he claims is a person against whom the defense or defect is ineffective." I recognize, too, that the comments following this section of the code state that the above language makes the rule stated in Neb. U.C.C. § 3-307 (Reissue 1980), dealing with negotiable instruments, applicable to securities. Section 3-307(3) provides: "After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course." However, the foregoing statutory language and comments contemplate the usual litigation posture in which the holder plaintiff seeks to recover on a security in his or her hands, and the issuer defendant seeks to avoid liability by raising a defense or defect. In such an instance, it becomes the plaintiff's burden to show that he or she is a purchaser for value and without notice. Here, however, the posture is the reverse of the usual situation: the issuer district has sued for a judgment declaring it is not liable. Logic therefore dictates that the burdens of pleading and proof be reversed as well.

By asserting that none but the perpetrators of the fraud could have known of its existence, the district has alleged, in effect, that the demurring defendants had no notice of the fraud. That leaves the question of what in the petition asserts that the demurring defendants did not pay value for the warrants they possess. The answer is—nothing. Nor does the majority pretend otherwise. Indeed, the petition itself acknowledges that at least some of the demurring defendants may be purchasers for value, as it prays that certain other defendants indemnify the district from any liability it may be found to have to "an innocent holder."

Accordingly, the operative petition fails to state a cause of action, and the court below correctly dismissed it. The judgment below should therefore be affirmed in its entirety.

SHANAHAN, J., joins in this dissent.

SCHOOL DISTRICT OF WATERLOO, DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. DREW HUTCHINSON AND JUDY HUTCHINSON, APPELLEES.

443 N.W.2d 611

Filed August 4, 1989. No. 87-846.

Pleadings: Demurrer. It generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. VONDRASEK, Judge. Judgment of District Court reversed, and cause remanded with directions.

John F. Recknor, of Barlow, Johnson, DeMars & Flodman, for appellant.

Jay L. Welch, of Rickerson, Welch & Kruger, for appellees.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and RIST, D.J.

GRANT, J.

This is a lawsuit about $540. Plaintiff school district wants defendants to pay for the transportation of defendants' three children to and from the Waterloo school. Defendants do not want to pay.

On November 6, 1986, plaintiff-appellant filed its petition seeking recovery of moneys from defendants for transportation of their children. On December 18, 1986, defendants demurred.

On January 20, 1987, the county court for Douglas County

sustained the demurrer and dismissed plaintiff's case. The court's order stated in part:

> The issue raised by the Demurrer is:
>
> "May a Class III School District which is providing busing service to resident students charge a fee for transporting the students?"
>
> It is the finding of the Court that school boards are under no statutory duty to provide actual bus service to students, and if the board in its discretion elects to provide busing service, there is no statutory authority to charge for the transportation.
>
> IT IS THEREFORE ORDERED that the Demurrer is sustained for the reason that the Petition does not state facts sufficient to constitute a cause of action. The Petition of Plaintiff is dismissed. All costs taxed to Plaintiff.

The order did not provide an opportunity for the plaintiff to amend its petition if it so desired.

Then began a series of events which primarily concern thrashing around in a legal thicket without either side presenting any clear issue for a court to decide. Plaintiff did not file motion for a new trial or motion for the court to set aside its judgment. On February 10, 1987, plaintiff filed a motion, apparently by mail, seeking an order "allowing plaintiff to file an amended petition. A copy of the proposed amended petition is attached hereto . . . ." The certificate of service attached to the motion set out a hearing to be held in February.

On February 11, 1987, the county court entered an order providing, in part, as follows:

> Hearing held on plaintiff's motion to file an amended petition. Defendants appeared through their attorney Jay L. Welch. Plaintiff did not make an appearance. Motion submitted without argument and allowed.
>
> The amended petition attached to the motion is hereby filed by this order. Defendants requested and allowed to file a demurrer to the amended petition by February 17, 1987.
>
> Hearing on the demurrer to the amended petition set for hearing at 11:00 A.M. February 27, 1987 before the

undersigned in Courtroom No. 21.

On February 19, 1987, at 10:50 a.m., defendants filed their demurrer to the amended petition. Also on February 19, at 10:13 a.m., plaintiff filed its notice of appeal to the district court for Douglas County "from an Order entered herein on January 20, 1986 [sic], which sustained a Demurrer filed by the defendants herein." Plaintiff deposited a docket fee at the same time and filed a praecipe for transcript. The notice of appeal and docket fee were timely filed to give the district court jurisdiction over plaintiff's appeal from the county court's order of January 20, 1987, and the filings removed the case from the jurisdiction of the county court.

Another praecipe for transcript was filed on March 16, 1987, in the county court, requesting seven items, including "Order of the Court sustaining the Demurrer to the Amended Petition which Order was dated February 27, 1987." The February 27 order sustained defendants' demurrer to the amended petition and dismissed the amended petition. The demurrer and order were filed after the notice of appeal to the district court filed February 19, 1987, and the county court had no jurisdiction to enter such an order.

In any event, on August 19, 1987, the district court entered its order as follows: "Order of County Court sustaining defendant's [sic] demurrer is affirmed." On August 24, 1987, plaintiff filed a motion for new trial. On August 31, 1987, plaintiff's motion for new trial was denied. Plaintiff filed its notice of intent to appeal on September 18, 1987. This filing was made within 30 days of the district court's order of August 19, 1987, affirming the county court order, and therefore, the problem presented in *Collection Bureau of Lincoln v. Loos, ante* p. 30, 443 N.W.2d 605 (1989), is not before us. It should be noted that plaintiff's motion for new trial, filed in the district court, is not an appropriate pleading when the district court is acting as an appellate court.

This case points out the pitfalls of practicing law by mail and the great difficulties facing a trial judge (in this case the county judge) in deciding cases which, on some points, are not even orally argued or explained. This court is faced with a confusing welter of pleadings. It would appear that if a case is sufficiently

important to be filed in the county court, appealed to the district court, and then appealed to the Supreme Court of this state, the case should be submitted succinctly and properly so that some court can dispose of it without the surrounding fog of confusion in this case.

The dispositive issue in this case is plaintiff's assignment of error that the trial court erred in that it offered no legally adequate opportunity for plaintiff to file an amended pleading. Plaintiff assigns this action of the trial court as one of its seven assignments of error. Since the resolution of that assignment is dispositive, we reverse on that ground and do not discuss plaintiff's six other assigned errors.

In *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 183, 302 N.W.2d 697, 701 (1981), we held, in connection with a demurrer ore tenus:

> "It 'generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.' [Citation omitted.] We feel the ends of justice will be served in this case by permitting plaintiff to amend its petition."

In *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981), we again stated that leave should ordinarily be granted to amend a petition after a demurrer is sustained, especially with respect to an original petition. In the *Fowler* case, the court noted that, on appeal, the case involved the sustaining of a demurrer to the plaintiff's third amended petition without permitting further amendment. In the cause before us, only the original petition was properly before the county court and the district court reviewing the county court dismissal.

In the cause before us, the issues are difficult enough that there is a reasonable possibility that a cause of action could be stated. In defendants' demurrer to that petition, defendants allege:

> Defendants Demur to Plaintiff's petition because the petition fails to state a cause of action upon which the Plaintiff is entitled to recover, i.e., Plaintiff School

> District is without lawful authority, and is engaging in conduct ultra vires in charging for bus service to transport students residing within Plaintiff's school district boundaries to and from regular school attendance at the Plaintiff's schools.
>
> Further, the Defendants Demur to the petition of the Plaintiff because the said petition alleges an unreasonable classification among students entitled to various transportation benefits from the Plaintiff School District for attendance at its schools, which unreasonable classification is by its unreasonableness, in violation of the equal protection clauses of the constitutions of the State of Nebraska and the United States of America.

Such issues are convoluted enough to permit plaintiff another attempt to plead a case. Indeed, defendants' demurrer might well be injecting factual matters into the case in defendants' attempt to prevail. The issue should be refined enough in the trial court, and before the appellate district court, to allow both of those courts, and this court, a reasonable opportunity to dispose of the case properly.

We note that plaintiff itself caused a major part of the problem by not so conducting itself as to permit appropriate amended pleadings in the trial court. Nonetheless, the decision of the district court affirming the judgment of the county court is reversed. The cause is remanded to the district court with directions to remand the cause to the county court to permit plaintiff the opportunity to file an amended petition.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF AUGUST P. GOLTL, DECEASED. MARJORIE L. GRAY, APPELLANT, V. ADRIAN P. GOLTL, PERSONAL REPRESENTATIVE OF THE ESTATE OF AUGUST P. GOLTL, DECEASED, APPELLEE.

443 N.W.2d 884

Filed August 4, 1989. No. 87-1066.

1. **Decedents' Estates: Appeal and Error.** In an appeal from a county court's decision of a probate matter as a law action, an appellate court reviews the county court's decision and judgment for error appearing on the record in the county court.
2. **Courts: Judgments: Appeal and Error.** On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court. Neb. Rev. Stat. § 24-541.06 (Reissue 1985). A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.

Appeal from the District Court for Morrill County, ROBERT R. MORAN, Judge, on appeal thereto from the County Court for Morrill County, RICHARD P. MYERS, Judge. Judgment of District Court affirmed.

George A. Sommer for appellant.

Robert J. Bulger, of Bulger & Jensen, for appellee.

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

PER CURIAM.

On July 15, 1982, as the result of a written assumption agreement, Marjorie L. Gray and August P. Goltl jointly assumed a mortgage held by Platte Valley Federal Savings and Loan Association on property in Scotts Bluff County, Nebraska. August Goltl died on March 25, 1984. After Gray had defaulted in the mortgage payments, Platte Valley foreclosed its mortgage and sold the property, leaving a deficiency in excess of $20,000, for which Gray and Goltl's estate were jointly and severally liable under the assumption agreement. Gray filed a claim against Goltl's estate and, based on an alleged oral indemnification agreement resulting from promissory estoppel, sought indemnification for Gray's

payments on the mortgage. Adrian P. Goltl, personal representative of Goltl's estate, disallowed Gray's claim. Gray filed a petition in the county court for allowance of her claim. After a hearing, the county court denied Gray's claim and dismissed her petition. On appeal, the district court upheld the decision of the county court. Gray appeals, contending that her claim against Goltl's estate should have been allowed.

In an appeal from a county court's decision of a probate matter as a law action, an appellate court reviews the county court's decision and judgment for error appearing on the record in the county court. *In re Estate of Miller*, 231 Neb. 723, 437 N.W.2d 793 (1989). See, also, Neb. Rev. Stat. §§ 24-541.06 (Cum. Supp. 1988) and 25-1911 and 30-1601 (Reissue 1985).

> On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the "case for error appearing on the record made in the county court." Neb. Rev. Stat. § 24-541.06 (Reissue 1985). A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.

Holden v. Urban, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987). See, also, *Justice v. Hand*, 227 Neb. 856, 420 N.W.2d 704 (1988); *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989).

Having reviewed the record, we find no error in the county court's decision which denied Gray's claim. For that reason, the judgment of the district court, upholding the decision of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. INGREAT N. SWIFT, APPELLANT.

443 N.W.2d 613

Filed August 4, 1989. No. 88-631.

Convictions: Appeal and Error. In reviewing 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 of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

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

Robert M. Spire, Attorney General, and Marie C. Pawol for appellee.

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

GRANT, J.

Defendant-appellant, Ingreat N. Swift, was convicted by a jury on June 6, 1988, in the district court for Douglas County of the offense of being a felon in possession of a firearm in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1985). An enhancement proceeding was held on July 8, 1988, after which the defendant was found to be a habitual criminal in violation of Neb. Rev. Stat. § 29-2221 (Reissue 1985). The defendant was sentenced to 10 years in the Nebraska Penal and Correctional Complex.

A single error has been assigned by the defendant. He contends that there was insufficient evidence as a matter of law to sustain his conviction. We affirm.

The record shows that on the night of August 26, 1987, an argument broke out in an Omaha bar between the defendant and another man. The bouncer of the bar was an employee of the bar with the duty to maintain order in the barroom. He testified as follows:

A. Yes, Mr. Swift was talking, discussing with another

guy very loudly about something another guy had did to his sister.

Q. OK, what happened next?

A. I asked them to please turn their voices down because, you know, if you get loud and stuff like that, we have to remove them from the establishment. And they kept on going. I removed one person. He left freely of his own free will. That was the one Mr. Swift was arguing with. He left.

Q. All right.

A. Mr. Swift did not want to leave.

Q. OK, and what happened next?

A. I had turned around, you know, to check the door because we accept money for people coming in. On that night it was very crowded, so I had door duties, so I turned around and looked towards the door. The next thing I know, a gun was raised towards my head, and I turned around, and I caught the butt right in the—right up here, caught it in my scalp.

Q. OK, did it cause any type of injury?

A. Oh, yes.

Q. OK. Is there any scar still from that?

A. Yes, a permanent scar.

Q. OK. Turn so—and point to where that is; show the jury where that is. And how'd you get that scar?

A. (After showing the jury) The butt of a—something like a Luger. Automatic weapon.

Q. Who was holding it?

A. Mr. Ingreat Swift.

A struggle ensued between the bouncer and the defendant. During the struggle the gun discharged, and a bullet struck a wall near the bathroom. The bouncer wrestled the gun from the defendant and placed it on the bar, and the bouncer held the defendant to the floor until the police arrived.

The manager of the bar testified that at approximately 11:25 p.m. he heard a gun go off. The gun was thrown across the floor during the struggle between the bouncer and the defendant, and somebody evidently picked up the gun and placed it on the bar counter. The manager testified that he took

the gun from the counter and retained it until the police arrived.

Four Omaha police officers testified at the defendant's trial. These officers testified that upon their arrival two men were observed fighting on the floor. The officers testified that they broke up the fight, and the defendant was placed in custody.

Defendant did not testify, nor was any evidence adduced by the defense. It is clear that there was evidence showing that defendant was in possession of a firearm on the night in question. Defendant stipulated at the trial that he had previously been convicted of a felony. We have often held that in reviewing 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 of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Botts,* 232 Neb. 802, 442 N.W.2d 384 (1989); *State v. Bowen,* 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Wickline,* 232 Neb. 329, 440 N.W.2d 249 (1989). We determine that the evidence was sufficient to support defendant's conviction.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVA MAXINE BOSTWICK, APPELLANT.

443 N.W.2d 885

Filed August 4, 1989. No. 88-840.

1. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
2. _____: _____. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

3. **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.
4. **Postconviction.** Proceedings under Nebraska's Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1985), are civil in nature.
5. **Constitutional Law: Postconviction: Speedy Trial.** The speedy trial provisions of the sixth amendment to the U.S. Constitution, Neb. Const. art. I, § 11, and the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1205 et seq. (Reissue 1985), apply only to criminal trials and, thus, do not apply to postconviction actions.

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

James Walter Crampton 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.

Steva Maxine Bostwick appeals from the district court's denial of her motion for postconviction relief under Nebraska's Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Bostwick claims the court erred in failing to find Bostwick was denied effective assistance of counsel in her jury trial and convictions for second degree forgery and possession of a forged instrument. Bostwick also contends that the district court erred in failing to grant a prompt hearing on Bostwick's postconviction motion, refusing to allow Bostwick to address the court at the hearing on the postconviction motion, and failing to delineate the issues and express findings of fact and conclusions of law in the judgment denying Bostwick's motion.

STANDARD OF REVIEW

A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of

> being raised, but were not raised, in the defendant's direct appeal. *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

State v. Dillon, 224 Neb. 503, 507, 398 N.W.2d 718, 720-21 (1987). See, also, *State v. Davis*, 228 Neb. 622, 423 N.W.2d 487 (1988).

FACTS

The account of events at Bostwick's trial and the factual basis for her convictions are contained in *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986), which disposed of Bostwick's direct appeal and affirmed her convictions.

On April 20, 1984, the State charged Bostwick with second degree forgery, Neb. Rev. Stat. § 28-603(1) (Reissue 1985), and possession of a forged instrument, Neb. Rev. Stat. § 28-604(1) (Reissue 1985).

Bostwick was a bookkeeper for Commercial Enterprises, Ltd., a company owned by Gail Hammitt. The instruments involved in the forgery charges were Commercial's checks, bearing Hammitt's apparent signature. The central issue in the case was whether Bostwick had forged Hammitt's signature on the checks.

Disposition of the charges against Bostwick involved three trials. In the first trial, the court granted Bostwick's motion for mistrial after the State had introduced evidence of Bostwick's prior convictions. The second trial ended in a mistrial because the jury was unable to reach a verdict. After the second trial, the court denied Bostwick's motion to dismiss based on prosecutorial misconduct in the first and second trials.

At Bostwick's third trial, through use of handwriting exemplars, which Bostwick had provided to the police department in 1975, and Bostwick's entries in Commercial's ledgers for comparison, the State's handwriting expert identified signatures on the checks in question as Bostwick's handwriting. Bostwick's attorney objected to the 1975 exemplars.

Although the State's handwriting expert apparently had

some prior mental health problems, Bostwick's attorney did not delve into these problems on cross-examination. According to the attorney: "I didn't want to have the jury sympathize with him and get angry at me for bringing something into the case that really didn't need to be in there."

Also during Bostwick's third trial, Hammitt, on cross-examination, mentioned that Bostwick had removed $50,000 from his bank account. As a result of Hammitt's remark, Bostwick's attorney moved for mistrial and asked that the remark be stricken. The court denied a mistrial, but instructed the jury to disregard Hammitt's remark. Although Hammitt had made a similar remark at Bostwick's second trial, Bostwick's attorney made no motion in limine to prevent Hammitt from making the same comment during the third trial. When asked why he failed to make a motion in limine, Bostwick's attorney replied: "[I]t was part of the strategy for the trial to paint Gail Hammitt as someone who was undercapitalized and who was trying to blame everything on Steva and, as a consequence, when he said something, the more outrageous they were I felt it was better for us in presenting our case."

Police officers testified that before Bostwick's arrest, they waited in a police cruiser outside her home. When Bostwick came out of her home, she saw the cruiser and began running away. Police followed Bostwick, apprehended her, and found checks bearing Hammitt's apparent signature in her purse.

Bostwick testified at her third trial that she had not signed the checks in question, denied running from police immediately before her arrest, and otherwise contradicted the arresting officers' accounts about Bostwick's arrest. Bostwick's attorney did obtain photographs of the arrest scene, but not until 6 months later, and he did not call witnesses to refute the police officers' testimony concerning Bostwick's arrest. According to Bostwick's attorney:

> Steva and I had a lot of conversations about the story involved or regarding her arrest. It was her opinion that that was a critical portion of the case. It was my opinion that her story of the arrest was going to cast serious doubts about her credibility. I talked with jurors after the first and

> second trials and I wrote her a letter and I told her that one of the things that the jury had real difficulty in buying was her story about the arrest. They just felt that her credibility was placed into serious question by her explanation of the episode and I tried not to follow that particular approach.

On cross-examination, Bostwick admitted her two prior felony convictions for grand larceny.

According to Bostwick's postconviction motion, the prosecutor, during closing argument, "continually wav[ed] the 1975 Handwriting Exemplars in front of the jury bringing excessive attention to them," and mentioned Bostwick's prior felony convictions introduced during Bostwick's cross-examination. Bostwick's attorney did not object to the prosecutor's closing argument and explained his reasons for declining to do so:

> Well, anything that has been marked as an exhibit and has ben [sic] introduced into evidence can be properly used and argued before a jury in closing argument and a prosecutor typically doesn't try to introduce evidence that is not going to be prejudicial to the defendant, so everything that they wave in front of the jury and every argument that they make is going to be prejudicial and that ground alone isn't going to be sufficient for an objection in their closing argument.

As a result of Bostwick's third trial, she was convicted and sentenced to two concurrent terms of 15 to 25 years' imprisonment as a habitual criminal. See Neb. Rev. Stat. § 29-2221 (Reissue 1985) (habitual criminal penalty—10 to 60 years' imprisonment).

On direct appeal of her convictions, Bostwick's lawyer argued that the trial court erred in admitting the 1975 handwriting exemplars as exhibits and in refusing to grant Bostwick's motion for a mistrial on account of Hammitt's response on cross-examination. In the direct appeal, however, Bostwick's lawyer did not provide this court with the bill of exceptions from Bostwick's first trial, which reflected the prosecutor's remarks about Bostwick's prior convictions. Bostwick's lawyer did not argue that Bostwick's sentence, which

was within statutory limits, was excessive and did not argue that the court erred in failing to grant Bostwick's motion to dismiss the charges based on prosecutorial misconduct in the first and second trials. However, Bostwick made the argument regarding prosecutorial misconduct in her pro se brief filed in her direct appeal to this court.

This court rejected all of Bostwick's arguments, determined that the handwriting exemplars were properly received as evidence and that Bostwick's motion for mistrial, based on Hammitt's remarks in the third trial, was properly overruled, and concluded that the prosecutor's conduct in the first and second trials did not necessitate dismissal of the charges against Bostwick or reversal of her convictions.

Bostwick filed a motion for postconviction relief on May 30, 1986, alleging that her lawyer in the third trial was ineffective in failing to move for dismissal after the first trial, to file a motion in limine regarding Hammitt's remark about Bostwick's stealing $50,000, to successfully exclude the 1975 handwriting exemplars, to cross-examine the State's handwriting expert regarding his mental health, to object to the prosecutor's closing argument, to research and raise on appeal the issues of prosecutorial misconduct and excessive sentence, and to provide a complete record of the first trial for review in Bostwick's direct appeal to this court.

In the postconviction proceeding, Bostwick, on February 22, 1988, filed a notice to take her deposition, which was taken on February 26. On June 6, 1988, Bostwick completed her corrections of and additions to her deposition.

Neither before nor at the postconviction hearing on August 5, 1988, did Bostwick make any objection regarding timeliness of the hearing on her motion for postconviction relief. At the hearing, Bostwick's deposition and the excerpt from the bill of exceptions for her first trial which Bostwick claims should have been included in the record reviewed in her direct appeal were received in evidence. Although present at the hearing on her postconviction motion, Bostwick did not testify. After closing arguments, Bostwick's attorney asked the court's permission for Bostwick to address the court. The court refused the request and stated: "I think I have heard enough argument now. She

has certainly been given time to tell everything and I am not going to listen to any more testimony because the testimony is closed. I have heard enough argument and I am ready to take this under advisement."

The court denied Bostwick's motion for postconviction relief, stating: "Defendant's motion for post-conviction overruled and found to be without any merit." The court made no other findings of fact or conclusions of law with regard to Bostwick's motion.

CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

> [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.

State v. Hawthorne, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988). "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." *State v. Uwanaka*, 230 Neb. 808, 809, 433 N.W.2d 540, 541 (1989).

As we noted in *State v. Hawthorne, supra*:

> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. . . ."

Hawthorne, supra at 347, 431 N.W.2d at 633 (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Without restating each of Bostwick's contentions, we find

that Bostwick has failed to show prejudice from any of her lawyer's alleged errors or omissions. For that reason, Bostwick's claim of ineffective assistance of counsel is without merit.

BOSTWICK'S HEARING

Bostwick claims several procedural errors regarding the hearing on her motion for postconviction relief, such as denial of a prompt hearing, the court's refusal to allow Bostwick to address the court, and the court's failure to delineate issues and make findings of fact and conclusions of law in its order denying Bostwick postconviction relief.

Section 29-3001 provides:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.
>
> 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 cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of sections 29-3001 to 29-3004 [the Nebraska Postconviction Act] shall be civil in nature. Costs shall be taxed as in habeas corpus cases.
>
> A court may entertain and determine such motion without requiring the production of the prisoner, whether

or not a hearing is held. Testimony of the prisoner or other witness may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

Proceedings under the Postconviction Act are civil in nature. *State v. Casper*, 219 Neb. 641, 365 N.W.2d 451 (1985); *State v. Huffman*, 186 Neb. 809, 186 N.W.2d 715 (1971). The speedy trial provisions of the sixth amendment to the U.S. Constitution, Neb. Const. art. I, § 11, and the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1205 et seq. (Reissue 1985), apply only to criminal trials and, thus, do not apply to postconviction actions. Nevertheless, Bostwick claims that the State denied her a "prompt hearing" required by the Postconviction Act. Not only did Bostwick fail to object regarding timeliness of her hearing, but she also has failed to demonstrate how she was prejudiced by the period of pendency from the filing of Bostwick's postconviction motion until disposition of the motion. In addition, much of the delay appears to have been caused by Bostwick herself, not by the court or the State. For those reasons, Bostwick's claim that she was denied a prompt hearing has no merit. Regarding Bostwick's claim that she was denied the opportunity to address the court at her postconviction hearing, we note that Bostwick was present at the hearing and expressed her desire to speak only after closing arguments by counsel. Under those circumstances, the court did not abuse its discretion in refusing to allow Bostwick to address the court.

Finally, concerning Bostwick's claim that the district court should have delineated issues and expressed findings of fact and conclusions of law underlying denial of postconviction relief, we note that the court succinctly stated the only finding of fact or conclusion of law necessary for disposition of Bostwick's case, namely, Bostwick's motion for postconviction relief is without merit.

CONCLUSION

Bostwick's motion for postconviction relief is without merit, and the district court's judgment denying Bostwick's motion is affirmed.

AFFIRMED.

MELODY A. JENSEN, APPELLEE, V. MARY LANNING MEMORIAL HOSPITAL, APPELLANT, NEBRASKA COMMISSIONER OF LABOR, APPELLEE.

443 N.W.2d 891

Filed August 4, 1989. No. 88-949.

1. **Employment Security: Appeal and Error.** In an appeal regarding disqualification for benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1988), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court.
2. **Employment Security: Words and Phrases.** The term "misconduct," as used in Neb. Rev. Stat. § 48-628(b) (Reissue 1988), has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests; (2) deliberate violation of rules; (3) disregard of standards of behavior which the employer can rightfully expect from the employee; or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.
3. **Employment Security.** In an employment position which requires close personal contact with persons served by the employer, it is not unreasonable for the employer to require that employees in such positions report for work without the odor of alcohol on their breath. Violation of such a requirement, after warnings to the employee, is misconduct within the meaning of Neb. Rev. Stat. § 48-628(b) (Reissue 1988).

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

Douglas Pauley, of Conway, Connolly and Pauley, P.C., for appellant.

Laureen Van Norman and John F. Sheaff for appellee Commissioner of Labor.

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

GRANT, J.

This is an appeal from a decision of the Adams County District Court affirming the decision of the Nebraska Appeal Tribunal granting the plaintiff-appellee, Melody A. Jensen, 10 weeks of unemployment benefits, which had been denied by a Nebraska Department of Labor claims deputy.

Jensen worked as a nursing assistant for the respondent-appellant, Mary Lanning Memorial Hospital (Hospital), the employer, from February 1971 until her termination on May 9, 1988.

Jensen had a history of absenteeism and reporting to work with the odor of alcohol on her breath. After conferences with her nursing supervisor on January 9 and April 14, 1987, Jensen was warned in writing that her conduct must improve. On January 9, 1987, it was suggested, in writing, to Jensen that she "[c]ome to work at 645 [sic] when scheduled and refrain from using alcohol prior to coming to work." In a hospital conference record dated April 14, 1987, and signed by Jensen, Jensen was warned that "[t]he next time [she] comes to work with alcohol odor [on her] breath she will be terminated."

At approximately 6:45 a.m. on May 5, 1988, Jensen reported to work with the odor of alcohol on her breath. Two nurses noticed the smell of alcohol and notified the supervisor. Jensen told the supervising nurse that she had consumed eight or nine mixed drinks the night before and that she had not had any alcohol to drink after 11:30 p.m. the night before. Jensen was sent home, and on May 9, 1988, after a review of the matter, Jensen was officially discharged by the Hospital.

At the hearing, to explain the existence of the odor of alcohol on her breath, Jensen stated that she suffered from periodontal disease. To corroborate this statement, Jensen provided a letter from her family physician, whom Jensen had seen the day after her discharge. This letter stated that Jensen had "moderately severe parodontal [sic] disease" and that "this type of problem can cause persistent mouth odor." In its letter of May 9, 1988, terminating Jensen, the Hospital relied on information to the contrary.

Hospital records showed that during Jensen's tenure she had been absent without excuse 12 percent of the total time of her employment. Hospital records also indicated that Jensen had been repeatedly warned that unless she corrected this problem she would be terminated.

On May 10, 1988, Jensen applied for unemployment benefits from the Nebraska Department of Labor. On May 18, 1988, Jensen was assessed a 10-week benefit disqualification, since

she had been terminated for reporting "to work with the smell of alcohol on [her] breath."

Jensen appealed her 10-week disqualification to the Nebraska Appeal Tribunal on June 3, 1988. A hearing was held before the tribunal on July 7, 1988, and on July 11, 1988, the tribunal entered its decision reversing the claims deputy. The tribunal's decision stated in pertinent part:

> Under the Nebraska Employment Security Law, a disqualification is assessed against a claimant found to have been discharged for misconduct in connection with the work. Neb. Rev. Stat. § 48-628(b) (Supp. 1987). "Misconduct" is such conduct as evinces a willful, deliberate disregard of the employer's best interests, or of the standards of behavior which it has a right to expect of its employees.
>
> Here, the focus of the analysis is on whether the actions of the claimant were willful and whether those actions, if willful, affected the employer's best interest. Drinking prior to going to work would constitute misconduct. Alcohol on the breath is one indication that that individual is under the influence of alcohol while working. However, this Tribunal is of the opinion that additional facts must be demonstrated in order to show that the claimant was under the influence of alcohol. Except for the odorous breath, the claimant appeared to be functioning normally on the day of termination. Furthermore, there is some evidence in the record that a gum disease may be causing the breath odor. Thus, the claimant might be unable to prevent bad breath.
>
> The evidence here does not demonstrate that the claimant's actions were willful and that the claimant was under the influence of alcohol. Therefore, the Determination of the Claims Deputy should be reversed.

On August 11, 1988, the Hospital filed an appeal in the Adams County District Court, and on October 17, 1988, the district court entered an order, apparently adopting the findings of the tribunal and affirming the decision of the tribunal.

The Hospital timely appealed to this court, assigning as error the district court's finding that the evidence did not support a

finding that Jensen was guilty of misconduct. We reverse and remand with directions.

In an appeal regarding disqualification for benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1988), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court. *O'Keefe v. Tabitha, Inc.*, 224 Neb. 574, 399 N.W.2d 798 (1987). That rule has apparently not been changed by the amendment of Neb. Rev. Stat. § 48-638 (Reissue 1988) and the repeal of Neb. Rev. Stat. § 48-639 (Reissue 1988), which changes were effective July 1, 1989.

Section 48-628(b) provides that an individual shall be disqualified for unemployment benefits

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

In *Stuart v. Omaha Porkers*, 213 Neb. 838, 840, 331 N.W.2d 544, 546 (1983), we held:

> While the term "misconduct" is not specifically defined in the statute [§ 48-628(b)], it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

See, also, *O'Keefe v. Tabitha, Inc., supra*; *Snyder Industries, Inc. v. Otto*, 212 Neb. 40, 321 N.W.2d 77 (1982).

We must determine from the record whether Jensen's

conduct amounted to "misconduct," as used in § 48-628(b). We agree with the tribunal's determination that while Jensen had a history of absenteeism and tardiness, that history seemed to be a secondary reason for Jensen's termination.

We hold that it is misconduct for employees to report to work with the odor of alcohol on their breath after having been warned not to do so. In *Federoff v. Rutledge*, 332 S.E.2d 855 (W. Va. 1985), a maintenance foreman of a coal mine had been terminated for reporting to work with alcohol on his breath. The employee's position was that he was not intoxicated on the job. The court held:

> The appellant's defense that he did not report to work intoxicated or drink on the job is no defense to the charge that he ignored previous oral warnings not to report to work in such an odoriferous condition. Being employed in a position with supervisory duties, such as the appellant in the instant case, or being in a position where one is in contact with the employer's customers, particularly compels such a determination.

332 S.E.2d at 858.

The court held that under West Virginia law, "reporting to work smelling of alcoholic beverages, after previously being admonished not to do so, supports a determination that an unemployment claimant was discharged for ordinary misconduct and thereby subject to a six-week disqualification from the receipt of benefits." *Id.* See, also, *Neville v. Bd. of Review*, 143 Ill. App. 3d 548, 494 N.E.2d 512 (1986).

Jensen, as a nursing assistant, necessarily came into close personal contact with hospital patients. Whether she was intoxicated or not, the Hospital was not unreasonable in requiring such an employee report to work without the odor of alcohol on her breath. Such an odor, detected at close range by a hospital patient, could well cause personal distress to the patient and weaken the patient's confidence in the abilities of the hospital's employees to properly care for patients entrusted to the hospital for treatment. The tribunal's determination that Jensen was not intoxicated at work is not dispositive of the issue.

We hold that in an employment position which requires close

personal contact with persons served by the employer, it is not unreasonable for the employer to require that employees in such positions report for work without the odor of alcohol on their breath. Violation of such a requirement, after warnings to the employee, is misconduct within the meaning of § 48-628(b).

The decision of the Adams County District Court is hereby reversed, and the matter is remanded with directions to enter an order remanding the case to the Nebraska Appeal Tribunal for the entry of an order disqualifying Jensen from receiving unemployment benefits for a period of 10 weeks.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissents.

PHILLIP H. ALLEY, APPELLANT, V. DAVE TITTERINGTON ET AL., APPELLEES.

443 N.W.2d 615

Filed August 4, 1989. No. 88-971.

1. **Workers' Compensation: Appeal and Error.** Findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas R. Lamb, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellees.

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

GRANT, J.

This is an appeal from an order entered by a three-judge panel of the Nebraska Workers' Compensation Court dismissing the petition of the plaintiff employee, Phillip H. Alley. On December 11, 1987, Alley filed his petition against "Dave Titterington, Dave's Contracting," seeking compensation for injuries he alleged were sustained while he was employed as a carpenter. The pleadings show that the employer is either Dave Titterington, doing business as Dave's Roofing & Contracting, or Dave's Roofing & Contracting and D.K. Titterington. The defendant or defendants will be referred to as the employer.

Alley timely appeals, assigning three errors, which may properly be summarized as contending that the order of the panel reversing the award of the single judge and dismissing the petition was not supported by the evidence. We affirm.

Alley testified that on July 31, 1987, he was on the roof of a house in Lincoln with a fellow employee, Robert Havner, when Havner struck him in the face. After being hit, Alley testified, he did a deep, twisting knee bend to prevent himself from falling off the roof, which caused him to feel a sharp pain in his lower back. Alley looked up to see Havner falling from the roof. Alley stated that he was able to grasp the wrist of Havner and pull him back to safety and that as he pulled Havner to safety, Alley felt a pain in his lower back and felt the pain rise up into his shoulder area.

Titterington, apparently the proprietor of Dave's Roofing, lived a few doors down from the jobsite. Alley stated that he left the jobsite and reported the incident to Titterington. Alley then testified that both he and Havner went back to work and that for the rest of the day he felt a considerable amount of pain in his lower back and shoulders. Although in pain, Alley continued to work on a full-time basis for the employer until September 3, 1987. On September 10, 1987, Alley was terminated.

The record shows that Alley had injured his lower back while working as a woodcutter in Missouri. Alley moved to Portland, Oregon, and then to Lincoln, Nebraska. While Alley was living at the Lincoln City Mission during September 1986, the

employer hired Alley to work as a temporary laborer for the employer, and on September 26, Alley began working for the employer on a full-time basis.

Titterington testified that he owed Alley $422 in backpay and that in a telephone conversation after Alley had been terminated, Alley had threatened to use the Workers' Compensation Court to collect this money. Titterington also testified that Alley complained of back pain and told stories of his Missouri back injury on a weekly basis, long before the alleged incident. Additionally, Alley testified that he had been accused of reporting that certain work release prisoners working for the employer had been using alcohol and drugs and that this might have been the cause of the animosity between Alley and Havner.

Havner testified that the incident testified to by Alley had never occurred.

Based on this evidence, the panel dismissed Alley's petition, stating in its order that "we are unable to say that the evidence, on this factual situation, preponderates in favor of the plaintiff . . . ."

Findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Gomez v. Kenney Deans, Inc.*, 232 Neb. 646, 441 N.W.2d 632 (1989); *Gloria v. Nebraska Public Power Dist.*, 231 Neb. 786, 438 N.W.2d 142 (1989). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986).

We cannot say from our review of the record that the panel was clearly wrong in holding as it did. There was sufficient evidence to support the panel's findings.

The judgment of the rehearing panel is affirmed.

AFFIRMED.

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

444 N.W.2d 610

Filed August 11, 1989. No. 86-946.

1. **Criminal Law: Right to Counsel.** An accused is entitled to be represented by counsel at all critical stages of criminal proceedings against him, including sentencing.
2. _____: _____. The exercise of sixth amendment rights to counsel is subject to the necessities of judicial discretion.
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. **Right to Counsel.** An indigent defendant's right to counsel does not include a right to be represented by counsel of his choice and to be represented by an attorney he likes or with whom he has rapport.
5. **Trial.** It is the duty of a trial court to expedite the trial as much as is possible without infringing upon the rights of the parties to a complete and orderly examination of all the facts and circumstances connected with the case.
6. **Trial: Joinder: Appeal and Error.** The right to a separate trial depends upon a showing that prejudice will result from a joint trial. A motion for a separate trial is addressed to the discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of a showing of an abuse of discretion.
7. **Trial.** A defendant may not make a tactical choice in the conduct of his trial and then, when dissatisfied with the results of his choice, make a different choice.
8. **Constitutional Law: Trial: Joinder.** Pursuant to Neb. Rev. Stat. § 29-2002 (Reissue 1985), two or more defendants may be tried together. There is no constitutional right to a separate trial, and a separate trial will only be granted upon a showing of prejudice.
9. **Trial: Evidence: Parties: Jury Instructions.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.
10. **Trial: Evidence: Jury Instructions.** While the giving of a limiting instruction is mandatory when requested, it is within the trial court's discretion whether to give a limiting instruction contemporaneously with the testimony or in the general instructions to the jury.
11. **Rules of Evidence: Other Acts.** 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.
12. _____: _____. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence, may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though

such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

13. **Trial: Evidence.** The responsibility for maintaining the delicate balance between the probative and prejudicial effect of evidence lies largely within the discretion of the trial court.
14. **Rules of Evidence.** There are four factors to be considered in determining admissibility under Neb. Rev. Stat. § 27-404(2) (Reissue 1985): (1) The evidence must have a proper purpose; (2) the evidence must be relevant; (3) the probative value of the evidence must outweigh its potential for unfair prejudice; and (4) the court must instruct the jury to consider the evidence only for the purpose for which it was admitted.
15. **Criminal Law: Jury Instructions: Verdicts: Insanity: Appeal and Error.** It is not error for a trial court to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity.
16. **Criminal Law: Jury Instructions: Intent.** A special diminished capacity instruction need not be given where the jury has been properly instructed on intent as an element of the crime charged.
17. **Constitutional Law: Insanity.** Neb. Rev. Stat. § 29-2203 (Reissue 1985) does not violate either the U.S. or Nebraska Constitution.
18. **Homicide: Insanity: Proof.** Neb. Rev. Stat. § 29-2203 (Reissue 1985) sets out an affirmative defense to the crime of murder and does not require the defendant to disprove any of the elements of the offense with which he is charged.
19. **Criminal Law: Presumptions: Proof: Insanity.** So long as the presumption of innocence is maintained throughout a trial and the State is required to prove all the elements of the crime charged beyond a reasonable doubt, a defendant may be required to plead and prove the defense of insanity, where defendant presents the defense as an absolute bar to the crime charged.
20. **Criminal Law: Trial: Juries: Appeal and Error.** The determination of whether or not a jury should be sequestered during the trial of a criminal case is left to the discretion of the trial court and, absent an abuse of that discretion or evidence of jury tampering or misconduct, that decision will not be reversed on appeal.
21. **Criminal Law: Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
22. **Criminal Law: Jury Instructions: Witnesses: Corroboration: Convictions.** Where a jury has been properly instructed that testimony of an accomplice should be scrutinized closely for possible motives of falsification, the uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction.
23. **Testimony: Juries.** The credibility and weight to be given testimony is a matter for the evaluation and determination of the jury.
24. **Juries: Insanity.** The defense of insanity when interposed by an accused is a question of fact for the jury.
25. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.

26. **Convictions: Appeal and Error.** In determining whether the evidence before a jury was sufficient to support the jury's finding, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury, for these are within the jury's province for disposition, and a jury's verdict must be sustained if evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
27. **Trial: Evidence: Witnesses.** It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury, but also on the examination of witnesses and otherwise during the course of the trial.
28. **Trial: Judges: Recusal.** A judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal.
29. **Constitutional Law: Homicide: Sentences.** The procedure set forth in Neb. Rev. Stat. § 29-2520 (Reissue 1985) does not violate either the U.S. or Nebraska Constitution.
30. **Homicide: Sentences: Appeal and Error.** The determination of whether to request the designation of a three-judge sentencing panel under Neb. Rev. Stat. § 29-2520 (Reissue 1985) is left to the discretion of the district court, and absent a showing of an abuse of that discretion, this court, on appeal, will affirm that decision.
31. **Criminal Law: Constitutional Law: Homicide: Sentences.** A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.
32. **Records: Judicial Notice: Rules of Evidence.** An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2) (Reissue 1985).
33. **Constitutional Law: Sentences: Evidence: Witnesses.** A sentencing court must consider information adduced at trial when exercising discretion in imposing sentence, and there is no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court.
34. **Trial: Presumptions: Appeal and Error.** Without some affirmative showing in the record that a grant of a motion for discovery was violated, this court will presume compliance.
35. **Sentences: Aggravating and Mitigating Circumstances: Proof.** The facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt.
36. **Sentences: Aggravating and Mitigating Circumstances: Evidence.** A sentencing court may not consider the same evidence to support different aggravating factors. However, a sentencing court may consider evidence of distinct incidents to support different aggravating factors.
37. **Sentences: Aggravating and Mitigating Circumstances.** Under the rationale of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), statutory aggravating circumstances must be clearly defined and applied by a

court so as to prevent a sentencing body from exercising discretion that may lead to arbitrary or inconsistent results.

38. _____: _____. "Exceptional depravity" as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."

39. **Homicide: Aggravating and Mitigating Circumstances: Proof.** The "especially heinous, atrocious, or cruel" language of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) is limited to cases where torture, sadism, or the imposition of extreme suffering exists, or where the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.

40. _____: _____: _____. In order for aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Reissue 1985) to be present, the method of killing must entail something more than the ordinary circumstances which attend any death-dealing violence.

41. **Sentences: Death Penalty.** The death penalty may only be imposed under sentencing procedures that do not create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.

42. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** This court's automatic review of capital cases does not require it to set aside a death penalty where certain aggravating factors found to exist below are determined here to be unsupported by the evidence. A finding of a single aggravating circumstance on appeal may be sufficient to support a death sentence.

43. **Homicide: Aggravating and Mitigating Circumstances.** The presence or absence of mitigating factors is not, in any way, an element of the crime of murder.

44. **Sentences: Aggravating and Mitigating Circumstances: Evidence.** A defendant may offer any evidence on the issue of mitigation.

45. **Criminal Law: Trial: Juries: Appeal and Error: Words and Phrases.** 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.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

Bruce Dalluge, of Morrissey, Morrissey & Dalluge, for appellant.

Robert M. Spire, Attorney General, A. Eugene Crump, and Melvin K. Kammerlohr for appellee.

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

GRANT, J.

The defendant, Michael W. Ryan, was charged with first degree murder in the death of James Thimm. Thimm died April 29, 1985, after being tortured by defendant and four others for 3 days.

On September 25, 1985, an information was filed in the Richardson County District Court charging defendant with two counts of murder. Count I charged him with the first degree murder of James Thimm, and count II charged him with the first degree murder of Luke Stice. Count II of the information was separated in the trial and is not a part of this appeal, except as defendant's later plea of nolo contendere to second degree murder in that crime is addressed below in connection with defendant's sentencing.

On October 8, 1985, defendant appeared before the Richardson County District Court and entered a plea of not guilty to both counts at an arraignment hearing at which defendant was fully advised of his constitutional rights, including his right to remain silent and not testify or otherwise incriminate himself. On November 27, 1985, defendant filed a "Notice of Insanity Defense." On defendant's motion, the case was moved to Omaha, Douglas County, for trial. On February 24, 1986, the trial of count I of the information, the first degree murder of Thimm, commenced with jury selection. On March 6, 1986, a panel of 12 jurors and 2 alternate jurors was sworn. The trial began on March 10, 1986, and closing arguments were made on April 7, 1986.

On April 10, 1986, the jury returned its verdict finding defendant guilty of the first degree murder of James Thimm. Defendant moved for a three-judge sentencing panel pursuant to Neb. Rev. Stat. § 29-2520 (Reissue 1985). On May 6, 1986, this motion was denied. On April 18, 1986, a motion for a new trial was filed, and after a hearing was held on April 25, 1986, defendant's motion for a new trial was denied.

A sentencing hearing was held on September 15 and 16, 1986, before the trial judge. On October 16, 1986, defendant was

sentenced to death. This court is charged with the review of the Richardson County District Court's judgment, pursuant to Neb. Rev. Stat. § 29-2525 (Reissue 1985). In his brief, defendant has assigned 60 errors, which are grouped into 30 arguments. Each is discussed hereinafter. We affirm the judgment and the sentence.

During the trial, evidence was adduced that established the chronological order of events leading up to the torture death of Thimm. Evidence in the record as to the group's lifestyle and the events culminating in Thimm's murder are set out chronologically, and the defendant's arguments are considered separately below.

The record shows the following. Defendant was described as the leader of a group, characterized at trial as both a religious cult and a band of criminals, living on a farm outside of Rulo, in Richardson County, Nebraska. The cult largely developed out of the teachings of Rev. James Wickstrom, the self-proclaimed leader of a group which called itself the "Posse Comitatus." See *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117 (1973). Defendant met Wickstrom at a Bible lecture in Hiawatha, Kansas.

Wickstrom's teachings centered around Anglo-Saxon supremacy, the unconstitutionality of income taxes, and the coming Battle of Armageddon. Although Ryan did not agree with all of Wickstrom's teachings, particularly with regard to tax matters, Wickstrom's ideology was the catalyst that formed the Rulo cult's belief system. As a result of his involvement with the Posse Comitatus, defendant met James Haverkamp, John David Andreas, Ora Richard (Rick) Stice, and James Thimm during 1982 and 1983. In June of 1983, Ryan and some of the other members of the group met with Wickstrom at a large meeting of the Posse Comitatus in Wisconsin.

During the Hiawatha meeting, Wickstrom showed Ryan what was known as the arm test. That test was described as follows. Defendant would face a group member, who would extend his right arm out at approximately a 90-degree angle from his or her body. Defendant would then place his left hand on the member's right shoulder and place his right hand on the member's right wrist. After asking Yahweh (the name used by

defendant and his group for God) a question, defendant would apply pressure to the person's right arm. If the arm dropped, the answer to the question being asked of Yahweh was "no"; if the person's arm stayed up, the answer was "yes." As time went on, others in the group used this arm test, and after awhile every aspect of the lives of the Rulo group was controlled by the use of the arm test.

Sometime in 1983, defendant began telephoning the individuals who later constituted the Rulo group with "orders from headquarters." Defendant would tell the person he called that he (defendant) had "talked to Yahweh and [the men were] supposed to go out and do some stealing . . . ." If any of the men refused to go on these stealing raids, defendant would remind them that their families would not be safe if they angered Yahweh.

The men, in keeping with the group's plans to build a "base camp," converted the spoils of these thefts into weapons, ammunition, and clothing and began to stockpile those items in preparation for the Battle of Armageddon. These stealing raids were conducted in the states of Kansas, Missouri, and Nebraska. The thefts involved the stealing of cattle, hogs, and various large items of farm machinery and construction equipment. Many of those items, including all the stolen livestock, were sold, and the proceeds financed the stockpiling mentioned above. At the time of defendant's arrest, officers recovered stolen property with a value in excess of $120,000 at the Rulo farm.

By the summer of 1983, it was determined, through the arm test, that defendant had the spirit of the Archangel Michael. Defendant also told the group that he could communicate directly with Yahweh through his mind.

The group began to meet each Saturday to study the Bible. These meetings were conducted by defendant and were usually attended by James Haverkamp; his sisters Cheryl Gibson and Lisa Haverkamp; his mother, Maxine Haverkamp; defendant's wife, Ruth; and defendant's three children. James Haverkamp's younger brother and father would also attend, as did Thimm, Andreas, Rick Stice, Stice's children, and Stice's girlfriend.

During these meetings, defendant would read and interpret various verses of the Bible. He told the group that "the Jews added" any passages that disagreed with his teachings. During these meetings, verses of the Bible were rewritten to conform to the group's beliefs. At the conclusion of these meetings, the group would smoke marijuana.

At one of these meetings, held in Kansas, where defendant and his family then lived, defendant took Cheryl Gibson aside and told her that Yahweh wanted her to leave her husband. Defendant used the arm test to determine that in Yahweh's eyes Gibson was not married to her husband, who was "on Satan's side." Defendant also told her that if she did not stay with defendant and Ruth Ryan, her husband and children would be killed in an automobile accident.

Gibson eventually left her husband, and for a time she and her children lived with Michael and Ruth Ryan. In May of 1984, a cult service was held, with Rick Stice officiating, where defendant and Gibson were married in Yahweh's eyes.

In June of 1984, defendant told his wife, Ruth, and Gibson that Yahweh wanted them to get better acquainted by going to the Rick Stice farm outside of Rulo. During the summer of 1984, defendant, Ruth Ryan, the three Ryan children (including Dennis), Rick Stice and his three children, Cheryl Gibson and her five children, James Haverkamp, Lisa Haverkamp, and James Thimm moved to the Rulo farm. In August 1984, John David Andreas and, in October, Timothy Haverkamp, a cousin of the Haverkamps, moved to the farm. This group of 7 adult men (including Dennis Ryan), 3 adult women (Ruth Ryan, Gibson, and 15-year-old Lisa Haverkamp), and 10 young children constituted the basic Rulo group. Maxine Haverkamp was a regular visitor.

In the meantime, in June of 1984, defendant officiated at the cult wedding of Rick Stice and Lisa Haverkamp, and, in August of 1984, defendant took his second cult wife by marrying Cheryl Gibson's mother, Maxine Haverkamp.

The Rulo farmstead included two trailer houses. Rick Stice was determined to be the high priest of the group, and he and Lisa Haverkamp shared a bed in the south trailer. During this period, the remainder of the group lived in the north trailer. The

men slept in a large room known as the barracks, and the women and children slept in various other rooms of the north trailer.

By August of 1984, daily life on the farm was established. The women would consult Yahweh through the arm test in order to determine meal plans, including how long to boil water, and Ryan would use the arm test to find out if any members of the group needed to fast or do penance that day.

Defendant acted as the leader of the group. He would assign tasks for the day and then spend most of his time watching television. During the evenings, defendant would direct the men on stealing raids. Apparently, defendant himself did not participate in the raids.

The group believed that the Battle of Armageddon would take place in the Rulo area, since the Battle of Armageddon was also known as the "Battle of the Wheat Fields." Defendant had observed that there were several wheat fields in the area, and concluded from this that the final battle would be waged near Rulo.

Defendant gave each of the men a military title, and within a few months all of the men were generals, some having attained five star general status, with the exception of Rick Stice, the owner of the farm, who was a six star general and the high priest.

By the fall of 1984, the group had acquired over 75,000 rounds of ammunition and dozens of weapons, including several that were fully automatic. The group also stockpiled seed, charcoal, and enough food to fill a room 20 feet wide by 35 feet long.

During the later part of 1984, Stice lost the Rulo farm due to financial difficulties. The farm was purchased by James Haverkamp and Lynn Thiele, partially with money stolen from James Haverkamp's father. During this same period, defendant determined that Yahweh was angry with Rick Stice; that Stice had raped Stice's cult wife, Lisa Haverkamp; and that Stice was having "bad thoughts." It would appear that one of Stice's more serious transgressions was losing the farm. Defendant demoted Stice and moved Lisa to the north trailer, where she shared a bed with Ruth Ryan and Cheryl Gibson.

In December of 1984, defendant took Lisa Haverkamp as his third cult wife, and on June 25, 1985, Ryan took his fourth cult wife by marrying Debra Thiele, the sister of Cheryl and Lisa. By this time, defendant was considered married to Cheryl, Lisa, and Debra and to their mother, Maxine Haverkamp, and Ruth Ryan, whom he married in a conventional ceremony in about November of 1967. Maxine did not live on the farm, but would come to the farm twice a month, apparently to perform her conjugal activities.

In December of 1984, defendant announced that Lisa Haverkamp was the queen of Israel. On New Year's Eve, defendant told the group that he and Lisa had spoken to Yahweh, and Yahweh had said that there were going to be changes on the farm. After the group smoked marijuana, defendant informed them that unless the jealousy stopped the law would come and that the children would be taken away. Defendant told the group that each individual had to make a decision on whether to remain or leave the farm; that Yahweh had indicated that anyone who elected to leave would "burn in hell"; and that if an individual elected to stay, he or she would have to stay with the group forever. Defendant said that if anyone decided to stay and then left, he would "hunt [them] down and kill [them]."

During a Saturday Bible meeting, James Thimm stated that he was not sure there was a Yahweh and expressed doubts in the arm test. Rick Stice's 5-year-old son, Luke Stice, also apparently had expressed doubts about Yahweh. After these incidents, in January or February of 1985, Thimm, Rick Stice, and Luke Stice were moved to the south trailer. Both Thimm and Rick Stice were demoted to "slaves," and Luke was called "dog," "mongrel," "gook," or "dogshit." During January and February, apparently as part of the changes Ryan had foretold, Rick Stice and Thimm were made responsible for most of the guard duty, washing of dishes, and care of the chickens and goats.

Evidence showed that about this time, defendant began to abuse Thimm, Rick Stice, and Luke Stice. Defendant threatened to amputate Rick Stice's penis and threatened to skin and then burn Luke Stice alive, and both Thimm and Rick Stice

were forced to do calisthenics. In March, defendant instructed Thimm to have anal sex with Rick Stice, and told Thimm "to make him hurt." Defendant also forced Rick Stice to perform oral sex on his son Luke and forced Luke to perform oral sex on his father while the other men watched. Ryan told the others that Yahweh wanted these acts performed in order to humiliate Thimm and Rick and Luke Stice as punishment for their having "bad thoughts."

Luke Stice died around March 25, 1985, after defendant repeatedly shoved him, causing Luke's head to strike a cabinet. Luke was knocked unconscious the third time defendant shoved him and died sometime during the night. Luke was buried the following morning in an unmarked grave that defendant forced Rick Stice and Thimm to dig.

After Luke's death, defendant forced Rick Stice to copulate with a goat on three different occasions.

During March, defendant and Lisa Haverkamp went to Kansas City for a honeymoon. Defendant left his son Dennis and Timothy Haverkamp in charge at Rulo. While defendant was gone, Rick Stice escaped. After defendant returned, James Thimm was kept chained to the south trailer porch.

After leaving the farm, Stice began to worry about "eternal damnation" and returned to the farm after 7 days. Upon his return, defendant had both Rick Stice and Thimm kept chained to the porch of the south trailer.

On April 4, 1985, Rick Stice escaped a second time after Timothy Haverkamp had taken Stice into town on defendant's orders, so that Stice could cash his Social Security check. Stice did not return to the farm and did not contact authorities until June 26, 1985.

After Stice's escape in April, the treatment Thimm received from defendant continued to deteriorate. Thimm was forced to sleep chained to the porch, was fed small birds the men shot, and was also forced to copulate with a goat. On April 27, 1985, after being accused of poisoning a turkey, Thimm was beaten by the men and taken to the hog confinement building, where he was kept chained for the night. At this time, the adult men present on the Rulo farm were: defendant; Dennis Ryan; Timothy Haverkamp; James Haverkamp; John David

Andreas; and the victim, James Thimm. Ruth Ryan, Cheryl Gibson, and Lisa Haverkamp were the adult women there, and there were nine young children.

On April 28, 1985, defendant sent Andreas out to Thimm with a bowl of granola cereal. Defendant informed the men during breakfast that "Yahweh would be pleased if [Thimm] lasted four or five days." At about mid-morning, defendant and the rest of the adult men went to the hog confinement building. Defendant instructed Thimm to disrobe and to bend over a farrowing crate.

Defendant then told Thimm that he was going to be sexually assaulted with a shovel handle. Defendant then inserted a shovel handle into a grease cartridge and told the men that Thimm had not done a good enough job with the goat and that Yahweh wanted Thimm "probed." Defendant then inserted the shovel handle about 5 or 6 inches into Thimm's rectum and "probed" Thimm for about 30 seconds. When Thimm would not stop fidgeting, defendant tied Thimm's arms to the farrowing crate with baling wire.

Defendant then informed the men that Yahweh had said that he wanted the handle inserted between 8 and 10 inches and had given defendant the order in which each man was to probe Thimm. A tape measure was then used, and the shovel handle was marked. While defendant had the handle inserted in Thimm's rectum, he told Thimm, "I ought to shove this thing up to your heart." (One of the examining pathologists testified that, in fact, the shovel handle was inserted some 2 feet into Thimm.) Each of the remaining four men then took their turns probing Thimm's rectum with the shovel handle. After Thimm screamed a couple of times, defendant kicked Thimm in the head and had furnace tape put over Thimm's mouth so that the men would not have to hear Thimm's cries.

After the probing, defendant instructed Thimm to sign his car title over to Timothy Haverkamp. Thimm did so, and apparently defendant told Timothy Haverkamp that Thimm's car was his birthday present.

Each man, beginning with defendant, probed Thimm again. During this second round of probing Thimm's rectal wall was ruptured. Defendant decided that the handle was being inserted

too far and that they needed an object that was bigger around. Defendant then greased the fat end of a pick handle and inserted it into Thimm's rectum about 3 inches. After this second round of probing, the men left to do some chores and left Thimm chained in the hog confinement shed.

That afternoon defendant told the men that Thimm had not been punished enough. The men returned to the hog confinement building, and Thimm was removed from the farrowing crate and bound to an overhead auger. Each of the five men then gave Thimm 15 lashes with a leather whip. Defendant began the whipping, and with each lash one of the cult members' names was called out. During this whipping Thimm said, "I'm sorry, Yahweh, please forgive me what I've done. Please stop this." Whereupon defendant said, "Well, you don't need to worry about that, because Yahweh's given up on you. You don't have any hope any more."

After this whipping Thimm was untied, given his sleeping bag, and chained up for the night.

During breakfast of the following morning (April 29, 1985), defendant told the men that Thimm had still not been punished enough. The men returned to the hog confinement building, and Thimm was again tied to an overhead auger. Beginning with defendant, each man gave Thimm 15 lashes with the leather whip.

After Thimm had received 75 lashes, defendant said that Thimm had still not received enough punishment. Thimm was forced to lie with his freshly whipped back on the floor. Thimm was then bound to a pipe, and each of the five men lashed Thimm's chest and stomach 15 times.

Defendant then had Thimm's left hand placed and bound palm up on a block of wood. Thimm began to moan, and defendant told him things would only get worse if he did not shut up. Defendant then shot one of Thimm's fingertips off with a pistol. Michael Ryan then instructed each man to shoot off one of Thimm's remaining left hand fingers and his thumb.

After the men had shot off Thimm's fingers, they returned to the north trailer for lunch. At lunch defendant told the men that Yahweh wanted Thimm dead by that afternoon. The men returned to the hog shed; defendant told Andreas to disk over

the field to prepare an area to bury Thimm and told Andreas that he should go say goodbye to his friend James Thimm. When Andreas said goodbye, Thimm was still alive and able to say that he was "sorry."

Defendant then kicked and broke Thimm's arm and told Thimm that he was going to skin a part of him. Defendant put on a pair of yellow kitchen gloves and used a razor blade to make incisions in Thimm's leg, and then used a pliers to pull off strips of Thimm's skin. Thimm was still alive at the time. Defendant then told Dennis Ryan that he could break one of Thimm's legs. Dennis took a rough-cut 2 by 4 board about 7 feet long and proceeded to strike Thimm's leg in the knee area until Thimm's leg broke. Defendant told Dennis Ryan and Timothy Haverkamp that there was an easier way to break a leg. Defendant then placed a block of wood under Thimm's leg and told Timothy Haverkamp to hit Thimm's leg with the 2 by 4. Timothy Haverkamp hit the leg once and it broke.

Defendant then bent down and asked Thimm if he thought Yahweh meant business. Thimm was alive at this time. Defendant then said, "I'll cave his chest in. . . . That's sure to kill him." Defendant then proceeded to stomp on Thimm's chest with his cowboy boots.

Defendant then had James Haverkamp get Thimm's sleeping bag. Timothy Haverkamp testified that Thimm was dead before James Haverkamp returned with the sleeping bag. Defendant placed Thimm's body and clothing into the sleeping bag. Three or four hours later, defendant told the men that Yahweh wanted the grave to be "six foot long by three foot wide and six foot deep." The men dug the grave. Thimm's body was placed in the unmarked grave, and defendant told Timothy Haverkamp to shoot Thimm's body in the head so it would look like an execution. After Thimm's body had been shot in the head, it was covered with dirt.

An autopsy of the body was conducted for the State by George Gamel, M.D., on August 19, 1985, and by William Eckert, M.D., on behalf of the defendant, on September 3, 1985. Both autopsies revealed the following injuries: The anus was markedly dilated; the left hand's fingertips had gunshot-type injuries; the left arm was broken; both legs were

fractured at the thigh level; the head had a gunshot wound, which shot had shattered the left side of the skull; there were multiple rib fractures on both the left and right sides of the chest and back; a blunt object had been inserted far up into the body cavity through the anus, causing damage to the liver; the colon was torn; linear bruises were on the body; and skin had been stripped from one of the legs. The victim's wrists and ankles were still bound with baling wire. The only disagreement between Drs. Gamel and Eckert was whether the victim's penis and scrotum had been cut away or had decomposed. Both pathologists reported that the cause of death was multiple traumatic injuries. Dr. Gamel testified the tear in the colon, the "whipping-like injuries," the gunshot wound to the head, the shock from the broken legs, and the crushed chest were all capable of causing the victim's death independently.

On June 25, 1985, James Haverkamp and Andreas were apprehended while attempting to return to the Rulo farm with a sprayer rig stolen in Kansas. While incarcerated, these men gave law enforcement officials information that was used to secure a search warrant. A team of law enforcement officers composed of FBI agents, Bureau of Alcohol, Tobacco, and Firearms agents, Nebraska State Patrol officers and investigators, and Richardson County sheriff's personnel, assisted by James Haverkamp and Andreas, searched the Rulo farm on August 17 and 18, 1985. On August 18, 1985, James Thimm's nude, partially decomposed body was found, and on September 25, 1985, the defendant was charged with Thimm's murder.

The foregoing facts were testified to by each of the five men involved in the murder. James Haverkamp, Timothy Haverkamp, John David Andreas, Dennis Ryan, and defendant himself each testified, in detail, as to the specific instances of probing, whipping, shooting, kicking, and beating. There is surprising agreement in the detailed facts related by each man.

Defendant's testimony is reflected in 291 pages of the record herein. He sets out his participation in the horrifying acts committed on Thimm and does not deny that the testimony of the other four criminals is generally true. In his testimony, defendant made the following points as to the testimony of the

others, setting out his disagreements with the testimony of the other four. Defendant testified that James Haverkamp was the instigator of most of the thefts, that defendant did not force Andreas to go to the Rulo farm, that the victim and Andreas were not best friends, that defendant did not always lead the Bible studies, that Cheryl Gibson testified against defendant only because she was threatened by the FBI, that defendant did not want to steal, that defendant was tired of the people on the farm and wanted to leave, that Lisa Haverkamp had more power than defendant, that Rick Stice was responsible for the abuse of his son Luke, that it was not defendant's idea for Stice and Thimm to have homosexual relations, and that defendant tried to stop the homosexual activities.

The denials, of course, were as to essentially peripheral activities at the farm. As to the murder incident itself, defendant did not deny and, indeed, specifically testified to the torture itself and to Thimm's death. Defendant did testify, in contradiction to the testimony of others, as to some specific instances. Defendant testified that Yahweh, not defendant, had Thimm chained in the hog shed; that Thimm agreed to his torture; that defendant did not kick Thimm in the head; that Yahweh would not allow the group to drive Thimm off the farm; that Timothy Haverkamp "tore" Thimm open while probing him; that defendant did not stomp on Thimm's chest with his boots; that Andreas and James Haverkamp stomped on Thimm's chest, and Thimm was not breathing after this; that defendant told the group to leave Thimm alone; and that James Haverkamp had the idea of shooting Thimm's fingers off.

Defendant further testified that everyone came to the Rulo farm of their own free will and that he, the defendant, did not intend to kill Thimm.

The defendant argues his 60 assignments of error in 30 separate arguments. While we are primarily concerned with the defendant's assignments of error, that is, defendant's allegations as to the specific actions of the trial court which prejudiced him, we will consider the assignments as defendant sets them out in the arguments in his brief in order to ensure that all points raised on this appeal are considered. After considering all of defendant's assignments, we affirm.

Our review of the record has been complicated due to the way the record has been presented to us. Although complete, the record does not appear to follow any logical order. The pages are not numbered sequentially, several volumes have the same number, and many pages have the same page number. This procedure is a violation of this court's rules. In view of the fact that this is a capital case, however, we have reviewed the record before us. We determine that the entire record ordered by defendant in his praecipe is before this court, and we have not been advised by either party to the contrary.

One cause of this state of disorder appears to stem from the fact that the sentencing judge purported to take judicial notice of the trial record. This procedure is discussed below in defendant's argument XVII. During the defendant's sentencing hearing the evidentiary part of the trial, on the guilt-innocence phase, was marked as exhibit 1. Exhibit 1 consists of 18 volumes with olive-colored covers numbered VIII through XXV, containing trial testimony from pages 1052 through 4542; 2 volumes with tan covers numbered XXX and XXXI, containing trial exhibits 1 through 128 (except exhibit 33); and 1 volume with a green cover numbered XXXII, containing trial exhibits 129 through 143 (except exhibit 142).

That portion of the entire record was marked as an exhibit at the sentencing phase. Necessarily, that part of the record was also fully considered in our review of the guilt-innocence phase of the trial.

Trial exhibits 144, 145, and 146 (not a part of sentencing exhibit 1) are contained in a brown folder numbered XXIX.

The remainder of the record before us consists of the following. The defendant's arraignment is found in the first 13 pages of a 37-page volume with a blue cover numbered I, and a portion of the motion hearings are in the same volume at pages 14 through 37. Progression hearings are found in two volumes with blue covers numbered II and III, containing pages 18 through 399. Motion hearings are found in a volume with a blue cover numbered VI, containing pages 735 through 985, with an additional part in volume I mentioned above. The pretrial conference is found in a volume with a light-blue cover numbered VII, containing pages 986 through 1043. The jury

voir dire is found in four volumes with blue covers numbered II, III, IV, and V, pages 38 through 991, and one volume with an olive cover numbered VIII, with pages 1044 through 1051 containing further voir dire. Opening statements are found in pages 992 through 1052 of blue volume V. Other exhibits, marked in connection with motion in limine hearings, are found in a volume with a blue cover numbered XXVIII, containing exhibits 1 through 143, 147 through 156, and two additional exhibits both marked as exhibit 1 (these exhibits are different from trial exhibits, although they have the same numbers).

The instruction conferences are found in a blue volume numbered V, between pages 1053 and 1112; a volume with a light-blue cover numbered XXVI, containing pages 4543 through 4563; and pages 1301 through 1312 in a volume with a blue cover numbered VI. Closing arguments are found in the same blue volume VI on pages 1113 through 1301. The hearing on the defendant's motion for a new trial is found in blue volume VI at pages 1313 through 1347. The sentencing hearing is found in a blue volume VII at pages 1348 through 1586. The hearing on the defendant's motion for a new trial on the sentencing phase is also found in the same volume VII at pages 1586 through 1589. Sentencing exhibit 1 is the trial itself, and sentencing exhibits 2 through 26 are found in two separate brown boxes.

This listing of the various items in the record in this court shows that the portions of the record requested by the defendant in his praecipe are before us.

I. "*The Defendant cannot be deprived of his constitutional rights to counsel (Assignment #1).*"

Defendant first assigns as error the actions of the trial court in "terminating and dismissing his court-appointed counsel Mr. [Louie] Ligouri" and the actions of the court "directed towards Mr. Ligouri which preceded said termination . . . and which impaired his effectiveness . . . ."

The second part of assignment of error No. 1, as affecting the effectiveness of counsel, is included within assignment No. 2 discussed below. As to the first part of the assignment, the termination of attorney Louie Ligouri, the defendant contends

that he was deprived of his constitutional right to counsel when Ligouri was terminated by the district court on April 25, 1986, after the trial was concluded. Throughout the trial and the preliminary proceedings, defendant was represented by two attorneys, Richard Goos and Ligouri, both of whom had been appointed on October 8, 1985. The record shows that Ligouri had been in practice in Richardson County for 6 years, had tried four criminal jury trials, and had no first degree murder trial experience. Goos was a member of the Lancaster County Public Defender's office and had been in practice for over 24 years, with the 15 years prior to the defendant's trial dedicated exclusively to criminal law. Before this trial, Goos had tried eight or nine first degree murder cases. The record shows that the court treated Goos as lead counsel for the defense.

The defendant was represented by both Ligouri and Goos until, as mentioned above, Ligouri's services were terminated 15 days after the jury had returned its verdict. At the hearing on the termination of Ligouri's services, the court told Goos that if he needed additional help, he should notify the court. The record does not disclose any such request. Goos then continued to represent defendant through the sentencing hearing. On some date not shown in the record, Bruce Dalluge was appointed as cocounsel for defendant. The record does show that both Goos and Dalluge appeared before the court with defendant, as his attorneys, on July 28, 1986, so it is apparent that Dalluge was appointed before that date. Goos withdrew as defendant's attorney sometime after the sentencing hearing, and Dalluge continued to represent defendant on this appeal. Defendant was represented by Goos and Dalluge during his sentencing hearing. It is not apparent from the record why the trial court substituted Dalluge for Ligouri, but the result was that defendant had two attorneys throughout sentencing, as well as two attorneys throughout the trial.

It is settled law that an accused is entitled to be represented by counsel at all critical stages of criminal proceedings against him, including sentencing. *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985). The exercise of sixth amendment rights to counsel is subject to the necessities of judicial

discretion. *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988). While it often happens in this state that two attorneys are appointed to represent a criminal defendant in a capital case, neither the U.S. nor the Nebraska Constitution dictates such a requirement. *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982). The defendant's constitutional right to counsel did not include the right to have the two attorneys representing him throughout the trial also represent him during his sentencing and on the appeal.

In view of the seriousness of the charges and the bizarre nature of the underlying facts, the trial court, acting properly within its discretion, felt that it was appropriate to appoint two attorneys to represent defendant throughout the trial and its preliminaries. In exercising its discretion, the district court then determined that Ligouri's services would then be terminated. For reasons not apparent on the record before us, the trial court later appointed Dalluge as the attorney to continue working with Goos. In view of the terrible, horrifying facts brought out by all the evidence, including defendant's testimony, as to defendant's participation in this crime, it is not possible for this court to hold that the trial court abused its discretion in terminating Ligouri. The reasons for the termination and the subsequent appointment of a different lawyer are not apparent from the record before us, but we are not concerned with the wisdom of the action, but only its legal effect.

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. *State v. Ditter,* 232 Neb. 600, 441 N.W.2d 622 (1989). The defendant has made no such showing, and complains only that he had a better rapport with Ligouri. Such a consideration is irrelevant. An indigent defendant's right to counsel does not include a right to be represented by counsel of his choice and to be represented by an attorney he likes or with whom he has rapport. *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988); *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987); *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983). Defendant has received effective representation.

His concern about the fact he was deprived of the service of an attorney with whom he had rapport does not control the legal issue before us on this point. Defendant's assignment of error with regard to the particular counsel to whom he was entitled is without merit.

II. "*The Court should not interfere with counsel's obligation to zealously represent his client (Assignment #2).*"

As his second assignment, defendant sets out that he was denied "a fair trial and Due Process of Law, Effective Assistance of Counsel, and his right to an Impartial Jury" by the actions of the trial court in "impairment of cross examination . . . ."

The defendant also asserts that the trial court interfered with his counsel's obligation to zealously represent him. Defendant states:

> Throughout the trial the Court curtailed Defendant's counsel from putting on a proper defense. On numerous occasions, Defendant's counsel was denied the right to cross-examine witnesses, was interrupted by the Court without any objection from counsel, and witnesses were allowed to continually answer questions in a [sic] unresponsive manner.

Brief for appellant at 34.

In support of these contentions the defendant cites this court to 10 areas of the record. All 10 of the citations are from the cross-examination of Rick Stice by Ligouri. Defendant, in his second assignment, specifically refers to the court's alleged errors in its conduct during the testimony of Stice. Stice was called by the codefendant Dennis Ryan, and during his direct examination, Stice testified as to his status as "high priest" of the group. During cross-examination of Stice by Dennis Ryan's attorney, that attorney spent 45 minutes attempting to impeach Stice on this issue with testimony Stice had given during a deposition. During the cross-examination of Stice by Ligouri, acting as defendant's attorney, Ligouri asked Stice 20 different times, in several different ways, whether he was a "high priest," and Stice consistently answered that he was to be the high priest after the Battle of Armageddon.

At this point the trial court requested a side bar. The reporter

noted that the record was made in "low tones," and the judge, in apparent frustration, stated, "Who gives a damn whether he was a high priest or not, for God's sake? . . . [Codefendant's counsel] went at him for 45 minutes on the high priest deal. Are you going on for another 45 minutes?" Whereupon the following exchange took place:

> MR. LIGOURI: I want to cross examine him on this. If he is lying about one thing, he's lying about everything.
>
> THE COURT: Mr. Ligouri, keep your tone down, okay?
>
> That's enough on the high priest business.
>
> MR. LIGOURI: I just want to introduce these depositions.
>
> THE COURT: Okay, introduce them.

Assuming testimony concerning whether Stice was the high priest or said he was the high priest was relevant, Neb. Rev. Stat. § 27-403 (Reissue 1985) states that "evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court did not abuse its discretion by terminating the cross-examination of Stice on this issue. At some point, the trial court is entitled to try to bring some order out of chaos. This action of the trial court was no more than that. In *Treppish v. State*, 126 Neb. 21, 33, 252 N.W. 388, 393 (1934), the defendant was charged with first degree murder and claimed on appeal that the trial court "interfered in the examination of defendant's witnesses, continually urging the defendant's attorneys in their examination of witnesses to hurry, and continually interrupting the defendant's attorneys in their examination of witnesses . . . ." In *Treppish*, we stated:

> It is the duty of a trial court to expedite the trial as much as is possible without infringing the rights of the parties to a complete and orderly examination of all the facts and circumstances connected with the case. In his endeavor to expedite the trial in this case, the trial judge used some expressions that perhaps would have been better omitted. However, we are satisfied reversible error cannot be predicated thereon.

Id. at 33-34, 252 N.W. at 393.

The trial court did not abuse its discretion by terminating the continued cross-examination of Stice on whether he was the high priest. Examination of the record shows this assignment of error is without merit and borders on the frivolous.

In his brief, defendant cites the Stice cross-examination as an "example" of the court's interference with his right of cross-examination. Counsel cites us to no other alleged "interference" by the court. We have examined the entire record, and our examination discloses some acrimony between the court and counsel (primarily expressed in hearings outside the presence of the jury), but no prejudicial interference with counsel. Defendant's second assignment of error has no merit.

III. "*After the joinder of two informations which each charge a different Defendant the Court has a duty to sever the cases if it appears either of the Defendants will be prejudiced (Assignments #3, #4, and #5).*"

In his assignment No. 3, defendant contends, in substance, that he was prejudiced by the trial court's failure "to sustain defendant's MOTION FOR SEVERANCE of his case from that of the Co-defendant's during the progress of the trial." His argument makes it clear that defendant's contention is directed to severance of his trial from the trial of his son Dennis Ryan.

Defendant, Michael Ryan, and his son Dennis Ryan could have both been charged with the same act, the murder of James Thimm. Neb. Rev. Stat. § 29-2002(2) (Reissue 1985). Since the charges could have been so joined, it was not error, per se, to try Michael Ryan and Dennis Ryan in a consolidated trial. § 29-2002(3). See *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987).

The record shows that on December 23, 1985, on the motion of the State, the court ordered case No. 2390, count I, State of Nebraska v. Michael W. Ryan; case No. 2384, State of Nebraska v. Dennis Ryan; and case No. 2389, State of Nebraska v. Timothy Haverkamp, consolidated for trial. Defendant objected to the joinder of his case with Timothy Haverkamp's case and moved that case be severed. As to severance of Dennis Ryan's case, the record does not show that defendant initially moved for severance, nor was severance

granted. Defendant admits that while he objected to joinder of his case with Timothy Haverkamp's case, he "did not make any objection at the time to the joinder of his case with his son, Dennis Ryan." Brief for appellant at 36. The record shows that at the conclusion of the State's evidence, defendant's counsel moved that the court

> sever . . . the case of Michael Ryan from the case of his son, Dennis Ryan, on the grounds that it I think became apparent to us, certainly yesterday, that it's going to be very difficult for Michael Ryan to have a fair trial when he is to be tried with his son and when the defense for his son is bringing in inflammatory and irrelevant matters to defend their client.

Defendant's oral motion for severance was then denied.

Defendant's position on severance was amplified during the instruction conference at the end of the trial, when the following discussion was held on the record outside the presence of the jury:

> THE COURT: Well, you didn't complain initially about joining the trials, and I could never understand that.
>
> MR. GOOS: I'm sorry, Judge, what?
>
> THE COURT: Did you — You didn't complain initially about consolidating the trials.
>
> MR. GOOS: Well, we had, tactically, something to gain from that. For example, no death qualification. Apart from legal things, it afforded the defendant a chance to see and be with his son throughout the trial, something that, you know, if he's convicted, he may have trouble seeing that boy for a long, long time, and — And so that he personally wanted a joint trial; and there is another reason which I — I — Well, a reason or two why we were not objecting to the joinder so much.

As stated above, at the close of the State's case, the defendant moved for severance of his case from Dennis Ryan's. A similar problem was present in *State v. Cook*, 182 Neb. 684, 157 N.W.2d 151 (1968), where defendant Cook moved for severance of his case from that involving a codefendant, after both the State and Cook had completed their evidence in the case. This court overruled defendant's motion, stating:

> To permit a defendant to proceed to trial without making a motion for severance and to take his chances on a favorable result in the absence of extraordinary circumstances or surprise would permit a defendant to defeat the orderly processes of justice and defeat the expeditious and constitutional purpose embodied in our severance statute, section 29-2002, R.R.S. 1943. . . . Under our present statute, section 29-2002, R.R.S. 1943, amended in 1957, jointly charged defendants are not entitled to a separate trial as a matter of right but are entitled to a separate trial if it appears that the defendant or the State would be prejudiced by the joining of the offenses or the defendants in a joint trial. The proper rule is stated in State v. Brown, 174 Neb. 387, 118 N.W.2d 328, wherein the court said: "The right to a separate trial now depends upon a showing that prejudice will result from a joint trial. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of a showing of an abuse of discretion. Opper v. United States, 348 U.S. 84, 75 S. Ct. 158, 99 L. Ed. 101, 45 A.L.R.2d 1308 . . . ."

State v. Cook, supra at 688, 157 N.W.2d at 154.

Similarly, in the case before us, there is no reason to let a defendant make a tactical choice in the conduct of his trial and then, when dissatisfied with the results of his choice, make a different choice. It is left to the discretion of a trial court whether the trial of two codefendants should be severed. *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988); *State v. Lee, supra*. Pursuant to § 29-2002, two or more defendants may be tried together. There is no constitutional right to a separate trial, and a separate trial will only be granted upon a showing of prejudice. *State v. Clark*, 189 Neb. 109, 201 N.W.2d 205 (1972). A ruling of the trial court regarding severance will not be disturbed without a showing of prejudice. *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976). Defendant was not prejudiced by the joinder of his trial with the trial of Dennis Ryan.

With regard to his assignment No. 4, defendant contends that the trial court erred in refusing "to orally instruct or admonish the jury that evidence pertaining solely to Dennis

Ryan, Co-defendant, should be considered only as evidence against or for Dennis Ryan and not this defendant . . . ." There are two procedural ways that such problems may be handled in a trial involving codefendants. It is not necessary that the judge, during such a trial, give an oral admonition to the jury as to how each item of evidence presented in the case shall be considered by the jury. Whether a judge chooses to do so as the trial progresses is within his discretion. So long as the jury is properly instructed as to how it is to consider such evidence, a defendant's due process rights are not violated. In this case, the judge did instruct the jury, at the conclusion of the case, as to how the jury should consider the evidence as it concerned each defendant.

Defendant points to Neb. Rev. Stat. § 27-105 (Reissue 1985), which states: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

While the giving of a limiting instruction is mandatory when requested, it is within the trial court's discretion whether to give a limiting instruction contemporaneously with the testimony or in the general instructions to the jury. *Lowther v. United States*, 455 F.2d 657 (10th Cir. 1972), *cert. denied* 409 U.S. 857, 93 S. Ct. 139, 34 L. Ed. 2d 102, and 409 U.S. 887, 93 S. Ct. 114, 34 L. Ed. 2d 144.

Defendant's contention that it is a violation of his constitutional rights when the court does not contemporaneously rule on the application of each piece of evidence to one or another of codefendants is without merit.

In his fifth assignment, defendant seems to admit that the trial court had the right to instruct the jury at the end of the case, but contends that the court, in so doing, confused the jury.

NJI 14.54 provides:

> Though the defendants are tried together, it is your duty to consider separately the guilt or innocence of each defendant. Each defendant is entitled to have his guilt or innocence determined from his own conduct and from the evidence which applies to him, as if he were being tried

> alone. Evidence relating to one defendant alone may not be considered against the other defendants. . . . You will not permit any defendant to be prejudiced by reason of the fact that the defendants are jointly charged with a criminal offense.

NJI 14.54A provides:

> In this case . . . defendants are being tried together. During the trial you were told that certain evidence was admitted against one (or more) of the defendants and not against the other(s). You must consider such evidence only in the case of the defendant(s) against whom it was admitted.

During the discussion concerning these instructions the following record was made:

> THE COURT: You wanted 14.54A rather than 14.54.
>
> MR. GOOS: Well, no, I wanted 14.54, but I want it in the language of that — of that instruction, and I wanted that language out of 14.54, that says "During the trial you were told that certain evidence was admitted, . . ." etcetera. And since that was the case, I think it ought to be in the instruction. I see 14.54A as an entirely different separate instruction than — and I would — I'm simply asking the Court instruct — give 14.54 in its entirety, and in addition, give 14.54A.
>
> . . . .
>
> THE COURT: Okay. Then, Instruction Number 6, we combined 14.54 and 14.55A (sic).
>
> MR. REHMEIER: Oh, I see.
>
> THE COURT: I don't think they were ever intended to both be given. Does the State have any objections?
>
> MR. REHMEIER: No, Your Honor.
>
> THE COURT: Defendant Michael Ryan?
>
> MR. GOOS: No objection. What was that number again, Judge?
>
> THE COURT: Six.
>
> MR. GOOS: Number 6? No objection.

Instruction No. 6 reads as follows:

> Though the defendants are tried together, it is your duty to consider separately the guilt or innocence of each

> defendant. Each defendant is entitled to have his guilt or innocence determined from his own conduct and from the evidence which applies to him, as if he were being tried alone. Evidence relating to one defendant alone may not be considered against the other defendant. During the trial you were told that certain evidence was admitted against one of the defendants and not against the other. You must consider such evidence only in the case of the defendant against whom it was admitted. You will not permit any defendant to be prejudiced by reason of the fact that the defendants are jointly charged with a criminal offense.

There was no error or abuse of discretion on the part of the trial judge. The giving of instruction No. 6 adequately charged the jury and must be presumed to have protected the defendant from prejudice. See, *United States v. Buschman*, 527 F.2d 1082 (7th Cir. 1976); *United States v. Weil*, 561 F.2d 1109 (4th Cir. 1977); *United States v. Papia*, 560 F.2d 827 (7th Cir. 1977); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied* 423 U.S. 1050, 96 S. Ct. 777, 46 L. Ed. 2d 638 (1976).

The defendant's counsel agreed to an instruction that acknowledged that the jury had received a limiting instruction. The briefs do not direct us to a part of the record showing that such a limiting instruction was given during the testimony concerning the codefendant.

In reading both NJI 14.54 and NJI 14.54A, we note that NJI 14.54 appears to be the instruction a trial court would give where the jury had not been given a limiting instruction during the trial and that NJI 14.54A, which contains the language "During the trial you were told that certain evidence was admitted against one (or more) of the defendants and not against the other(s)," is intended where the court has instructed the jury during the trial. Defendant, in his fifth assignment, contends that this language confused the jury. We do not determine that it did, but in any event, defendant's counsel agreed to the instruction as given. Defendant's fifth assignment is without merit.

IV. "*The trial court denied the Defendant a fair trial by allowing into evidence irrelevant uncharged crimes, wrongs or acts (Assignment #6).*"

In his sixth assignment of error, the defendant contends that the trial court denied him a fair trial by admitting into evidence uncharged crimes, wrongs, or acts. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) provides:

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

Defendant points out that we have held that the admission of irrelevant uncharged misconduct evidence is reversible error. *State v. Moore*, 221 Neb. 706, 380 N.W.2d 288 (1986); *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983); *State v. Stewart*, 209 Neb. 719, 310 N.W.2d 706 (1981). Each of the cases referred to by defendant, however, concerns a defendant tried for crimes the defendant committed alone, and concerns other activities of that defendant. There was no issue in those cases as to the relationship between the named defendant and others, all of whom were engaged in committing the same crime, such as in this case. In this case, in order to present a true picture to the jury of the relative culpability of the five participants in the death of James Thimm, it was appropriate for the State to present evidence showing the relationship of defendant to the other participants. All the evidence presented by the State in the way of defendant's actions which consisted of uncharged crimes tended to show defendant's dominance over the group. Such dominance was shown by defendant's ordering others to engage in such sordid acts as homosexual and bestial conduct—and in the fact that others followed such orders. See *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976).

The State was relying on the testimony of persons engaged in the same actions charged against defendant. Necessarily, the testimony of such criminals was indispensable to the State's case. Testimony before the jury showed that those witnesses were permitted to plead to crimes lesser than murder in the first degree, and the jury was entitled to know of the relative involvement of all involved in this terrible crime. As set out in *State v. Riley*, 199 Mont. 413, 426, 649 P.2d 1273, 1280 (1982):

> We hold that the jury is entitled to view the death of James Gill in the context of prior events and that the beatings inflicted by the other people in the community were not isolated events, but part of a continuous series of beatings inflicted by appellant and others over a period of months. To properly understand the events that took place before James Gill's death, the jury was entitled to consider all of these factors of child abuse prior to the boy's death.

It was also proper for the State to show defendant's dominance of the Rulo group in order to present evidence to the jury with regard to the testimony of the accomplice witnesses. As stated in *U.S. v. Scarfo*, 850 F.2d 1015, 1020 (3d Cir. 1988),

> The other crimes history was relevant to the government's case. If accepted by the jury, the testimony was also damaging to defendant. That impact, however, does not require exclusion here where the evidence was essential in the government's effort to establish the credibility of its disreputable, yet indispensable, witnesses.

Evidence of relevant uncharged misconduct may be admissible, and the admission of evidence of uncharged crimes lies largely within the discretion of the trial court. *State v. Baker*, 218 Neb. 207, 352 N.W.2d 894 (1984); *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). In *State v. Hitt*, 207 Neb. 746, 749, 301 N.W.2d 96, 99 (1981), we held:

> [E]vidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence . . . may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

See, also, *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Nielsen*, 203 Neb. 847, 280 N.W.2d 904 (1979).

In the present case, five individuals took part in the acts resulting in the death of James Thimm. The State was entitled to produce evidence which would show that the defendant was the leader of those who took part in Thimm's murder.

Evidence that the defendant's control over the group included the ability to order sexual assaults, bestiality, and the abuse of a child was probative in that it showed the defendant's absolute power over the group. This evidence was probative of the defendant's overall motive, intent, and plan in his Rulo operation, and demonstrated the circumstances that led to the torture death of Thimm. The responsibility for maintaining the delicate balance between the probative and prejudicial effect of evidence lies largely within the discretion of the trial court. *State v. Williams, supra.*

There is a further reason the evidence of uncharged crimes was admissible. Defendant had entered a plea of "not responsible by reason of insanity." Both for the benefit of the State and the defendant, the jury was entitled to know the circumstances leading up to the murder of Thimm. Without the background of those circumstances, the actual torture death of Thimm would be incomprehensible to a jury hearing just that evidence. The overall relationship among defendant, his accomplices in the murder, and the victim is essential to the understanding of the case by the jury.

The U.S. Supreme Court has set out the requirements for the admissibility of evidence under Fed. R. Evid. 404(b), the equivalent of Neb. Evid. R. 404(2). The Supreme Court stated there were four guidelines for admissibility under that rule: (1) The evidence must have a proper purpose; (2) the evidence must be relevant; (3) the probative value of the evidence must outweigh its potential for unfair prejudice; and (4) the court must instruct the jury to consider the evidence only for the purpose for which it was admitted. *Huddleston v. United States,* 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

In this case each of those criteria has been met. The trial court did not abuse its discretion in admitting the evidence of other crimes committed by, or participated in by, defendant.

V. "*The jury should be instructed as to the consequences of an insanity verdict to avoid speculation and conjecture (Assignment #7).*"

Defendant tendered an instruction (defendant's requested instruction No. 2) which purported to set out, in detail, the procedures which would be followed "in the event of a verdict

of acquittal on grounds of insanity . . . ." The instruction was refused, and defendant assigns that action of the court as error.

The law in this state on the question presented by defendant has been settled since 1979. In *State v. Reeves*, 216 Neb. 206, 218-19, 344 N.W.2d 433, 443 (1984), we held:

> The defendant assigns as error the trial court's refusal to instruct the jury with regard to the consequences of an acquittal by reason of insanity. In *State v. Reitenbaugh*, 204 Neb. 583, 284 N.W.2d 19 (1979), and *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), we held that it was not error for the trial court to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity. Our reason for so holding was that, " 'in the absence of some specific statutory provision, a defendant's disposition is not a matter for the jury's concern.' " *Reitenbaugh, supra* at 585, 284 N.W.2d at 20.

Defendant's contention in this regard is without merit.

VI. "*Diminished capacity instruction should be given to jury if any sufficient evidence of the defense exists (Assignment #8).*"

In his eighth assignment of error, defendant contends that the trial court erred in refusing to give defendant's requested instruction on the question of defendant's "diminished capacity" to form the intent necessary to commit murder in the first degree.

Such an instruction is not required under our law. In *State v. Vosler*, 216 Neb. 461, 467, 345 N.W.2d 806, 810 (1984), this court stated: "This court said therein [in the case of *Starkweather v. State,* 167 Neb. 477, 93 N.W.2d 619 (1958)] that a special diminished capacity instruction need not be given where the jury had otherwise been properly instructed that intent was an element of the crime charged." The trial court did not err in refusing to give defendant's requested instruction as to "diminished capacity."

In the case before us, the court fully instructed the jury on the issues of intent and insanity. Aside from the general instruction on intent, the trial court instructed, in part, as follows:

> You may consider any evidence received concerning the

> defendant's mental condition as it bears on the presence or absence of the intent necessary to prove the crime charged. It is for you to determine from all of the facts and circumstances in evidence whether or not each defendant had the criminal intent or purpose [necessary to find the defendant guilty of first degree murder or murder in the second degree.]

Defendant's eighth assignment is without merit.

VII. "*When the Defendant raises the issue of sanity the state should have the burden of proving beyond a reasonable doubt that the Defendant was sane at the time of the offense (Assignments #9 and #10).*"

Prior to the trial the defendant filed notice of his intention to rely on insanity as a defense pursuant to Neb. Rev. Stat. § 29-2203 (Reissue 1985). This statute provides in pertinent part:

> Any person prosecuted for an offense may plead that he . . . 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. . . .
>
> Upon the filing of the notice the court, on motion of the state, may order the defendant to be examined at a time and place designated in the order, by one or more qualified experts, appointed by the court, to inquire into the sanity or insanity of the defendant at the time of the commission of the alleged offense.

The defendant contends that § 29-2203 is unconstitutional in that the statute "violates the Due Process Clause, Equal Protection Clause, and Cruel and Unusual Punishment Clause of the Fourteenth and Eighth Amendments to the United States Constitution and Article I, Sections Three, One and Nine of the Nebraska Constitution . . . ." Brief for appellant at 46. The gist of assignments Nos. 9 and 10 is that § 29-2203 unlawfully shifts the burden to the defendant to prove by a preponderance of evidence that he was not responsible by reason of insanity.

The defendant sought to limit his culpability on the grounds that he was not responsible by reason of insanity. The jury was instructed that the State had the burden of proving that the

defendant was guilty beyond a reasonable doubt of the crime charged against him. Section 29-2203 sets out an affirmative defense to the crime of murder and did not require the defendant to disprove any of the elements of the offense with which he was charged.

Defendant cites *Davis v. United States*, 160 U.S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895), which held that the United States, in federal court actions, had the burden of proving that a criminal defendant was sane at the time of the offense. Defendant does not direct our attention to the fact that in 1952, the U.S. Supreme Court refused to apply the *Davis* rule, which the Court determined to be "only the rule to be followed in federal courts," to proceedings in the State of Oregon. *Leland v. Oregon*, 343 U.S. 790, 797, 72 S. Ct. 1002, 96 L. Ed. 2d 1302 (1952). In the *Leland* case, the defendant pled not guilty to a charge of first degree murder and gave notice of his intention to rely on insanity as a defense under an Oregon statute which required a criminal defendant to prove his insanity beyond a reasonable doubt. The U.S. Supreme Court upheld the Oregon statute, noting that so long as the presumption of innocence was maintained and the State was required to prove all the elements of the crime charged beyond a reasonable doubt, a defendant could be required to plead and prove the defense of insanity, where defendant presents the defense as an absolute bar to the crime charged. The Nebraska statute is more favorable to a defendant, since the burden of proof under the Nebraska statute is by a preponderance of the evidence rather than beyond a reasonable doubt.

In *Patterson v. New York*, 432 U.S. 197, 205, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the Supreme Court reaffirmed the viability of *Leland*, when it stated:

> Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of *Leland v. Oregon*. This occurred in *Rivera v. Delaware*, 429 U.S. 877 (1976), an appeal from a Delaware conviction which, in reliance on *Leland*, had been affirmed by the Delaware

> Supreme Court over the claim that the Delaware statute was unconstitutional because it burdened the defendant with proving his affirmative defense of insanity by a preponderance of the evidence.

See, also, *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987), where the Supreme Court of the United States affirmed a decision of the Ohio Supreme Court holding it was not unconstitutional to place the burden of proving self-defense, in a murder charge, on the defendant. In *State v. Hankins,* 232 Neb. 608, 441 N.W.2d 854 (1989), this court held that § 29-2203 was constitutional. We continue to so hold in this case.

Insofar as defendant contends that § 29-2203 is unconstitutional in view of the provisions of Neb. Const. art. I, §§ 1, 3, and 9, we also determine that § 29-2203 is constitutional.

In *Leland v. Oregon, supra*, and *Patterson v. New York, supra*, the U.S. Supreme Court confirmed that the Oregon and New York statutes, similar to § 29-2203, were constitutional. As stated above, § 29-2203 affords greater protection to a defendant than did Oregon's statute, in that the Nebraska statute places a lesser burden of proof on a defendant. We hold § 29-2203 as constitutional under the Nebraska Constitution.

In the defendant's 10th assignment of error, he contends that § 29-2203 is unconstitutional in that the "shifting of the burden of proof back and forth between the State and the Defendant is so confusing to the jury as to violate the Defendant's Due Process Rights." The defendant fails to cite this court to any authority for this proposition. The contention concerning possible confusion of the jury in determining the distinction between the State's burden of proving premeditation and the other elements of a murder charge and a defendant's burden of proving insanity was also present in the *Leland* case. On that issue, the Court stated:

> We think the charge to the jury was as clear as instructions to juries ordinarily are or reasonably can be, and, with respect to the State's burden of proof upon all the elements of the crime, the charge was particularly emphatic. Juries have for centuries made the basic decisions between guilt

> and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think that to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so.

Leland v. Oregon, 343 U.S. 790, 800, 72 S. Ct. 1002, 96 L. Ed. 2d 1302 (1952). We have reviewed the record and find that the instructions herein fully conform to the standards set out in *Leland*.

Potential jurors were informed during voir dire, and the court's instructions provided, that the State was required to prove beyond a reasonable doubt all the elements of the crime charged. The jury was also instructed that defendant was required to prove by a preponderance of evidence that he was not responsible by reason of insanity.

These two burdens were specifically defined by the court in the general instructions to the jury, and the jury was instructed that the burden of proving all the elements of the crime never shifts from the State. The jury was also instructed as to the presumption of defendant's innocence.

Section 29-2203 is not unconstitutional under the U.S. or Nebraska Constitution, and the instructions in this case did not violate defendant's due process rights. Assignments Nos. 9 and 10 are without merit.

VIII. *"Third parties should not be allowed to circumvent [a] sequestration order (Assignment #11)."*

During the trial, the court ordered that the witnesses be sequestered pursuant to Neb. Rev. Stat. § 27-615 (Reissue 1985). The defendant contends that he was denied due process and his constitutional right to confront the witnesses against him because the State had a psychiatrist present in the courtroom during the trial and that this psychiatrist, Dr. Wingert, advised the prosecution and consulted with Dr. Kenney, a psychiatrist who testified on behalf of the State. The defendant contends that this was a violation of the sequestration order and violated his constitutional rights as set

out above. We do not agree.

After the jury had been excused for lunch on Thursday, April 3, 1986, Dennis Ryan's attorney moved the court for an order to prevent the State's psychiatrist who was testifying at the trial from speaking to the State's psychiatrist who had been present in the courtroom during the trial. The court responded:

> THE COURT: I don't think there was any order of sequestration that said that people couldn't talk to each other outside of the courtroom. There just wasn't such an order entered. If you want to show me one, Mr. Rehm, I will be happy to look at it.
>
> MR. REHM [Dennis Ryan's cocounsel]: Well, I think that it's so — If you have a sequestration order, the idea is that you don't want your witnesses, subsequent witnesses, to get —
>
> THE COURT: Mr. Rehm, you've showed depositions to all of your witnesses. What are you talking about?
>
> MR. REHM: I didn't have a psychiatrist sitting in here that talked to the other psychiatrist to tell him what the other doctor said in professional terms. We didn't do that. We haven't had that.
>
> . . . .
>
> THE COURT: Mr. Rehm, you asked for a daily copy, which you were granted, so you could take the testimony from the courtroom and deliver it to your witnesses so they could read it. Now what are you talking about?
>
> . . . .
>
> MR. REHMEIER [the assistant prosecutor]: Dr. Wingert has been present and Dr. Wingert has conferred with Mr. Merz [the prosecutor] and myself and with Dr. Kenney [the State's psychiatrist]. That was the reason to have him in here. The first day that Dr. Wingert was in here, Mr. Rehm knew it and asked me, "Are you going to call that guy as a rebuttal witness?"
>
> I said, "No. He is in here to assist us on the terminology and what is going on in the courtroom." He knew from the very first day that Dr. Wingert ever walked into this courtroom his purpose.
>
> Now he waits and raises this.

> Number two, there is no violation of the sequestration rule. We're not going to be calling Dr. Wingert as a witness. There's no difference in me talking to my witness or if I have somebody else sitting here listening on my behalf to help me understand what in the heck is going on so that I can intelligently talk to our psychiatrist.

There are several problems in the discussion of this point. Initially, we are not directed by defendant to any part of the record setting out the terms of the sequestration order, nor does our examination disclose a specific order. We will assume that a general court order as to sequestration of witnesses was made by the court based on § 27-615. The record shows that a motion for mistrial was made and overruled, but defendant does not cite that action of the court as error, but instead alleges that violation of the statute violates his constitutional rights.

The sequestration statute, § 27-615 provides:

> 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.

As far as the record discloses, there has been no evidence that any witness has heard "the testimony of other witnesses." Further, we note that the record appears to indicate that Dr. Wingert may well have been a natural person designated as a representative of a party not a natural party, the State of Nebraska. Counsel for the State told the court that the presence of Dr. Wingert was essential to the presentation of its case. See § 27-615(2) and (3).

Further, it would appear that defendant waived the presence of Dr. Wingert during portions of the trial. Dennis Ryan's counsel was informed by the prosecutor on the first day Dr. Wingert appeared that Dr. Wingert was not to be called as a witness and that he was present to assist the prosecutors "on the terminology and what is going on in the courtroom." No

objection was raised until Dr. Kenney was halfway into his testimony. The objection was too late.

Defendant has not been deprived of any constitutional rights because of the presence of Dr. Wingert at the trial. See *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989). There is no merit in defendant's assignment of error No. 11.

IX. "*To avoid the undue influence of jurors they should be sequestered during trial and deliberations in a capital case (Assignment # 12).*"

The defendant requested that the jury be sequestered throughout the trial and deliberations. The trial court denied the request, but did order the jury sequestered during its deliberations, as required by Neb. Rev. Stat. § 29-2022 (Reissue 1985).

The determination of whether or not a jury should be sequestered during the trial of a criminal case is left to the discretion of the trial court and, absent an abuse of that discretion or evidence of jury tampering or misconduct, that decision will not be reversed on appeal. *State v. Myers*, 205 Neb. 867, 290 N.W.2d 660 (1980). Defendant asks that we overrule *Myers* to the extent that it holds that it is within the trial court's discretion to determine whether the jury should be sequestered during the trial of a capital case.

The defendant does not allege jury misconduct or that he was prejudiced by the trial court's decision not to sequester the jury during the trial. Section 29-2022 provides, in part:

> If the jury are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on the subject of the trial, nor to listen to any conversation on the subject; and it is their duty not to form or express an opinion thereon until the cause is finally submitted to them.

In keeping with the legislative mandate that requires this court to review all cases where the death penalty has been imposed, we have reviewed the record and conclude that the trial court did not abuse its discretion and that the defendant was not prejudiced as a result of the trial court's refusal to sequester the jury during the trial. The rule in *Myers* stands.

Defendant's assignment No. 12 is without merit.

X. "*The state must prove that the Defendant intended to kill the victim (Assignment #13).*"

Defendant's assignment No. 13 sets out that the " 'Aider and Abettor' jury instruction created an impermissible presumption which denied the Defendant his rights under the Due Process Clause and Cruel and Unusual Punishment Clause." Defendant's argument heading and his assignment of error lead to the conclusion that defendant is assigning as error the court's giving of instructions Nos. 11 and 13.

The jury was given two instructions on aiding and abetting. Instruction No. 13 reflected NJI 14.12, and provided:

> To be guilty of the crime charged, it is not necessary that the State prove that defendant Michael W. Ryan himself committed the unlawful act or acts in question.
>
> Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.
>
> If you find from the evidence beyond a reasonable doubt that the unlawful act or acts in question were committed by another person who was:
>
> 1. Engaged by defendant Michael W. Ryan to commit the unlawful act or acts, or
>
> 2. Engaged with defendant Michael W. Ryan in a common, concerted unlawful act or acts, or
>
> 3. Incited or encouraged by defendant Michael W. Ryan to commit the unlawful act or acts,
>
> then defendant Michael W. Ryan is as guilty as if he himself committed the unlawful act or acts, and it is your duty to find defendant Michael W. Ryan guilty.
>
> 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.
>
> On the other hand, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving a defendant guilty.

This instruction accurately describes the statutory requirements of Neb. Rev. Stat. § 28-206 (Reissue 1985), which 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."

The jury also received instruction No. 11, which provided in part:

> Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself or herself had the required intent. If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated him or her.

In addition, the court instructed the jury as to the intent necessary to be found before the defendant could be convicted of the various degrees of homicide.

The defendant contends that the language of instruction No. 11 "had the effect of letting the jury find the Defendant guilty of First Degree Murder without specifically finding that the Defendant intended to kill." Brief for appellant at 51. Defendant is not correct in this assertion. Instruction No. 11 told the jury that an aider and abettor could not be held as a principal unless he knew the perpetrator had the required intent. The jury was also instructed that an "aider's guilt is measured by the intent that actuated him . . . ." The jury was properly instructed on the law of aiding and abetting, and there was more than sufficient evidence before the jury to support a determination of defendant's guilt of first degree murder. Defendant's assignment No. 13 is without merit.

XI. "*Fundamental fairness demanded the testimony of co-defendants be excluded (Assignment #14).*"

In this assignment of error, defendant does not complain of any specific action of the trial court, but states, "By allowing co-defendants to testify who admittedly had continually lied and guessed under oath, the Court decreased the reliability of the trial so as to violate the Defendant's Due Process rights and subjected him to Cruel and Unusual Punishment."

The conduct of the court complained of in this assignment apparently was the trial court's failure to exclude the testimony of "John Andreas, James Haverkamp, Timothy Haverkamp, and Ora Richard Stice." Brief for appellant at 52. The testimony of Stice will not be considered in this regard, since he was not a codefendant, nor was he an accomplice in the actual murder of James Thimm.

With regard to the testimony of the others named, while they were all accomplices in the murder of Thimm, none of those named were actually codefendants during the trial of defendant and Dennis Ryan. The case filed against Timothy Haverkamp was consolidated at one time with defendant's case, but Timothy Haverkamp pled guilty to second degree murder before defendant's trial and appeared in the trial as a witness for the State. Andreas and James Haverkamp pled guilty to other charges before defendant's trial. The testimony of these witnesses will be discussed as the testimony of accomplices.

This court has long held that an accomplice is competent to testify and that the value of such testimony is for the jury. *State v. Sneff*, 22 Neb. 481, 35 N.W. 219 (1887). We have held that a criminal conviction may be based upon the uncorroborated statements of an accomplice. *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986).

The jury was given the following instruction:

> The State has adduced testimony from claimed accomplices. Their testimony should be closely scrutinized for any possible motives for falsification, and if you find that any of them has testified falsely in regard to any material matter, you should be hesitant to convict upon his testimony without corroboration, and in no case should you convict a defendant unless you are satisfied of his guilt from all the evidence beyond a reasonable doubt.

The defendant contends that James Haverkamp "admitted to one lie after another, to guessing instead of telling the truth and to fabricating testimony to protect himself and others." Brief for appellant at 57. Where the jury has been properly instructed that testimony of an accomplice should be scrutinized closely for possible motives of falsification, the

uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction. *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985). In the cause before us, the evidence in the record, including defendant's own testimony, shows that the evidence of defendant's guilt was overwhelming.

The trial court properly instructed the jury, and the evidence was sufficient to support the jury's finding. The testimony of Andreas, James Haverkamp, and Timothy Haverkamp was properly before the jury, and it was for the jury to decide what weight to attach to their testimony. Defendant's assignment of error No. 14 is without merit.

XII. "*There was insufficient evidence for the jury to find beyond a reasonable doubt that the Defendant intended to kill the victim (Assignment #15).*"

Defendant's 15th assignment alleges: "There was insufficient evidence to prove the Defendant guilty of the killing of James Thimm. The jury also erred by not finding the Defendant met his burden on the question of his insanity." With regard to the contention that there was insufficient evidence presented at the trial to warrant his conviction for first degree murder, we have said above that the evidence was overwhelming. The defendant testified at the trial. During this testimony the defendant admitted that he was the leader of the group and admitted that he gave orders to torture Thimm. The events of the torture and death were presented in nauseating detail. The defendant also admitted to having used the arm test through Lisa Haverkamp in order to determine when Thimm was to die. The record also shows that Ryan had Thimm sign the title of his vehicle over to Timothy Haverkamp. All the evidence clearly indicated that the defendant intended to take Thimm's life. Defendant's contention in this regard is frivolous.

The defendant also asks this court to find as a matter of law that he was insane under the provisions of § 29-2203 and lacked the requisite mental state to be able to form the intent necessary to be convicted of first degree murder. The statute explicitly leaves this determination to the jury.

The record demonstrates that there was ample evidence before the jury to support a finding that the defendant was

legally sane at the time of James Thimm's murder. The defendant was examined by Maurice K. Temerlin, Ph.D., a clinical psychologist, who testified on defendant's behalf. Dr. Temerlin testified that in his opinion the defendant was a paranoid schizophrenic. Dr. Temerlin supported his opinion with the following statement:

> My opinion is that [the defendant] was so lost in Wickstrom's teachings and had been so — his mind so distorted by Wickstrom's teachings and by his own individual psychology and the crazy environment in which he lived, that he did not know what he was doing, or did not understand the consequences of it. I think he thought that he was doing what Yahweh wanted him to do, to punish sinners. And to him, given the disorganized, nonrational state that I think his mind was in, he was doing a virtuous deed.

The defendant was also examined by James K. Cole, Ph.D., a clinical psychologist. Dr. Cole testified that there was no evidence that the defendant was suffering from schizophrenia at the time of Thimm's murder. Dr. Cole also testified that there was no evidence that the defendant was suffering from any type of psychosis.

Emmett Kenney, M.D., a psychiatrist, also examined the defendant and testified on behalf of the State. Dr. Kenney testified that there was no evidence that the defendant was suffering from an organic brain syndrome or psychosis and that the defendant was capable of understanding the nature and quality of his acts during the time Thimm was being tortured. Kenney also testified that he did not believe that the defendant suffered from paranoid schizophrenia, that the defendant had a sufficient mental capacity to turn the matter over in his mind, and that the defendant intended the obvious and probable consequences of his actions. Kenney testified that defendant "had sufficient capacity to understand the rightness or the wrongness of his acts" and that "he did know that the acts were wrong and were deserving of punishment." Kenney also testified that the Rulo group was "an eccentric family or . . . an adult criminal gang."

It was on this evidence that the jury concluded that the

defendant was sane. The credibility and weight to be given testimony is a matter for the evaluation and determination of the jury. *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). The defense of insanity when interposed by an accused is a question of fact for the jury. *Philbrick v. State*, 105 Neb. 120, 179 N.W. 398 (1920). The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975); *State v. Klatt*, 187 Neb. 274, 188 N.W.2d 821 (1971); *State v. Newson*, 183 Neb. 750, 164 N.W.2d 211 (1969).

In determining whether the evidence before a jury was sufficient to support the jury's finding, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury, for these are within the jury's province for disposition, and a jury's verdict must be sustained if evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. LynCook*, 227 Neb. 719, 419 N.W.2d 686 (1988); *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988).

The issue of defendant's sanity was fairly presented and decided by the jury, and we will not disturb that decision on appeal. Defendant's assignment of error in this regard is without merit.

XIII. "*Judicial misconduct and failure of the Court to disqualify itself at sentencing denied Defendant a fair and impartial sentencing tribunal (Assignments #16 and #17).*"

Rather than an assignment of error, in his assignment No. 16 defendant has stated what he considers a fact determinative of his statement that he has been denied due process, apparently during the guilt-innocence part of the trial. In his assignment No. 17, defendant straightforwardly sets out that the trial judge erred "in failing to disqualify [himself] at the penalty phase" of the trial and in support of that contention sets out events occurring during the trial. We shall treat assignment No. 16 as if defendant is contending that the trial judge erred in failing to disqualify himself from presiding at the trial. As presented in defendant's brief, the two points are argued together, and we

will so consider them.

This court, long ago, set out the standards as to conduct during a trial to which a trial judge must conform in order to provide a defendant a fair trial. In *Hansen v. State*, 141 Neb. 278, 286-87, 3 N.W.2d 441, 446 (1942), we said:

> "It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury . . . but also on the examination of witnesses and otherwise during the course of the trial. The trial judge should not deny the existence of any fact bearing on the innocence of accused, or make any remark or inquiry in the presence of the jury concerning matters of fact at issue which indicates his opinion as to such facts." . . .
>
> ". . . It is well known to those who are familiar with jury trials that jurors are usually alert to discover the attitude of the court respecting the merits of the case, and particularly in criminal actions. For this reason, among others, the court should avoid even the appearance of partiality as between the parties. . . ."

See, also, *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946); *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985); *State v. Larmond*, 244 N.W.2d 233 (Iowa 1976).

The cases we have cited are concerned primarily with statements made by the trial judge, but it is axiomatic that conduct can speak as loudly as words. The trial judge in this case, by his conduct, has expressed himself to some degree. We must consider whether that conduct has prejudiced defendant's right to a fair trial.

The facts set out by defendant on these issues are the following.

During the sentencing hearing held on September 15, 1986, the defendant's attorney asked the trial judge

> to say something about the meeting in chambers when we were here for sentencing on the second degree murder charge. [The defendant pled nolo contendere on July 28, 1986, to the second degree murder of Luke Stice and was sentenced to life imprisonment for this murder on September 11, 1986.] The meeting in chambers,

apparently, between the court and to some extent, Mr. Merz [the prosecuting attorney], with — with persons interested in the Luke Stice matter.

THE COURT: Okay. Well, for the record and for your information, Mr. Goos and Mr. Ryan, the Court has, after each — at the conclusion of each case, asked the family members of the victims if they would like to visit with the Court, and if so, answer certain questions about legal proceedings that might have gone on during the course of the trial. And a number of the family members did want to visit with the Court and, basically, the subject of that visit was to answer — All right, Mr. Merz, first of all, wasn't there except for — I asked him to explain one thing to them. And, basically, it was just to answer questions about the proceedings that went on pertaining to that case. *There was absolutely no discussion about any other cases other than that case.*...

. . . .

. . . The Court didn't have any inquiries it wanted to make of the family. The only thing the Court wanted to do was make itself available to the family to answer any questions about any procedural matters; legally — legal procedural matters that might have been confusing to them, 'cause we're quite frequently getting criticized that —that no one ever shows any consideration of the victims by at least being willing to answer questions. And I asked Mr. Merz to come in and answer a question that they had, and to be right honest with you, I — Do you recall what that was? It had to do with the plea bargain, I believe.

MR. MERZ: Well, Your Honor, the substance of the question was, frankly, what was the legal effect of the no contest or the nolo contendere plea.

THE COURT: Yeah, that's right. So, that question was raised to, you know, what is the legal consequences of a — or, significance or meaning of a no contest plea. . . .

(Emphasis supplied.)

In *State v. Barker*, 227 Neb. 842, 847, 420 N.W.2d 695, 699 (1988), we held: "[A] judge, who initiates or invites and receives an ex parte communication concerning a pending or impending

proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal." See, also, *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989).

Initially, we must determine whether the trial judge violated this rule. It is true that the trial judge stated he had invited an ex parte communication with "the family members of the victims." The law does not condone such a practice. The record does not show, however, that the trial judge met with the James Thimm family, and the judge affirmatively stated, "There was absolutely no discussion about any other cases than that [Luke Stice] case." There is nothing in the record indicating anything to the contrary.

The trial judge did meet with the Luke Stice family before defendant was sentenced on his plea of nolo contendere to the second degree murder of Luke Stice, and so stated in the case before us. In that connection, the trial court acted as a witness within the holding set out in *State v. Barker, supra*. The propriety of the court's actions in the Stice murder case is not before this court in this case. Any communication the judge had with the Stice family cannot be said to have concerned the pending or impending proceeding before the trial court and this court in this case, the murder of James Thimm, in connection with either the sentencing of defendant or the conduct of the trial.

Additionally, the sentencing court did not consider the Luke Stice murder as an aggravating circumstance under Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985). This subsection provides: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity."

We held in *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), and *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), that this circumstance exists where the defendant had killed someone prior to the murder for which he was sentenced to death.

The rule set forth in *Barker, supra*, does not apply to the case at bar, given the fact that the ex parte meeting did not concern a pending case, and the murder of Luke Stice was not considered

under circumstance (1)(a) by the judge in sentencing the defendant.

In his 17th assignment of error the defendant contends that he was prejudiced before the jury when the trial judge turned his back to the defendant "during at least half of [the defendant's] testimony." Brief for appellant at 59. During a hearing on a motion for a new trial the trial judge stated to defendant's attorney:

> Let me get your advice for the next trial, would you rather that when testimony's coming in about a shovel handle going up somebody's rectum and it just, you know, kind of smarts a little bit, would you rather I do that facing the jury, or would you rather I do that with my back to the jury?

The trial judge apparently has admitted the conduct alleged by defendant on this point. The fact that the trial judge turned away from the defendant in an attempt to hide his expressions from the jury while the defendant described, in detail, the atrocities of his crime was inappropriate, but does not constitute prejudicial error in this case. There are cases when such conduct by a judge might constitute prejudicial error in a criminal trial, but in this case, where the evidence of defendant's guilt is so overwhelming, we hold that the trial judge's actions did not constitute reversible error. It would have been better had the judge observed all witnesses while they testified about the sickening events, as the jury was required to do, but the judge's conduct does not constitute prejudicial error in this case.

If it be considered that defendant is attacking the judge's conduct as affecting the guilt-innocence portion of the trial, there are separate reasons why that conduct does not require reversal of this cause on that issue.

With regard to the Luke Stice matter, any communications with the Stice family occurred after the case had been submitted to the jury and the jury had determined defendant guilty of first degree murder. The activities in this regard could not have affected the jury verdict in any way.

With regard to the judge's actions during defendant's testimony, we cannot find in the record, nor are we directed to any portion of the record, where defendant objected to the

judge's actions. The incident was not mentioned until defendant filed a motion for new trial after the verdict. It is not possible for this court to now judge the effect of the judge's turning his back on defendant while he was testifying, but defendant may not let that occur and then, after the verdict, complain of the conduct. We are not faced with the situation in *State v. Larmond*, 244 N.W.2d 233 (Iowa 1976), where the Iowa court was faced with the further problem that defendant's counsel was inexperienced. Defendant's counsel in this case was experienced and, as the record shows, was not at all reticent in representing defendant.

Insofar as defendant contends the trial judge's activities affected the sentencing procedure, that issue will be discussed later in this opinion.

Defendant's 16th and 17th assignments of error are without merit.

XIV. "*It is error for the sentencing judge not to convene a three-judge panel when requested by the Defendant (Assignments #18, #19, & #20).*"

The defendant contends that § 29-2520 is unconstitutional, since it grants the trial judge discretion in determining whether a three-judge sentencing panel will preside over the sentencing of a defendant charged with a capital crime. We have held that the sentencing procedure provided by § 29-2520 does not violate either the Nebraska or federal Constitution. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977).

As we noted in *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), the State of Florida has a statute similar to § 29-2520. This statute, Fla. Stat. Ann. § 921.141 (West 1985), provides:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment . . . . The proceeding shall be conducted by the trial judge before the trial jury . . . .
>
> . . . After hearing all of the evidence, the jury shall deliberate and render an advisory sentence to the court . . . .

> . . . Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . . .

This statute was challenged on constitutional grounds in *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 960, 49 L. Ed. 2d 913 (1976). We quoted from *Proffitt* in *State v. Simants, supra* at 558, 250 N.W.2d at 887:

> "[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

The Nebraska statute, § 29-2520, provides for the sentencing determination to be made by:

> (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

This statute does grant the trial judge discretion in that he or she may opt to conduct the sentencing with or without the assistance of two additional judges. However, this discretion cannot be said to be constitutionally infirm where the U.S. Supreme Court has held that a single judge presiding at a defendant's trial may conduct and decide the sentencing phase of a capital case. *Hildwin v. Florida*, ____ U.S. ____, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989); *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

The U.S. Supreme Court has refused to select a single best method for a state to conduct capital sentencing. *Spaziano,*

supra. See, also, *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 871 (1984); *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

There are currently 37 states with death penalty statutes. Twenty-nine of these states have statutes that allow a death sentence only after a jury recommends such a sentence. Three of these states allow a judge to override the jury's recommendation. Ala. Code § 13A-5-46 (1982); Fla. Stat. Ann. § 921.141 (West 1985 & Supp. 1989); Ind. Code § 35-50-2-9 (Supp. 1988). Nevada requires a three-judge panel to impose sentence only if the jury cannot agree. Nev. Rev. Stat. §§ 175.554 and 175.556 (1987). Of the remaining four states, of which Nebraska is one, the sentencing determination in a capital case is made by a judge without a jury. Ariz. Rev. Stat. Ann. § 13-703 (Supp. 1988); Idaho Code § 19-2515 (1987); Mont. Code. Ann. § 46-18-301 (1987); Neb. Rev. Stat. § 29-2520 (Reissue 1985). After reviewing these statutes and the cases interpreting them, we are convinced that the Nebraska Legislature has provided a sentencing method that is fair and sensitive to a capital defendant and satisfies the requirements of the U.S. and Nebraska Constitutions. The Nebraska statute ensures the death penalty will not be imposed arbitrarily or discriminatorily.

Defendant argues that where a defendant has requested a three-judge sentencing panel, such a panel should be mandatory. We disagree. The statute clearly places the discretion with the trial judge, and this grant of discretion is neither unreasonable nor constitutionally infirm.

Pursuant to Neb. Rev. Stat. § 29-2521.03 (Reissue 1985), this court is charged with a review to determine the propriety of the death sentence in a case in which it has been imposed by comparing the sentence with previous cases involving the same or similar circumstances. *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). We have compared this case with previous cases in which the death penalty has been imposed under § 29-2520. We do not find any evidence in the record indicating the defendant was prejudiced by the trial judge's refusal to request the designation of a three-judge sentencing panel.

The determination of whether to request the designation of a three-judge sentencing panel under § 29-2520 is left to the discretion of the district court, and absent a showing of an abuse of that discretion, this court, on appeal, will affirm that decision. Defendant's 18th, 19th, and 20th assignments of error are without merit.

XV. "*Defendant's sentence was unconstitutionally imposed because he was denied a jury trial on the facts that comprise the ingredients of his offense (Assignment #21).*"

The defendant argues that Neb. Rev. Stat. § 29-2522 (Reissue 1985) is unconstitutional in that it denies a criminal defendant the right to have a jury determine the factual issues comprising the condemned criminal act. This contention has been determined adversely to defendant's position.

The U.S. Supreme Court held in *Hildwin v. Florida, supra* at 109 S. Ct. at 2057:

> [T]he requirement that the [capital sentencing] findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." [Quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).] Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty." *Id.*, at 86, 106 S.Ct., at 2417. Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). Assignment No. 21 is without merit.

XVI. "*Without an affirmative showing on the record that Miranda type warnings have been given to the Defendant prior to an examination by the state's psychiatrist the psychiatrist should be precluded from testifying at the penalty hearing (Assignments #22 and #23).*"

In his assignment No. 22, defendant states that "[b]y the introduction of the State's psychiatrist's testimony at the

sentencing stage without the State giving the Defendant *Miranda* type warnings prior to the psychiatrist's interview of the Defendant, the Defendant's constitutional protection against self-incrimination were [sic] violated."

On this point, defendant sets out no specific action of the trial court which he challenges in this regard. Apparently, defendant is assigning as error the failure of the trial court to sustain his objection to the use of the trial testimony of the State's psychiatrist, Dr. Kenney, at the sentencing.

Assignment No. 23 is another general statement that defendant was denied due process and effective counsel because he did not receive "advanced notice of the intended use of the psychiatric exam by the State"—apparently at the penalty phase of the trial. Again, there is no assignment of error in any specific action of the trial court, but we assume the error complained of is the court's consideration of Dr. Kenney's trial testimony during the penalty phase, when defendant had not been given *Miranda* warnings prior to a psychiatric examination which had been ordered after the defendant gave notice of his intention to rely on an insanity defense.

Defendant cites this court to *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), wherein the court ordered a psychiatric examination of defendant. Smith was examined by a court-appointed psychiatrist pursuant to a court order, which the trial judge had entered sua sponte, to determine the issue of Smith's competency to stand trial. After the trial, Smith was found guilty of murder by a jury. At a separate sentencing hearing after Smith had been found guilty by the jury, this same psychiatrist, who was not listed as a witness, testified on behalf of the State, over Smith's objections, on the question of defendant's future dangerousness. The Supreme Court summed up the case when it stated: "The state trial judge, *sua sponte*, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent." 451 U.S. at 465. On these facts, the U.S. Supreme Court held: "A criminal defendant, who neither initiates a psychiatric evaluation nor

attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." 451 U.S. at 468.

This ruling is not applicable to cases where a defendant has put his sanity into issue. In this case, defendant put at issue his sanity, as a defense to the charge of first degree murder. He apparently contends that the question of defendant's insanity must be decided twice—at the trial of the guilt or innocence of defendant and at the penalty hearing—and that evidence at the trial should not be considered at the penalty phase.

At the jury trial on the issue of defendant's innocence or guilt, a psychiatrist testified on defendant's behalf.

At the penalty phase of the trial, the same psychiatrist testified that at the time of the murder of James Thimm, defendant was acting under "unusual influences." In answer to the question "do you feel that he was under the influence of any extreme mental or emotional disturbance," this witness answered: "[I]f that phrase includes what we would term being actively psychotic or being delusional with regards to the events that were going on at the time, the answer would be yes." This witness also testified, in answer to the question, "What about his capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law?" as follows:

> A Well, certainly he, personally, did not view what happened to James Thimm as wrong, but as something commanded by God and as something he was obligated to obey. In terms of his ability to control his behavior, to the extent that his behavior is — is guided by a persons thought process, and his, regarding that issue, was — was clearly delusional. His behavior was not under the influence of any kind of cognitive control.

These answers were obviously a part of defendant's evidence to show that mitigating circumstances (b), (c), and (g) of § 29-2523(2) were proved by defendant by the evidence before the court on the penalty phase. These answers were based on the examination the witness had made of the defendant in connection with the insanity defense filed on behalf of the defendant. After the psychiatrist had testified at the penalty

phase, the defendant testified on his own behalf.

At the conclusion of the defendant's testimony, Emmett Kenney, M.D., a psychiatrist, testified in rebuttal for the State. During the guilt-innocence phase Dr. Kenney testified that he had examined the defendant at his office in Omaha under the following circumstances:

> I introduced myself, explained my particular role, explained that it was not a standard psychiatric interview in that it was not confidential, explained that the other way in which it was not customary was that there was a tape-recorder present on the desk. I asked him to speak loudly . . . and explained that the tape-recording was there at the request of his attorney.

It is obvious from this uncontroverted testimony that the defendant was advised that anything he told Dr. Kenney would not be kept confidential and that defendant's counsel was fully aware of the psychiatric interview in that the examination was being recorded for the defendant's attorney. The rule set forth in *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), does not apply under these circumstances.

In *Buchanan v. Kentucky*, 483 U.S. 402, 404, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), one of the questions determined by the Supreme Court was

> whether the admission of findings from a psychiatric examination of petitioner proffered solely to rebut other psychological evidence presented by petitioner violated his Fifth and Sixth Amendment rights where his counsel had requested the examination and where petitioner attempted to establish at trial a mental-status defense.

In the case before us, defendant and his counsel had, in effect, requested or authorized a psychiatric examination by a State's expert when the defense of insanity was raised under § 29-2203. Further, defendant was attempting to establish at trial, and at the sentencing hearing, a "mental-status defense."

The Supreme Court has held that, in such circumstances,

> [s]uch consultation, to be effective, must be based on counsel's being informed about the scope and nature of the proceeding. There is no question that petitioner's counsel had this information. To be sure, the effectiveness

> of the consultation also would depend on counsel's awareness of the possible uses to which petitioner's statements in the proceeding could be put. Given our decision in *Smith*, however, counsel was certainly on notice that if, as appears to be the case, he intended to put on a "mental status" defense for petitioner, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal.

483 U.S. at 424-25.

In this case, defendant's challenge to the testimony of Dr. Kenney at the sentencing hearing is without merit. Defendant's contention that Dr. Kenney's trial testimony should not have been considered at the penalty phase is discussed in the following argument. Defendant's assignments of error Nos. 22 and 23 are without merit.

XVII. "*Introduction of entire trial record by the state at the sentencing phase was error (Assignments #24, #25, #26, #27, #28, and #29.*"

Defendant has summarized his assignments of error Nos. 24 through 29 in the heading to his argument XVII. We shall assume that in those assignments of error, defendant is assigning an error which may be summarized as alleging that the trial court erred in receiving the evidence at the trial in the sentencing portion of the trial because, by such action, defendant was denied his right to confront the witnesses against him.

We first note that a motion by the prosecutor that the court take judicial notice "of the trial record in these proceedings" and the court's oral finding that he would take such judicial notice are inappropriate. An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2) (Reissue 1985). Nonetheless, for reasons set out below the trial court was entitled to consider the evidence adduced at trial during the sentencing phase.

In its sentencing order, the court did make factual findings based on evidence received during the guilt-innocence phase of the trial. It is clear that the court did not err in the respects claimed by defendant and, indeed, that the assignments in this regard are frivolous. First of all, Neb. Rev. Stat. § 29-2521

(Reissue 1985) provides in part:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received.

Also, § 29-2522(3) provides in part:

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

This section clearly allows the sentencing body to consider evidence adduced at trial to support findings of aggravating and mitigating circumstances.

Further, in *State v. Anderson and Hochstein*, 207 Neb. 51, 72, 296 N.W.2d 440, 453 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 219 (1981), we said:

> We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate.

As can be seen, this court implicitly held that a trial court can, at a minimum, consider evidence adduced at the trial at the sentencing phase of a capital case. See, also, *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984). Defendant's assignments Nos. 25 through 29 are without merit.

XVIII. "*Deposition of a Co-defendant should not be introduced at sentencing hearing even if Co-defendant refuses to testify (Assignments #30, #31, and #32).*"

Defendant assigns as error the sentencing judge's action in permitting into evidence the deposition of Timothy Haverkamp at the defendant's sentencing hearing after Timothy

Haverkamp refused to testify at the hearing. Among other allegations, defendant contends he was denied his right of confrontation. This contention is frivolous.

The trial court did not commit reversible error in allowing the deposition of Timothy Haverkamp in evidence at the sentencing phase of the trial. The testimony Timothy Haverkamp gave at trial was substantially the same as, if not identical to, the testimony contained in his deposition.

The admission of this deposition was merely cumulative, since the trial court record was already before the sentencing court as disclosed above. At the trial, Timothy Haverkamp was cross-examined extensively by the defendant's attorney. Timothy Haverkamp's testimony on direct examination at the trial encompasses 87 pages of the record, and there are 99 additional pages of cross-examination.

Defendant was not prejudiced by the trial court's admission of Timothy Haverkamp's deposition during the sentencing phase.

XIX. "*Defendant is entitled to receive advanced notice of aggravating facts on which the state will rely at sentencing (Assignment #33).*"

Prior to the sentencing phase the defendant filed a motion requesting that the State provide the defendant with the evidence it intended to utilize during the sentencing hearing. This motion was sustained by the court. The defendant argues that since the record does not affirmatively show that this information was provided to the defendant, he was denied his constitutional right to be "informed of the nature and cause of the accusation against him . . . ." Brief for appellant at 75-76. We disagree. Without some affirmative showing in the record that a grant of a motion for discovery was violated, this court will presume compliance. No such violation was ever directed to the attention of the trial court. We need not discuss the matter further. Defendant's assignment of error No. 33 is without merit.

XX. "*The Court must find the facts upon which an aggravating circumstance relies beyond a reasonable doubt (Assignments #34 and #35).*"

In these two assignments defendant again makes general

statements without specifying what action of the trial court constituted error. We, of course, agree that the facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

As we understand the thrust of defendant's assignment of error No. 34, defendant contends that in considering the applicability of § 29-2523(1)(d), the court made a finding in subsection (i) of paragraph 4 of its sentencing that "[t]here is also some evidence that Michael W. Ryan either removed or amputated James Thimm's penis and testicles or directed that this be done by others" and that this finding, by its own terms, has found this fact by less than the standard of "beyond a reasonable doubt."

We fully agree with defendant's statement that this finding, if it was a finding, was not supported by sufficient evidence and should not have been made. The trial court itself did note, however, that there was only "some evidence," and apparently did not consider this factor in its ultimate determination.

We cannot agree with defendant's conclusion, however, that "[i]f the Court on this one identifiable instance found facts by the wrong standards, it must be assumed that the Court was using the wrong standard on all or a part of the other findings of fact throughout the Order." Brief for appellant at 76. Such a leap in logic is not required as a matter of law by this court. The particular statement of fact referred to above is not supported by the evidence; the trial court so stated; and we have so stated. The reference to possible penis amputation was made by the State's pathologist in his testimony concerning the autopsy, but that same pathologist, in other testimony, argues that the disfiguration is probably the result of decomposition.

That does not control the outcome of this particular assignment of error. The ultimate finding made in connection with this particular challenged finding was that "[t]he court concludes and finds beyond a reasonable doubt this aggravating circumstance [the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. § 29-2523(1)(d)] exists in this case."

In support of that finding, the court lists 10 other specific acts which the court found had been proved beyond a reasonable doubt. Among those specific findings were:

> a) The death of James Thimm occurred over several days while James Thimm was tied and chained in a hog confinement shed;
>
> b) Michael W. Ryan on numerous occasions sodomized James Thimm with a shovel handle and directed others to do the same;
>
> . . . .
>
> e) Michael W. Ryan skinned James Thimm while he was alive . . . .

Our examination of the record shows that all of the other specific facts related by the trial court were established by evidence beyond a reasonable doubt. Defendant does not specifically challenge any of the other findings on this issue. The findings of the trial court in this regard do not constitute prejudicial error to defendant.

In his 35th assignment of error defendant contends that "[b]y the Court inventing its own aggravating circumstances," defendant has been deprived of various constitutional rights. Defendant's brief seems to contend that ordering other people, subject to defendant's full control as in this case, to do evil acts is somehow different from defendant's performing the evil acts himself. That cannot be.

Defendant's assignments Nos. 34 and 35 are without merit.

XXI. "*Double counting of the facts supporting aggravating circumstances is impermissible (Assignment #36).*"

Defendant also contends that the sentencing court counted certain factors twice in determining aggravating circumstances found in § 29-2523(1)(a) and (d). We held in *State v. Rust, supra* at 538, 250 N.W.2d at 874:

> We think it is not reasonable to construe the definitions [of the aggravating circumstances in § 29-2523] in such a manner as to make them overlap and make the same identical facts constitute two aggravating circumstances.
>
> We believe the Legislature intended by each definition to convey a different concept, at least to the extent that some added different and important element . . . is

> included in each separate definition even though some fact or facts in a particular case may pertain to more than one of the definitions . . . .

This standard was complied with by the sentencing court. In his brief, the defendant contends the following facts were used to support a finding of both aggravating factors (1)(a) and (1)(d). In support of (1)(a) the court noted that the "defendant assaulted both Richard Stice and James Thimm leading up to, and prior to the time of, the events involving the death of James Thimm." In support of (1)(d) the sentencing court noted that the defendant "caused James Thimm to suffer further humiliation by directing him to perform homosexual acts with another member of the group." There is evidence in the record to support both of these statements. The record shows that the defendant struck and beat both Stice and Thimm. There was also evidence that the defendant forced James Thimm to engage in homosexual activity. These incidents were distinct and involved different testimony. The ruling in *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), prevents a sentencing court from using the same evidence to support different aggravating factors. It does not prevent a sentencing court from considering evidence of distinct incidents to support different aggravating factors. Defendant's assignment No. 36 is without merit.

XXII. *"Circumstance 1(a) is vague and overbroad and thus unconstitutional (Assignments #37 and #38)."*

Section 29-2523(1)(a) provides as follows: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity."

We have narrowed our interpretation of this statute as this court has been required to review its application. In *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), we held that aggravating circumstance (1)(a) did not exist where the defendant has no prior criminal record. We stated in *Stewart* that "(1)(a) should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose." *Id.* at 520, 250 N.W.2d at 863.

In *State v. Rust, supra,* we determined that aggravating circumstances (1)(a) applied where the defendant had a prior conviction for assault with intent to inflict great bodily harm, and we stated: "We interpret *'substantial history* of serious assaultive or terrorizing criminal activity' to refer to events and incidents prior to and not part of the events out of which the current charge arises. The use of the term 'history' clearly implies earlier events." (Emphasis in original.) *Id.* at 535, 250 N.W.2d at 872-73.

In *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), we found the existence of circumstance (1)(a) where the defendant had convictions for armed robbery and first-degree assault and three convictions for bank robbery. We stated in *Holtan*:

> The words "serious," "assaultive," and "terrorizing" are words in common usage with meanings well-fixed and generally clearly understood. The term "substantial history" is likewise reasonably clear. "History" refers to the individual's past acts preceding the incident for which he is on trial and "substantial," as here used, refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence.

Id. at 546, 250 N.W.2d at 879.

In *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), we upheld a finding of aggravating circumstance (1)(a) where the defendant had the following record: (1) felony escape involving forcible detainer and robbery of a jailer, (2) armed robbery of a service station, (3) burglary of a home, (4) auto theft, (5) three armed robberies in the State of Ohio, (6) armed robbery and rape of a 7½-month pregnant woman in her home, and (7) assault of a librarian in an attempted escape.

In *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), defendant was charged with two murders of cabdrivers occurring 4 days apart. We upheld the sentencing panel's finding of (1)(a) with regard to the second murder and held that a substantial history of serious assaultive or criminal activity included the first premeditated murder. We also stated that the aggravating circumstances in § 29-2523 were to be given a

narrow construction and application.

In *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982), we refused to apply (1)(a) where the facts supporting the circumstance had been shown through the defendant's immunized testimony concerning an Iowa murder.

In *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), on appeal to this court for postconviction relief, we affirmed our finding of circumstance (1)(a). See *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

In *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), we held that any serious assaultive or terrorizing criminal activity committed by the accused prior to the time of the offense charged may properly be considered in order to determine the applicability of aggravating circumstance (1)(a).

In *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987), the defendant had been convicted of two charges of assault and of an attempted second degree assault prior to his first degree murder conviction. We narrowed our interpretation of (1)(a) further in *Bird Head*:

> The State elected not to adduce any evidence concerning the factual circumstances surrounding the assaults in question. We agree with the sentencing panel's conclusion that there are two aspects to aggravating circumstance (1)(a), one of which may be proved by establishing prior convictions for "another murder or crime involving the use or threat of violence to the person" and the other of which may be proved by showing that the offender "has a substantial history of serious assaultive or terrorizing criminal activity," irrespective of whether the offender was convicted for the conduct creating the history.

Id. at 836, 408 N.W.2d at 319.

We must first determine whether the sentencing court correctly applied our interpretation of aggravating circumstance (1)(a).

As noted before, the sentencing judge did not consider the Luke Stice murder in applying this circumstance. The sentencing judge did, however, consider certain other factors which he considered demonstrative of the defendant's history

of "assaultive or terrorizing criminal activity."

In the sentencing judge's written order he stated:

> The evidence submitted to the sentencing court establishes that the defendant did not have, prior to the death of James Thimm, a prior conviction of another murder or a crime involving the use or threat of violence to the person.
>
> However, the facts surrounding the death of Luke Stice actually predated the death of James Thimm by approximately one month. Although, the first clause of this aggravating circumstance is not applicable, the Court feels that the second clause of the aggravating circumstance is applicable. The Court finds from the evidence that the following facts, which facts are not all inclusive, support the finding beyond a reasonable doubt that Michael W. Ryan had a substantial history of serious assaultive or terrorizing criminal activity:
>
> a) Michael W. Ryan either spanked and beat Luke Stice, or directed others to do this;
>
> b) Michael W. Ryan either administered cold showers to Luke and held him under cold water or directed that this be done to Luke;
>
> c) Michael W. Ryan directed others to sexually abuse Luke Stice;
>
> d) Michael W. Ryan used Luke Stice as an ashtray;
>
> e) Michael W. Ryan rolled Luke around in the snow without any clothes on or directed others to do this to Luke;
>
> f) Michael W. Ryan spit in the mouth of Luke Stice;
>
> g) Michael W. Ryan shot chickens in the presence of Luke Stice to create in him a fear of guns or directed that this be done to Luke;
>
> h) Michael W. Ryan terrorized Luke Stice by placing a gun in his mouth and also by shooting him in the arm;
>
> i) Michael W. Ryan either shoved Luke against the wall on three different occasions or directed others to shove Luke against the wall, which acts ultimately resulted in the death of Luke Stice;
>
> j) Michael W. Ryan either held Luke off the ground

with a belt around his neck or directed others to do this to Luke;

k) Michael W. Ryan either shot cigarettes himself from Luke's mouth or directed others to do this; and

l) Michael W. Ryan told Luke that he would be castrated, and that he would be placed on a brush pile and burned alive by him.

The evidence further shows that the defendant assaulted both Richard Stice and James Thimm leading up to, and prior to the time of, the events involving the death of James Thimm. These acts would further support the finding that the defendant had a substantial history of serious assaultive or terrorizing criminal acts prior to the death of James Thimm.

Other facts taken from the evidence which would support finding that the defendant had a substantial history of serious assaultive or terrorizing criminal activity are the following:

a) Shortly before Michael W. Ryan left high school, he assaulted a teacher;

b) According to Michael W. Ryan's own testimony, he assaulted a principal at his high school;

c) According to Michael W. Ryan's accounting to Dr. Logan, he was discharged from the military as a result of fighting with six [military police officers].

We note first of all that the defendant's murder of Luke Stice could have been considered by the court in light of our decisions in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). However, it might have been error for the court to have considered this murder as an aggravating circumstance after having met with members of the Stice family prior to the defendant's sentencing on the James Thimm murder. In this case, the trial court did not consider defendant's plea of nolo contendere and sentence in connection with the murder of Luke Stice as a prior conviction of second degree murder. The court, however, did consider the admitted murder of Luke Stice as evidence of a previous "substantial history of serious assaultive or terrorizing criminal activity."

We feel that the evidentiary facts cited by the sentencing judge rise to the level of "serious assaultive or terrorizing criminal activity," considering that that conduct eventually resulted in the death of Luke Stice. There is sufficient evidence, some of it from defendant, that these events took place, and they are supported beyond a reasonable doubt by the record. We are satisfied that aggravating circumstance (1)(a) was established beyond a reasonable doubt in that the defendant's conduct in causing Luke Stice to be sexually abused, shooting Luke Stice in the arm, hanging Luke Stice by the neck with a belt, shoving Luke Stice against a wall, and shooting cigarettes out of Luke Stice's mouth together all show a "substantial history of serious assaultive or terrorizing criminal activity." Aggravating circumstance (1)(a) was also shown by the defendant's chainings and beatings of both Rick Stice and James Thimm. The record clearly supports a finding of circumstance (1)(a).

We must now determine whether this court's narrow interpretation and application of § 29-2523(1)(a) is unconstitutionally vague or overbroad under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Under the rationale of *Furman*, statutory aggravating circumstances must be clearly defined and applied by a court so as to prevent a sentencing body from exercising discretion that may lead to arbitrary or inconsistent results. The standard laid down in *Furman* is met by our interpretation and application of (1)(a).

Defendant's assignments Nos. 37 and 38 are without merit.

XXIII. "*Circumstance 1(d) is vague and overbroad and thus unconstitutional (Assignments #39 and #40).*"

Section 29-2523(1)(d) is an aggravating circumstance and provides as follows: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

In *State v. Rust*, 197 Neb. 528, 538, 250 N.W.2d 867, 874 (1977), we adopted the following statement made by the sentencing panel:

> "We recognize that all first degree murder crimes are capable of being accurately characterized by one or more

> of the descriptive adjectives employed [in § 29-2523(1)(d)], but by the use of the words 'especially' and 'exceptional' the legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering. . . ."

Defendant argues that § 29-2523(1)(d) is unconstitutionally vague and overbroad. We have held in *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), that § 29-2523(1)(d) is not unconstitutionally vague. We note that the defendant tortured and sexually abused James Thimm and thus imposed extreme suffering on him. Section 29-2523(1)(d) was properly applied by the sentencing judge.

In *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982), we held:

> Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists. . . . The second circumstance pertains to the state of mind of the actor. In *State v. Stewart*, [197 Neb. 497, 250 N.W.2d 849 (1977)], we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in *State v. Holton*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court).

In *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), we held that

> "exceptional depravity" [as used in § 29-2523(1)(d)] exists when the act is totally and senselessly bereft of any regard

> for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."

(Syllabus of the court.)

In *State v. Hunt*, 220 Neb. 707, 725, 371 N.W.2d 708, 721 (1985), we stated:

> [F]orcing items into the victim's throat and the strangulation itself were cruel, but not "especially so," for any forcible killing entails some violence toward the victim. There is no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.

In order for aggravating circumstance (1)(d) to be present, the method of killing must entail something more than the ordinary circumstances which attend any death-dealing violence.

Thus it can be seen that this court has adopted a limiting construction on aggravating circumstance (1)(d), as shown in cases extending from 1977 to 1986. We have held that "especially heinous, atrocious, or cruel" is limited to cases where "torture, sadism, or the imposition of extreme suffering exists," *State v. Moore, supra* at 470, 316 N.W.2d at 41, or where the murder was preceded by acts "performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time," *State v. Hunt, supra* at 725, 371 N.W.2d at 721.

Similarly we have sharply limited the circumstance of "exceptional depravity" sufficient to constitute an aggravating circumstance to circumstances showing relishing of the murder by the killer, infliction of gratuitous violence on the victim, needless mutilation of the victim, senselessness of the crime, or helplessness of the victim. *State v. Joubert, supra.*

In this case, the sentencing court relied on both parts of § 29-2523(1)(d). The court found facts that showed torture,

sadism, and the inflicting of extreme suffering and the fact that the pain existed for a prolonged period of time. The court also found facts showing that defendant relished the murder, that defendant inflicted gratuitous violence on the victim, that defendant needlessly mutilated the victim, and that the victim was helpless.

The findings of the trial court fit squarely with the statutory definition of § 29-2523(1)(d), as that subsection has been limited by this court's decisions.

The U.S. Supreme Court affirmed the U.S. Court of Appeals for the 10th Circuit in *Maynard v. Cartwright,* 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), holding that "heinous," "atrocious," and "cruel," as used in the Oklahoma murder sentencing statute, were "unconstitutionally vague" under the eighth amendment to the U.S. Constitution.

The court noted, in making that ruling, that the Oklahoma courts had not adopted a limiting construction that cured the infirmity in the Oklahoma statute. See, also, *Lindsey v. Thigpen*, 875 F.2d 1509 (11th Cir. 1989) (The "heinous, atrocious or cruel" aggravating factor in Alabama's death penalty statute had been narrowed to those homicides that are unnecessarily torturous to the victim for purposes of determining whether imposition of the death penalty was unconstitutionally "wanton" or "freakish").

We hold that Nebraska has adopted such a limiting construction as to render the Nebraska statute sound and in full compliance with the U.S. Constitution.

We note also that the trial court, in its order of sentence, set out a list of the Nebraska Supreme Court cases it relied on in entering its order and that some of our cases referred to above are on that list.

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the U.S. Supreme Court held that the death penalty may only be imposed under sentencing procedures that do not create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. In *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Court held: "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of

whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

We agree with the court below that the evidence supported a finding of the existence of the "exceptional depravity" circumstance of (1)(d) in that the defendant apparently relished the murder, inflicted gratuitous violence on the victim, and needlessly mutilated the victim. The defendant had the victim tied and chained, and then repeatedly sodomized the victim with a shovel handle thrust some 2 feet into his body, rupturing his colon and damaging his liver. He also whipped, beat, shot, and skinned him, and then assisted in breaking the victim's legs. The defendant also directed others to inflict extreme suffering on the victim. This evidence alone is sufficient to find the existence of circumstance (1)(d). Section 29-2523(1)(d), as applied, meets the standards set forth by the U.S. Supreme Court and this court.

The balancing of aggravating and mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). Additionally, this court's automatic review of capital cases does not require it to set aside a death penalty where certain aggravating factors found to exist below are determined here to be unsupported by the evidence. See Neb. Rev. Stat. § 29-2528 (Reissue 1985). A finding of a single aggravating circumstance on appeal may be sufficient to support a death sentence.

The sentencing court correctly found that sufficient evidence existed to support a finding that both prongs of circumstance (1)(d) existed beyond a reasonable doubt.

Defendant's assignments Nos. 39 and 40 are without merit.

XXIV. "*The state should have the burden at sentencing to prove mitigating circumstances do not exist (Assignment #41).*"

Aside from the fact that the defendant would have the State prove a negative—always a difficult chore—defendant misses the point when he states, "The United States Supreme Court has continually stated that it is impermissible to shift the burden of proof on elements of the crime to the Defendant." Brief for appellant at 88.

We agree with that statement, but suffice it to say that the presence or absence of mitigating factors is not, in any way, an element of the crime of murder. (See the discussion under argument VII above, concerning the burden of proof on the insanity issue.)

Defendant's assignment No. 41 is frivolous.

XXV. "*Refusal of trial court to specifically deal with non-statutory mitigating circumstances (Assignments #42, #43, #44, #45, and #46).*"

The gist of these assignments of error is that the court erred in "failing to deal specifically with the mitigating factors numbered 5 through 16 of defendant's 'Requested Mitigating Factors' . . . ."

We held in *State v. Joubert, supra*, that a defendant may offer any evidence on the issue of mitigation. Prior to the sentencing hearing in this case, defendant requested that the court consider the following "mitigating factors":

> 5. For 34 years of his life [the defendant] was a law abiding citizen, committed no anti-social acts, and no crimes.
>
> 6. It was only after exposure to Jim Wickstrom [sic] teachings that [the defendant's] life changed and anti-social acts were committed.
>
> 7. [The defendant] was a very good father and loved by children.
>
> 8. [The defendant] had a normal childhood (with exception of beatings by his mother), was well-behaved, attended church, fished and hunted with his father.
>
> 9. The disparity of treatment of co-defendants, who did everything defendant did in the matter of the death of James Thimm, compels a life term of imprisonment.
>
> 10. Defendant offered to plead guilty to the offenses of second degree murder and kidnapping with harm to the victim (life imprisonment with no minimum term), so that he could have received two life sentences on such pleas; and in addition he offered to plead no contest to a charge of manslaughter insofar as the death of Luke Stice was concerned, all of which could have led to terms of imprisonment of life consecutiive [sic] to life consecutive

to 20 years imprisonment. But such offers of pleas to the county attorney were rejected.

11. Defendant is already serving sentence of life imprisonment and no legitimate interest of the State will be served by imposing the sentence of death.

12. Letter from the Director of Nebraskans Against the Death Penalty.

13. Letter from juror Short.

14. The court extended mercy to co-defendant Tim Haverkamp when it allowed the State to amend its charges to second degree murder, thus making him a witness—although not a truthful one—against defendant, and the Court can extend and should extend mercy to this defendant.

15. Defendant cooperated with the authorities by assisting in the identification of the stolen property on the Rulo farm—most of it stolen by Co-defendants.

16. Dave Andreas does not want defendant to be executed.

The sentencing court considered these factors, as may be seen in the following excerpt from the court's sentencing order:

> In addition to the statutory circumstances set forth in Section 29-2523 . . . the terms of Section 29-2521 provide, in part, as follows: "In the proceeding for determination of sentence, evidence may be presented as to any matter that the Court deems relevant to sentence, ... Any such evidence which the Court deems to have probative value may be received. . . ."
>
> The court is also aware of the decision of the United States Supreme Court in the case of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), and the direction of [the Nebraska] Supreme Court to apply the rule of that case permitting the introduction of any mitigating evidence offered by the defendant which the Court deems to have probative value, even though such evidence may not specifically come within the scope of the statutory mitigating circumstances. Keeping that direction and guidance in mind, the Court has considered additional mitigating factors [requested by the

defendant].

The trial court clearly considered the mitigating circumstances presented by defendant.

The defendant argues that "Nebraska statutes, Section [sic] 29-2521, 29-2522, and 29-2523 are unconstitutional and void," brief for appellant at 90, since they do not require the sentencing court to make specific findings concerning a defendant's proposed nonstatutory mitigating circumstances. The defendant has not shown that he was prejudiced by the sentencing court's refusal to make specific findings concerning the defendant's proposed mitigating circumstances. The trial court considered the defendant's request. Some of defendant's proposed mitigating circumstances (e.g., Nos. 7 and 8) were not supported by the record. Others (e.g., Nos. 10, 11, and 12) are immaterial. Still others were the same as statutory circumstances.

The sentencing court fairly considered the defendant's proposed mitigating circumstances prior to rendering its decision. The Nebraska capital sentencing procedure fully complies in this regard with the requirements set forth by the U.S. Supreme Court. See, *Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

Defendant's assignments Nos. 42, 43, 44, 45, and 46 are without merit.

XXVI. "*Equally culpable Co-defendants should be sentenced as uniformly as possible to prevent the appearance of impropriety (Assignments #47 and #48).*"

Defendant argues that his sentence was excessive in that "equally culpable co-defendants" were given much less severe sentences. We first note that the only codefendant was Dennis Ryan, who was also convicted.

While it is true that others were involved in James Thimm's murder, the record shows that the defendant was the leader of the group and that the victim was tortured and killed on the defendant's orders. The actions of defendant and the others were not "equally culpable." See, also, *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980) (where only two of the three coperpetrators were charged with first degree

murder).

Defendant also argues that the "only reason which could account for this extreme disparity in sentence is that Michael W. Ryan had a lengthy and expensive trial and the Co-defendants plead [sic] guilty . . . ." Brief for appellant at 92. Defendant's assertion is unwarranted, unsupported by law or logic, and without merit. The record shows that James Thimm would not have suffered death absent the defendant's leadership.

Defendant's assignments Nos. 47 and 48 are without merit.

XXVII. "*Defendant's sentence was excessive (Assignments #49, #50, #51, and #52).*"

The defendant argues that his sentence was excessive. It is hard for this court to conceive of a more senseless and brutal murder. We have reviewed all criminal homicide cases pursuant to Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1985) and find that the defendant's death sentence is justified when compared to all other homicide cases. *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

XXVIII. "*The trial court erred in denying Defendant's showing to Court in addition to Defendant's motion to exclude death penalty, motion to exclude the death penalty, and specific objections to imposition of death penalty (Assignments #53, #54, #55, #56, #57, and #58).*"

In defendant's 60 assignments of error, the defendant has assigned the above-numbered six general statements, contending the trial court erred in its failure to review the motions made by the defendant in the court below, including defendant's motion to exclude the death penalty, defendant's additional motion to exclude the death penalty, and defendant's specific objections to imposition of the death penalty. The sum and substance of these general statements is contained in various other assignments of error and have been discussed above. We have reviewed these motions and the arguments made in support thereof, and conclude that the trial court's decisions denying these motions were not an abuse of discretion. These assignments are without merit.

XXIX. "*Cumulative effect of errors at guilt-innocence and life-death portions of trial deprived Defendant of a fair trial (Assignment #59).*"

In the defendant's 59th assignment of error the defendant contends that the combined effect of the errors assigned rendered the proceedings against him fundamentally unfair. He makes no real argument, nor does he cite any cases, to support such assertion. It is without merit.

Of more controlling effect is the doctrine of harmless error.

We held in *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988): "Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." This comports to the rule found in *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), wherein the U.S. Supreme Court stated:

> All of these [harmless error] rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

The Court in *Chapman* further held that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.

In *Rose v. Clark*, 478 U.S. 570, 576, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), the U.S. Supreme Court stated:

> In *Chapman v. California*, 386 U.S. 18 (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. And since *Chapman*, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."

In view of all of the evidence before the jury, we conclude

that the combined effect of the errors defendant alleged occurred at trial was harmless beyond a reasonable doubt and that the defendant was not prejudiced by these alleged errors. This conclusion is supported by the overwhelming evidence against the defendant, including the defendant's own testimony as to his part in the murder of James Thimm. The cumulative effect of these alleged errors did not have a material effect on the jury in reaching its verdict. A defendant is not constitutionally entitled to receive a perfect trial, only a fair and constitutional trial. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984).

XXX. "*The Nebraska Supreme Court should not limit brief size in a capital case (Assignment #60).*"

Defendant has a fundamental problem with the meaning of the word "brief." The defendant filed a motion requesting leave to file a 191-page brief with this court. This motion was denied, and the defendant was allowed to file a 100-page brief with 60 assignments of error. The defendant's case has been argued zealously in all stages of the proceedings. We also note that the Attorney General only addressed 15 of the 60 assignments made by the defendant. The defendant cannot predicate error on this court's denial of his motion requesting leave to file a 191-page brief.

As stated before, this court is charged with the automatic review of all cases in which the death penalty has been imposed. § 29-2525. This court has separately reviewed each of defendant's assignments of error. The decision of the Richardson County District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. RYAN, APPELLEE, LOUIE M. LIGOURI, APPELLANT.

444 N.W.2d 656

Filed August 11, 1989. No. 86-879.

1. **Attorney Fees.** Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires that court-appointed attorneys shall be paid reasonable fees and reasonably necessary expenses for services performed pursuant to their appointment.
2. **Effectiveness of Counsel.** Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded with directions.

Charles D. Hahn for appellant, and Louie M. Ligouri, pro se.

Douglas E. Merz, Richardson County Attorney, for appellee State.

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

GRANT, J.

Michael W. Ryan, defendant in *State v. Ryan, ante* p. 74, 444 N.W.2d 610 (1989), was represented in the trial court by Louie M. Ligouri (applicant), an attorney in the private practice of law in Auburn, Nemaha County, Nebraska, and Richard Goos of Lincoln, Lancaster County, Nebraska. Both were court-appointed to represent defendant at the trial level in the case in which defendant was charged, in two counts, with the first degree murders of Luke Stice and James Thimm. The two charges were separated for trial, and only the Thimm case was tried. After that trial, defendant pled guilty to a charge of second degree murder in connection with the death of Luke Stice. Applicant was first appointed by the county court for Richardson County on August 23, 1985, and by the district court on October 8, 1985. He represented defendant in the county court proceedings and, after defendant was bound over to the district court, in the district court.

Richard Goos was an assistant public defender in Lancaster County and was appointed by the district court for Richardson County to represent defendant as cocounsel with applicant. The payment for the representation by Goos was provided for by a contract between Richardson and Lancaster Counties. The contract itself is not before this court, but evidence shows that Goos was to continue to be paid by Lancaster County as an assistant public defender, at his regular salary with attendant fringe benefits, and that Richardson County would reimburse Lancaster County at the rate of $30 per hour for each hour Goos devoted to representing defendant Ryan. Testimony at the fee hearing on Ligouri's applications for fees indicated that Ligouri was also to represent Ryan, as cocounsel, both because it was difficult for one attorney to represent a defendant in a possible capital case and because Goos could not devote sufficient time, on his own, to represent Ryan without assistance.

Applicant represented Ryan from applicant's initial appointment on August 23, 1985, until the court discharged applicant on April 25, 1986. On June 27, 1986, applicant filed his amended fee application, seeking payment of fees. This application showed that applicant had spent 605 hours of time defending Ryan from December 1, 1985, to the date of his discharge. An earlier fee application, filed December 9, 1985, sought payment for 94 hours for services by applicant in November 1985. Applicant thus sought payment for 699 hours of service. After a fee hearing on September 4, 1986, the trial court ordered applicant be paid the total sum of $8,776 for services from August 23, 1985, to his termination. The court further found that applicant had been paid $3,208.25 for his services in county court and district court from August 23 to November 1, 1985; that this sum should be deducted from the total award of fees; and that, therefore, applicant should be paid the additional sum of $5,567.75. The trial court made no specific finding as to hours served by applicant nor as to the rate to be charged.

Applicant timely appealed to this court, assigning as error that the action of the trial court was contrary to law and erroneous in that it did not make a proper allowance for

expenses and fees for applicant in his appointed representation of Ryan. Applicant also sought interest on any amount due him. For the reasons set out below, we reverse the order of the trial court and fix the appropriate fees in this court, but do not make an award for interest.

The brief of Richardson County in this court does not challenge the rate requested by applicant, nor the number of hours submitted for payment. The only points raised are the technical points as to the appropriate form of claim and of payment, discussed and determined adversely to the county in *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987). Since that case disposed of the underlying issues, those issues will not be discussed again in this opinion.

The record before us shows the following. Applicant was first appointed by the county judge for Richardson County and was first paid $2,000 by the county court for his representation of Ryan for the period of time from August 23 to September 23, 1985, at an apparently agreed rate of $50 per hour for legal services and traveltime, plus .21 per mile for miles traveled. Applicant was also paid for the time from September 23 to October 31, 1985, at the same rates by the trial court. Applicant made later applications for fees, but no further payments were authorized by the trial court.

In a telephone conversation between the trial judge and applicant on December 5 or 6, 1985, the trial judge informed applicant that future payments would be at the rate of $30 per hour and only for hours authorized by the court. Applicant was not satisfied with the hourly rate, nor with the court's involvement with applicant's representation of defendant, and therefore he prepared an order for the court to sign terminating his appointment. Goos then filed a motion that the trial court keep applicant on the case with appropriate remuneration, because Goos felt he alone could not devote sufficient time to the case to represent defendant properly. The record before us does not show that the motion was ever acted on. Because of applicant's continued representation of defendant, it is clear that the trial court did not sign applicant's proposed order.

The controlling statute on the fee questions is Neb. Rev. Stat. § 29-1804.12 (Reissue 1985), which provides:

> Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him or her for all expenses reasonably necessary to permit him or her to effectively and competently represent his or her client and for fees for services performed pursuant to such appointment except if the defendant was not bound over for trial in the district court, the application shall be made in the appointing court. The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court.

At the hearing on applicant's fees, the transcript of the fee hearing in the *Rehm and Faesser* case was received in evidence without objection. The trial court noted in that hearing that it thought $50 per hour was an appropriate rate. In the applicant's case, the trial court reduced the hours sharply by examining everything done by applicant in the way of taking depositions, investigating, or consulting with his client, and by not allowing for any time spent by applicant which the trial court determined not to be "necessary." There was no specific finding as to what was "necessary."

The record before us shows that, in the fee hearing, the trial court cross-examined witnesses produced by applicant and made factual statements contradicting evidence adduced by applicant. The trial court's participation in the hearing made it inappropriate for the trial court to make dispositive rulings on applicant's fee applications. Because our analysis of the facts before us discloses, without any doubt, that substantial hours claimed to be devoted to Ryan's representation were spent in applicant's representation of Ryan, we set applicant's fee, in this court, to avoid a further remand.

First of all, the record shows that applicant was present in court for 7 days during the voir dire of prospective jurors. Additionally, 18 days were spent in the actual trial of the cases of defendants Michael Ryan and Dennis Ryan. Of these days, 9 were used by the State in presenting its cases and 9 were used in presenting defendants' cases. In addition, 3 full days were spent in instruction conferences and in final argument after the

evidentiary portion of the trial was concluded.

The defense was somewhat convoluted in that, after others involved in the crimes testified for the State, defendant's only real chance of acquittal was a successful defense of insanity. The matter of the sentence of defendant had to be a real concern throughout the trial. Defendant was tried jointly with his son, and in representing the son, the son's attorneys tried to put as much blame on defendant herein as possible, in order to enhance the son's chances. Since Michael Ryan and his son were tried in a joint trial some confusing positions had to be adopted by the trial attorneys.

At any rate, we calculate each day actually in court as a 6-hour trial day. On each trial day, applicant set out an additional 2 or 3 hours devoted to preparation for the trial. We are satisfied that applicant devoted a total of 8 hours each trial day to representing defendant herein. The total of such time is 8 hours times 28 days, or a total of 224 hours.

Additionally, it is totally appropriate that applicant's amended fee application is recognized as correct in setting out that on each weekend (Saturday and Sunday) during the trial for 5 weeks, applicant spent approximately 6 hours in preparing for trial and in appropriately consulting with defendant and with applicant's cocounsel. This amounts to an additional 30 hours.

In addition, six progression hearings were held after November 1, 1985, by order of the court. Applicant was present at four of those hearings. From our examination of the record, it can be determined that four additional days of court time were required for the progression hearings and other interim motion hearings. The record indicates that such hearings averaged 2 hours per day, or an additional time of 8 hours.

An additional item of controversy is traveltime. The murders of James Thimm and Luke Stice occurred near Rulo, Richardson County, Nebraska, located in the extreme southeast corner of Nebraska. We can only assume that the trial court was unable to provide defendant Ryan with adequate defense counsel in Richardson County. The problem is self-evident, because additional attorneys had to be provided for other defendants (Timothy Haverkamp, James Haverkamp, Dennis

Ryan, and John David Andreas). The pool of attorneys who would, or could, represent such defendants was not large. It is futile to appoint an attorney some distance away to represent a defendant and not to provide compensation for that attorney to reach his client.

As a result, applicant, from Auburn, Nemaha County, Nebraska (35 miles from Falls City, the Richardson County seat), and another Auburn attorney were appointed, as were three attorneys from Lancaster County, one from Pawnee County, and two from Richardson County, to represent various of the five persons involved in the torture and murder of James Thimm. The four attorneys representing Timothy Haverkamp, James Haverkamp, and Andreas were involved a lesser time because their clients agreed to, and did, testify for the State in exchange for lighter sentences. We note, in passing, that such other attorneys were paid at the rate of $50 per hour for at least some of the limited time they served. The upshot was a great deal of traveltime involved for applicant—particularly after the actual trial was moved to Douglas County, some 65 miles from Auburn, and defendant Ryan was incarcerated in Sarpy County. Applicant sought only $332 for travel miles (at an apparently agreed upon rate of .21 per mile). In addition, under the circumstances of this case, defendant should be reimbursed for his time spent in traveling. That time is set out in the fee applications as 49 hours (in addition to 11 hours noted by applicant but not billed).

It can thus be seen that in court-connected time alone, applicant has spent 311 hours in the defense of Michael Ryan. With the trial court's statement that $50 per hour was a reasonable rate, and considering the fact that six witnesses testified that $50 per hour was a minimum rate and that some of these witnesses testified that a reasonable rate would be $65 to $120 per hour, we determine that under the facts of this case, $50 per hour is a reasonable rate. Applicant is entitled to the sum of $15,550 for such court-connected hours alone, without any consideration of research and investigative time spent on the case. The trial court's finding that applicant is entitled to a total of $8,776 for time devoted to the appointed defense of Michael Ryan from August 23, 1985, to April 25, 1986, is not

supported in any way by the undisputed evidence in the record. The order of the trial court as to the fees to be awarded applicant is an abuse of discretion and is hereby set aside and reversed.

In addition to the hours set out above, applicant's fee applications set out that approximately 337 additional hours were spent between November 1, 1985, and April 25, 1986, in investigating the factual background; taking statements and depositions; interviewing his client; researching the law, particularly the insanity issues; conferring with witnesses, including a psychiatrist called by the defense; reviewing evidence, including tapes; preparing for the testimony of the State's psychiatric witness; and appropriately consulting with cocounsel and conferring with all counsels in the case; and in general preparation for depositions and for the trial. A witness list of 58 witnesses was submitted at one time as witnesses to be called. Twenty-four witnesses were actually called by the State at trial. Thirty-one witnesses were called by defendant Dennis Ryan and 11 by defendant Michael Ryan. The record shows mention of other witnesses at other times. Many of these witnesses had to be interviewed and many were deposed. There are in the record of this phase of the trial 14 depositions taken by applicant, either alone or with his cocounsel. The deposition of the father of Luke Stice was 469 pages long. The record before us shows many other depositions were taken. We have reviewed carefully the applicant's fee applications and are not able to conclude that any of his time spent was not necessary. It is the determination of this court that applicant, between November 1, 1985, and February 24, 1986, spent an additional 337 hours in preparing for trial of the Ryan cases.

The trial court's answer to much of applicant's time spent in depositions was that the various police reports were available to defendant's counsel and depositions were unnecessary in most cases. Such an assumption is without foundation in fact or logic.

The ABA Standards For Criminal Justice standard 4-4.1 (2d ed. 1986) provides:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits

> of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

A defense lawyer's obligation to investigate seldom can be satisfied by a mere search of police records. It is obvious that statements in such reports may or may not be true, and such statements have to be the subject of closer scrutiny than a mere reading.

Following the trial, applicant spent additional time on posttrial motions and conferences. The amended fee application indicates 12 hours were spent on such activity from April 8 to the time of applicant's termination on April 25, 1986.

Some 349 hours over 133 days (the time between November 1, 1985, and the beginning of the trial on February 24, 1986, and after trial from April 8 to April 25) in legal work relating to the case against defendant cannot be considered excessive. If action had not been taken, the effectiveness of appointed counsel in representing Ryan would be questioned in this court, and in any other court in which Ryan's conviction is reviewed. The greatest number of cases of ineffective counsel rests on allegations by defendants of insufficient investigation and failure to communicate with defendant. As stated in *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Obviously if the representation of defendant was ineffective, the case would have to be retried at additional expense.

We determine that applicant properly spent an additional 349 hours in out-of-court investigation, consultation, and preparation for trial, and in posttrial activities, and that counsel should be paid at the rate of $50 per hour for such time spent. Applicant is entitled to $17,450 for such additional services beyond time actually spent in court.

This means applicant is entitled to a total additional fee of $33,000, plus $332.00 in travel expenses and $207 in telephone

expenses.

For this court to approve the amount awarded to applicant by the trial court would be to send a message that the sixth amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution have no real meaning. This case was a disaster to many, aside from the two victims of Michael Ryan. Among those affected are the taxpayers of Richardson County and of the State. The fact remains, however, that the attorneys appointed to represent the defendants in this bestial event are not guilty of any crime. They are honorable professional people and have been appointed by a court to perform a duty required by the Constitution. It is not appropriate to subject attorneys, appointed or otherwise, to the treatment seen in the fee hearing in this case. In such hearings, it is not appropriate to require appointed attorneys to submit income tax records to the court, as was done in this case, nor to submit such things as the attorney's notes made in preparation for final argument, as requested in the *Rehm and Faesser* case.

In horrifying cases such as this case, it is vital that we, as a State and a nation, maintain our decree of civilization and reliance on our Constitution. We must not sink to the level of nations that execute transgressors the morning after alleged offenses occur. Defense attorneys perform an absolutely essential function under our Constitutions and must be treated as honorable persons performing a necessary legal duty.

We note that applicant seeks interest on the amounts due him. He cites Neb. Rev. Stat. § 45-104 (Reissue 1988). The sum due Ligouri was not liquidated, but had to be evaluated and calculated. Interest is not due under such circumstances. The judgment of the trial court on the issue of fees granted for Louie M. Ligouri is reversed, and the cause is remanded with directions to enter an order in conformity with this opinion. It is to be understood that the fee herein awarded is for services rendered by Ligouri to defendant in both the Thimm and Stice matters and that the fees awarded herein are in addition to amounts paid to applicant before November 1, 1985.

REVERSED AND REMANDED WITH DIRECTIONS.

ROSE CASSIO, SPECIAL ADMINISTRATOR OF THE ESTATE OF MICHAEL R. CASSIO, DECEASED, APPELLANT AND CROSS-APPELLEE, V. CREIGHTON UNIVERSITY, A NONPROFIT CORPORATION, APPELLEE AND CROSS-APPELLANT.

446 N.W.2d 704

Filed August 11, 1989. No. 87-310.

1. **Trial: Evidence: Appeal and Error.** A party may not complain on appeal of the admission of evidence to which no objection was made at the time of the offer.
2. **Ordinances: Pleadings: Negligence.** Evidence of an ordinance and its violation, although not pled, is admissible, if properly offered, under a general averment of negligence when it is relevant to a material issue in the case.
3. **Appeal and Error.** Upon appeal involving a question of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.
4. **Recreation Liability Act.** The Nebraska Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1988), does not apply to independent indoor recreational facilities, including indoor swimming pools.
5. **Negligence.** An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury; (2) his or her conduct concurs and cooperates with the defendant's actionable negligence; and (3) his or her conduct contributes to his or her injuries as a proximate cause.
6. **Directed Verdict.** In order to sustain a motion for a directed verdict or for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
7. _____. In considering the evidence for the purpose of a motion for a directed verdict or for judgment notwithstanding the verdict, the party against whom a motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
8. **Negligence: Liability: Words and Phrases.** The doctrine of assumption of risk involves a choice made more or less deliberately and negatives liability without reference to the fact that the party seeking recovery may have acted with due care, whereas the defense of contributory negligence implies the failure of the party seeking recovery to exercise due care.
9. **Negligence.** Where one knowing and comprehending the danger voluntarily exposes himself or herself to it, although not negligent in so doing, he or she is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.
10. **Jury Instructions: Appeal and Error.** On appeal, the Supreme Court examines instructions given to determine whether they are a correct statement of the law.
11. _____: _____. It is not error on the part of the trial court to refuse to give a

requested instruction if the substance of the request is in the instruction actually given.

12. **Jury Instructions: Proof: Appeal and Error.** In order to establish as error the trial court's refusal to give a tendered instruction, the party complaining is under a threefold burden to show that he or she 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.
13. **Trial: Witnesses: Evidence.** A witness without qualifications may not be permitted to offer an opinion regarding a matter requiring scientific, technical, or other specialized knowledge.
14. _____: _____: _____. Testimony of a witness in the form of opinion which is pure speculation should not be received in evidence.

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

Debra R. Nickels and James R. Welsh, of Welsh & Sibbernsen, for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

HASTINGS, C.J.

Plaintiff, special administrator of the estate of Michael R. Cassio, Cassio's sister, appeals from the order of the district court granting defendant Creighton University's motion for a new trial. This followed a jury verdict in favor of the plaintiff in a wrongful death action in the amount of $118,940. Creighton cross-appeals from the rulings of the district court overruling its motions for directed verdict and judgment notwithstanding the verdict.

Plaintiff simply assigns as error the action of the trial court which granted Creighton a new trial. On cross-appeal Creighton contends the trial court erred in not sustaining its motions for a directed verdict or for a judgment notwithstanding the verdict because (1) the evidence established as a matter of law that the plaintiff's action was barred by the Nebraska Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1988); (2) the evidence conclusively established that Cassio was guilty of contributory negligence more than

slight sufficient to bar recovery; and (3) the evidence established as a matter of law that Cassio was guilty of assumption of the risk.

Cassio, plaintiff's decedent, was a 31-year-old bachelor who had been in the U.S. Air Force for the past 10 years. His mother lives in New Jersey, and Cassio would visit home as his duties would permit, would call or write home usually once a month, and would send his mother $100 every month. Considering the mother's life expectancy of 15.04 years, and calculated at a 6-percent interest rate, this monthly payment would have a present worth of $11,673.59. In addition, Cassio's hospital bill amounted to $1,217.14, and the funeral bill was $2,927.

On May 14, 1984, Cassio went swimming in Creighton's pool located in the Kiewit Center. He put on scuba gear which consisted of a compressed air tank, a mask, a mouthpiece and regulator, a buoyancy compensator, a weight belt, and fins. He swam laps with his scuba gear on for 30 to 45 minutes. After that, he moved to the deep end of the pool and began doing breathing exercises, repeatedly submerging and coming up again.

Only one lifeguard, Catherine Dalipe, was on duty while Cassio was in the pool. Apparently, she had taken and passed a course at Creighton in advanced lifesaving. She had been sitting on the elevated guard stand when Cassio first came into the pool, but later moved down to a deck chair beside the pool.

At about 4:45 p.m. Dalipe's supervisor, Mike Hardigan, came in, and they talked for about 10 minutes. While they were talking, their attention was directed to the deep end of the pool by Kevin Croft, who had been working out with weights in the vicinity of the pool. He had seen a girl, whose identity is unknown, walk past the deep end of the pool, look down, and then step back and stick her hand to her mouth. She walked over to Dalipe and Hardigan, and they got up and started running. At that time, Croft jumped over the fence between the pool and the weight lifting area. When Croft got to the pool, Dalipe was diving in. According to Croft, Cassio was lying on his back on the bottom of the pool with his tank and weight belt off his body, but his buoyancy compensator was still strapped on. Dalipe tried to lift Cassio off the bottom, but could not

because he was too heavy. She came back up and said she was hurt. Dalipe testified that Cassio was still wearing his scuba gear. Croft then dove in and brought Cassio up and got him out of the pool with Hardigan's assistance. Croft noticed a pink champagne-like froth coming out of Cassio's mouth, and Cassio's face was cyanotic. CPR was attempted, paramedics arrived, and Cassio was taken to the hospital, where he was pronounced dead.

Plaintiff's petition alleged several acts of negligence on the part of Creighton University relating to the operation of its pool. Creighton in turn answered by alleging that the action was barred by the Nebraska Recreation Liability Act and that Cassio was guilty of contributory negligence and assumption of risk in diving without a partner. At the close of plaintiff's case, leave was granted plaintiff to strike the specific acts of negligence originally alleged and to simply state that Creighton was negligent in "failing to properly life guard its swimming pool while Michael Cassio was in this pool on 5/14/84."

At trial the plaintiff offered in evidence Omaha ordinances which stated that two lifeguards were required to be present at pools the size of Creighton's and which also required a pool of Creighton's classification to be under the immediate supervision of a certified operator. Evidence was also introduced indicating Creighton's violation of the ordinances by having only one lifeguard on duty and no certified operator. Creighton specifically stated that it had no objection to the reception into evidence of those ordinances and regulations.

Following the verdict in favor of the plaintiff, Creighton filed a motion for judgment notwithstanding the verdict or alternatively for a new trial. In its motion for a new trial Creighton contended, among other things, that the trial court erred in admitting evidence of violation of the ordinances because violation of the ordinances had not been specifically pleaded; in allowing a lay witness with no medical training to give his opinion, over objection, as to the cause of death; and in refusing to submit as part of the jury instruction on present cash value the present worth table and examples contained in NJI 4.13, although specifically requested to do so by Creighton.

Subsequent to Creighton's motion for judgment notwithstanding the verdict or for a new trial, plaintiff moved, pursuant to Neb. Rev. Stat. § 25-852 (Reissue 1985), to amend the petition to conform to the evidence.

The trial court sustained Creighton's motion for a new trial, finding that "the pleading of a city ordinance under the law of the State of Nebraska is essential to an allegation of negligence premised on a breach of that ordinance." The trial court further found:

> Plaintiff's Motion for Leave to Amend its Petition to allege specifically the city ordinance involved, and to conform the allegations of the Petition to the evidence adduced will not correct the original error of the Court in permitting evidence of such violation of said ordinance to be received; and that therefore, said Motion should be denied.

ADMISSIBILITY OF THE ORDINANCES

We consider first Creighton's complaint regarding the admissibility of the Omaha city ordinances. That may be disposed of quickly by simply referring to the record and the fact that the ordinances were received without objection by Creighton. It cannot now complain of the admission of evidence to which no objection was made. See *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988).

Second, evidence of an ordinance and its violation, although not pled, is admissible, if properly offered, under a general averment of negligence when it is relevant to a material issue in the case. See, *Owen, Administrator v. Moore*, 166 Neb. 226, 88 N.W.2d 759 (1958); *Carter v. Zdan*, 151 Neb. 185, 36 N.W.2d 781 (1949); *Omaha Street R. Co. v. Larson*, 70 Neb. 591, 97 N.W. 824 (1903). We see no reason why that rule should not apply in this case.

The plaintiff's allegations in the first instance, as well as the amended allegation that Creighton was negligent in failing to properly lifeguard its swimming pool, were broad enough and general enough that an ordinance establishing the required number of lifeguards is relevant to prove the alleged negligence in failing to properly lifeguard the pool.

THE RECREATION LIABILITY ACT

The issue as to the Nebraska Recreation Liability Act refers to §§ 37-1001 et seq. The purpose of the Nebraska Recreation Liability Act is "to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon . . . ." § 37-1001. Accordingly, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." § 37-1002.

Under the act,

> an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

§ 37-1003. However, an owner is still liable "(1) for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, or (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land." § 37-1005. Therefore, the owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility. In this instance, there was evidence which would support an inference that Cassio had paid a fee for his admission to the pool.

However, we further examine the applicability of the act to this case. Under the act, "land" includes "roads, water, water courses, private ways and buildings, structures, and machinery or equipment thereon when attached to the realty." § 37-1008(1). "Recreational purposes" includes, but is not limited to "[h]unting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water-skiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using

land for purposes of the user." § 37-1008(3).

Disregarding the issue as to whether Cassio paid an admission fee for use of the pool, it must first be determined whether the Recreation Liability Act applies to indoor swimming pools as being included within the definition for lands for recreational purposes. Since this is a question of law, this court has an obligation to reach an independent conclusion. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

The Supreme Court of Pennsylvania, in *Rivera v. Philadelphia Theological Seminary*, 510 Pa. 1, 507 A.2d 1 (1986), held that the owner of an indoor swimming pool is not immune under Pennsylvania's Recreation Use Act.

The court explained:

> We turn first to the Seminary's contention that its liability for young Rivera's death is precluded under the provisions of the Recreation Use Act. Specifically, the Seminary would have us construe the Act to immunize any owner of a swimming pool from liability so long as no admission fee is charged for its use. Both public policy and the legislative history of the Recreation Use Act show that it was not intended to, and should not, apply to immunize the Seminary from liability for negligence in the maintenance of its indoor swimming pool. The policy implications of such a result are so far-reaching and out of harmony, generally, with the modern trend in tort law that we cannot ascribe an intent to immunize owners of indoor pools from tort liability for foreseeable harm without a stronger indication of such intent than we can discern in this statute.
>
> The stated purpose of the Recreation Use Act is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." 68 P.S. § 477-1. An owner of recreational land, as defined in the statute, "owes no duty of care to keep the premises safe for entry or use by others for recreational purposes." 68 P.S. § 477-3. An owner who "directly or indirectly invites or permits without charge

any person to use such property for recreational purposes" does not incur liability for injury to such persons, 68 P.S. § 477-4, except "[f]or wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." 68 P.S. § 477-6.

"Recreational purpose," under the Act, "includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, water sports and viewing or enjoying historical, archaeological, scenic, or scientific sites." 68 P.S. § 477-2.

. . . .

The Recreation Use Act is therefore designed to encourage the opening up of large, private land holdings for outdoor recreational use by the general public by limiting the liability of the landowner. Considering that purpose, we believe the Legislature intended to limit the meaning of the words "buildings, structures and machinery or equipment when attached to the realty" in Section 2 of the Act, 68 P.S. § 477-2, to ancillary structures attached to open space lands made available for recreation and not to enclosed recreational facilities in urban regions. Grammatically, this construction is indicated by the dual presence of the conjunctive "and" in the list, both before "buildings" as well as after "structures." The position of the limiting clause "when attached to the realty" at the end of the sentence is another such indication. All of these factors make it appropriate to treat the list beginning with the word "buildings" as a restrictive modifer [sic] of "land, roads, water, watercourses." *Id.*

The intention of the Legislature to limit the applicability of the Recreation Use Act to outdoor recreation on largely unimproved land is evident not only from the Act's stated purpose but also from the nature of the activities it listed as recreational purposes within the meaning of the statute. Specifically, with the exception of "swimming," which may be either an indoor or outdoor sport, the recreational activities enumerated in the statute

> are all pursued outdoors.
>
> . . . .
>
> Consequently, neither the language nor the purposes of the Recreation Use Act require a construction which applies its immunity to the Seminary's indoor pool. Instead, they induce us not to so construe it. Accordingly, we hold that the Seminary is not immune from tort liability under the provisions of Pennsylvania's Recreation Use Act.

507 A.2d at 6-9. The court noted in a footnote that "[t]he need to limit owner liability derives from the impracticability of keeping large tracts of largely undeveloped land safe for public use. The same need does not arise in the case of indoor recreational facilities which, in contrast, are relatively easy to supervise and monitor for safety hazards." 507 A.2d at 8 n.17.

In *Gibson v. Keith*, 492 A.2d 241 (Del. 1985), the court limited application of Delaware's recreational use immunity statute "to the recreational use of essentially undeveloped land and water areas (primarily rural or semi-rural land, water or marsh)" and found the statute "not applicable to urban or residential areas improved with swimming pools, tennis courts and the like." *Id.* at 244.

The appellant in *Erickson v. Century Management Company*, 154 Ga. App. 508, 268 S.E.2d 779 (1980), sued to recover for personal injuries she sustained while swimming in a pool on the premises of a motel owned and operated by the appellees. The appellant, not a customer of the motel, was attending a party given by the management in celebration of the Fourth of July. The public was invited but no admission was charged.

The trial court awarded summary judgment to the appellees on the basis of Georgia's recreational use statutes. The appellant contended on appeal that the statutory immunity does not apply to the operation of a swimming pool owned by a private business. In reversing the trial court, the appellate court said:

> The stated purpose of the Act is "to encourage owners of land to make land and water areas available to the public for recreational purposes . . ." Code Ann.

> § 105-403. We do not believe that the term "land and water areas" can reasonably be construed to encompass a swimming pool. Instead, the term clearly has reference to larger bodies of water, i.e., lakes and seashores. The appellees base their contention that the Act specifically applies to this case on the fact that swimming is one of the recreational purposes listed in Code Ann. § 105-404(c), which provides that the term "recreational purpose" "includes, but is not limited to hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites." However, we view this language as a further indication that the Act was intended to apply only to relatively large tracts of land and water, since only two or three of these activities could conceivably be done in any other setting.

154 Ga. App. at 508-09, 268 S.E.2d at 780.

The court in *Keelen v. State, Dept. of Culture, Recreation*, 463 So. 2d 1287 (La. 1985), held that Louisiana's recreational liability statutes did not immunize the State from a wrongful death claim for the drowning of plaintiff's decedent in a swimming pool in a state park. The court stated:

> [I]t is clear that a swimming pool is not the type of instrumentality commonly found in the true outdoors. Rather, swimming pools are most often found in residential backyards. We recognize that "swimming" is included in the list of recreational activities in La.R.S. 9:2795; however, the word should be construed by reference to the context in which it is found. . . . Such consideration leads to the conclusion that the legislature intended to grant immunity for injuries incurred while swimming in lakes, rivers, ponds or other similar bodies of water. Thus, an injury which occurs in a swimming pool is not subject to a defense of immunity under La.R.S. 9:2791 and 2795. It follows that the State cannot assert these statutes in order to avoid liability in the instant case.

463 So. 2d at 1290-91.

Some courts have gone so far as to hold that there is no

immunity under a recreational liability act for backyard swimming pools. See, *Glittenburg v Wilcenski*, 174 Mich. App. 321, 435 N.W.2d 480 (1989); *Loyer v. Buchholz*, 38 Ohio St. 3d 65, 526 N.E.2d 300 (1988); *Boileau v. De Cecco*, 125 N.J. Super. 263, 310 A.2d 497 (1973), *aff'd* 65 N.J. 234, 323 A.2d 449 (1974).

Although we previously have held that the provisions of the Nebraska Recreation Liability Act do apply to urban as well as to rural areas, *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987), there are no Nebraska cases in which the act is applied to indoor recreational activities or swimming pools. We therefore hold that the act does not apply to independent indoor recreational facilities, including indoor swimming pools. Therefore, the trial court did not err in failing to grant Creighton's motions for directed verdict or for judgment notwithstanding the verdict on the basis of the Nebraska Recreation Liability Act.

CASSIO'S CONTRIBUTORY NEGLIGENCE

Creighton argues that it was entitled to a directed verdict or judgment notwithstanding the verdict because as a matter of law Cassio was contributorily negligent to a degree sufficient to bar plaintiff's recovery.

An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury; (2) his or her conduct concurs and cooperates with the defendant's actionable negligence; and (3) his or her conduct contributes to his or her injuries as a proximate cause. *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989); *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

However, in order to sustain a motion for a directed verdict or for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for the purpose of such a motion, the party against whom a motion is made is entitled to have every controverted fact resolved in his or her favor and

to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989). A jury verdict will not be disturbed unless it is clearly wrong. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

Creighton's scuba expert, Don Stanger, testified that a scuba diver should never dive alone; i.e., he should always have a diving buddy present with him when making dives. Stanger had become certified as a scuba diver in 1971 and became a scuba instructor in August of 1974. In between he had received ratings as an advanced diver, diver master, and assistant instructor, all requirements to become an instructor. However, the record does not disclose whether these certifications came from the Red Cross, the YMCA, or some other organization. At the present time Stanger owns and runs a scuba shop in Omaha.

On the other hand, plaintiff's scuba expert testified that when scuba diving alone in a swimming pool, the lifeguard becomes the buddy of the diver. Furthermore, according to the plaintiff's expert, the rule against diving alone applies primarily to open water, where the dangers to a diver are greater. Plaintiff's expert, Ralph Johnson, is an associate professor of health, physical education, and recreation; the director of aquatics, and a diving coach at Indiana University. Johnson has a bachelor of science in education with majors in social studies and health and physical education and has a master of science degree in education. He is currently completing his doctoral work, Ph.D., in sports administration. His duties as director of aquatics concern programming the swimming pool, which includes staffing it with lifeguards, providing inservice training, and scheduling the pool for university classes. He has taken many courses in aquatics, water safety, lifesaving, lifeguarding, scuba diving, small craft, use of canoes and sailboats, pool management, pool design, and pool operation. He was originally trained in scuba diving in 1955. In 1961 he achieved his instructor's certification through the national YMCA scuba program and has been serving in that capacity ever since, teaching on the university level and also to the public. He has

been certified by the Professional Association of Diving Instructors for a period of about 10 years. He is also certified as a scuba instructor by the YMCA of the U.S.A. He has just completed writing large sections of the YMCA Scuba Instructor's Leadership Manual, which is used for training YMCA scuba instructors.

Given the conflicting testimony of the scuba experts on the propriety of a scuba diver's diving alone, this court cannot conclude that as a matter of law Cassio was contributorily negligent. This was an issue for the jury to decide upon proper instructions, which it did. The trial court did not err in failing to grant Creighton's motion for a directed verdict or for judgment notwithstanding the verdict.

ASSUMPTION OF THE RISK

Creighton also argues that as a matter of law Cassio had assumed the risk of diving alone, and therefore a verdict should have been directed in favor of Creighton on that basis.

The only evidence in the record remotely relating to this issue came from Creighton's witness Stanger. He testified as follows:

> Q. In your opinion, sir, did Mr. Cassio then deviate from the standard of care in holding his breath when he arose?
>
> A. I'd say so, yes.
>
> Q. Now, there has been evidence here that Mr. Cassio was a scuba diver for approximately ten years. In your opinion, sir, would a scuba diver with ten years' experience know and appreciate the dangers of diving alone, and holding his breath?
>
> A. Just from the length of time he has been diving, I'd say yes.

Language including "standard of care," "[i]n your opinion," and "would a scuba diver with ten years' experience know" is the language of negligence or of tort law.

Courts, including this one, have had difficulty dealing with the two concepts: negligence and assumption of risk. *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943), contains a comprehensive explanation and comparison of the two doctrines. This court stated:

Is the defense of assumption of risk in negligence cases under the maxim *"volenti non fit injuria"* consistent with the defense of contributory negligence? A discussion of this distinction is found in 38 Am. Jur. 847, sec. 172: "The defense of assumption of risk is closely associated with the defense of contributory negligence. One who does not exercise ordinary care for his own safety is said, speaking broadly, to assume the risk, that is, take the chance, of being hurt. The defense of assumption of risk is not incompatible with contributory negligence; the two defenses may arise under the same state of facts. Some courts regard the defenses as interchangeable. However, there is a clear distinction between the defense of assumption of risk and the defense of contributory negligence, notwithstanding they may arise under the same set of facts and may sometimes overlap. There is a line of demarcation which, if carefully scrutinized and followed, will allow the court to differentiate between them. Assumption of risk rests in contract or in the principle expressed by the ancient maxim, "*volenti non fit injuria*," whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff to exercise due care. As stated in some decisions, assumption of risk is a mental state of willingness, whereas contributory negligence is a matter of conduct." A further discussion of this will be found in 45 C.J. 1043, sec. 600. As stated in *White v. McVicker, supra*: "While the doctrine of contributory negligence and assumption of risk may arise under the same set of facts and sometimes thus overlap each other, yet we have consistently distinguished them and held that they are distinct and separate and must not be confounded with each other." As stated in *Watterlund v. Billings, supra*: "There is a distinction between the doctrine of contributory negligence and the doctrine of assumed risk, since there may be the voluntary assumption of the risk of

> a known danger such as will bar one from recovery for injury to person or property, even though in the exercise of due care." [Citations omitted.] Assumption of risk under the maxim *"volenti non fit injuria"* involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas, the defense of contributory negligence implies the failure of the plaintiff to exercise due care. It may be said that contributory negligence involves the notion of some fault or breach of duty on the part of the one charged therewith, or a failure to use such care for his safety as an ordinary prudent person would have used under the same or similar circumstances. On the other hand, under the assumption of risk, even though the risk be obvious, the person may be free from any suggestion of fault or negligence on his part. While under a certain set of facts the two may be difficult to distinguish and sometimes seem to overlap, yet when carefully considered they can be distinguished and are distinct and separate and not inconsistent.

Landrum v. Roddy, supra at 946-47, 12 N.W.2d at 89.

Creighton cites *Hollamon v. Eagle Raceway, Inc.*, 187 Neb. 221, 188 N.W.2d 710 (1971), in support of its contention that Cassio assumed the risk of drowning by diving alone. In *Hollamon*, this court reiterated that one who participates in the sport of stock car racing assumes the ordinary risks of that sport, including injury when a car goes out of control and enters the pit area. According to the court, "where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." *Id.* at 224, 188 N.W.2d at 711.

In *Hollamon*, the court said:

> There is no factual dispute that plaintiff knew and appreciated the danger of being in the pit area. Plaintiff's car on previous occasions had generally been in this same area. He was aware that he was directly east of the opening off the first turn while in the pit area. Plaintiff conceded that there are some risks incident to racing, and estimated

> that if he were to consider racing accidents over the whole racing season they would average one an evening. He stated that he would expect cars to go out of control on occasions, and had considered the possibility of an accident from a car coming into the pit area.

Id. at 225, 188 N.W.2d at 712.

There was no question in *Hollamon* that the plaintiff knew and appreciated the dangers. He said that he did. That is far removed from the evidence in this case. Here, one witness gives an opinion that from the length of time that Cassio had been diving, he, the witness, would say "yes," Cassio would know the risks of diving alone and holding his breath. This presents a fact question as to a finding of negligence, not assumption of risk. Perhaps testimony that Cassio was a certified diver, that to become certified he would have had to have taken a course in scuba diving, and that the standard instructional course would have required that he be taught the dangers of diving alone and holding his breath while ascending might permit a finding that he did in fact know the danger. However, absent such evidence in the record, there is a real question as to whether there was even a submissible issue as to his knowledge. Certainly the evidence was only sufficient to have permitted a jury to make a factual finding on that basis, which it did.

Creighton's assignment of error regarding the failure of the trial court to find that Cassio was contributorily negligent or assumed the risk as a matter of law is without merit.

PRESENT WORTH INSTRUCTION

In its motion for a new trial, Creighton contended that the trial court erred in failing to include within its instruction to the jury the present worth tables found as part of NJI 4.13. The court's instruction on damages did require the jury to reduce any verdict to its present worth and included in that instruction the first two paragraphs of NJI 4.13. However, it did not include the examples of calculation or the present worth table itself.

Creighton cites us to rule (a), adopted by this court on November 20, 1968, of the Nebraska Jury Instructions, which states:

> Whenever Nebraska Jury Instructions (NJI) contains an instruction applicable in a Civil or Criminal Case, and the Court, giving due consideration to the facts and the prevailing law, determines that the jury should be instructed on the subject, the Nebraska Jury Instruction shall be used.

In *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979), this court reversed a judgment of the district court because the trial court gave its own instruction concerning gross negligence rather than the one contained in Nebraska Jury Instructions. In doing so, this court referred to rule (a) and added: "Whenever applicable and practicable, Nebraska Jury Instructions (NJI) are to be used when charging the jury . . . ." *Id.* at 261, 278 N.W.2d at 580.

In a later case, *Enyeart v. Swartz*, 218 Neb. 425, 355 N.W.2d 786 (1984), the district court was reversed and a new trial granted because the trial court did not follow the Nebraska Jury Instructions fully in giving its instructions, nor did it instruct on proximate cause. The court stated:

> Although neither party raised any objection at the time of the instruction conference and appellant does not assign it as one of his errors, an examination of the instructions tendered by the court to the jury discloses that the court did not provide the jury with an instruction on the definition of "proximate cause" as required by NJI 3.41. No such instruction was given even though this was a case in which the issue of the proximate cause of the accident was vigorously disputed. . . . While it may not be error, per se, to fail to give a definition of proximate cause as set out in NJI 3.41 if the matter is not an issue [citation omitted], the failure to give an instruction on the definition of proximate cause where, as here, it is one of the principal issues in the case must be considered by the court to be plain error, requiring reversal.

Enyeart v. Swartz, supra at 426-27, 355 N.W.2d at 788.

The trial court here gave as its reason for not including the present worth tables the following explanation:

> The court has given 4.13 in essence, but has not included examples of the table. It is my feeling that the inclusion of

> those materials are [sic] confusing to a jury, and would not serve the ultimate purpose of this trial, which is to seek the truth, because I don't think confusion leads to truth. With that in mind, the Court overrules the objection to the instruction and declines to include the examples and/or the table in the instruction.

We examine the instruction given to determine whether it is a correct statement of the law. *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989). It is not error to refuse to give a requested instruction if the substance of the request is in the instruction actually given. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989); *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988). In order to establish as error the trial court's refusal to give a tendered instruction, an appellant is under a threefold burden to show that he or she 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. *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989); *Zeeb v. Delicious Foods, supra*.

The law as reflected by Nebraska's general rule is that an award for future damages must be reduced to its present worth. *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972); *Abbott v. Northwestern Bell Tel. Co.*, 197 Neb. 11, 246 N.W.2d 647 (1976).

The instruction given by the trial court was a correct statement of the law. The suggested examples and the present worth table found at NJI 4.13 of the 1969 edition of Nebraska Jury Instructions are not a statement of the law. The trial court did not err in refusing Creighton's request, and it should not have granted a new trial on that basis.

OPINION TESTIMONY BY LAY WITNESSES

Finally, we deal with Creighton's complaint that Ralph Johnson was permitted to testify that the cause of Cassio's death was cerebral anoxia. Johnson was no more qualified to state an opinion in this regard than any other scuba diver who knows that death may occur from drowning after hyperventilation or from an air embolism following a too rapid

ascent to the surface of the water after having taken in quantities of compressed air. The opinion was not based on what the witness knew because of his experience and education, but on what he had been told. It was based primarily upon the autopsy report of Dr. Jerry Jones, who gave as his opinion that Cassio was hyperventilating and lost consciousness and thereby drowned. Johnson had no qualifications within the meaning of Neb. Rev. Stat. § 27-702 (Reissue 1985) to offer an opinion as to the cause of death. His testimony was pure speculation and should not have been received. *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983).

Dr. Claude Zanetti, who specialized in internal medicine and in the subspecialty of pulmonary diseases with specialized training in treating scuba diving accident victims, testified that the cause of death was an arterial gas embolism.

The cause of death in this instance was extremely important because it relates to proximate cause; i.e., if death was due to drowning, there was evidence from which a jury could find that properly trained lifeguards on duty could have saved Cassio's life. On the other hand, if death was due to an air or gas embolism, there was probably nothing Creighton could have done to have prevented the accident short of prohibiting Cassio from entering the pool.

Due to the importance of the cause of death, permitting an unqualified witness to express an opinion on that subject constituted prejudicial error.

Although we disagree as to the basis, we agree with the trial court that a new trial was required, and therefore the judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

CITY OF WOOD RIVER, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. GEER-MELKUS CONSTRUCTION COMPANY, INC., ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS AND CROSS-APPELLEES, GEO. A. HORMEL & COMPANY, A CORPORATION, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

444 N.W.2d 305

Filed August 11, 1989. No. 87-559.

1. **Trial: Judgments: Limitations of Actions: Final Orders.** The special bifurcation of a trial pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1985) does not create a separate judgment when the trial court determines the action is not barred by the statute of limitations. Interlocutory orders may be modified at subsequent terms provided the court still has not rendered a final decision in matters still pending.
2. **Pleadings: Actions.** Even if a pleading mistakenly identifies a cause of action, the right to recover under the facts alleged is not affected.
3. **Limitations of Actions.** Statutes of repose do not start to run until the cause of action has accrued. A cause of action has not accrued on an indemnity action until the indemnity claimant suffers loss or damage.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with direction.

John A. Wolf, of Shamberg, Wolf & Bush, for appellants.

Richard L. Spangler, Jr., of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellee Hormel.

William A. Francis, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, and O. Wm. VonSeggern, of Grimminger & VonSeggern, for appellee City.

BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and WITTHOFF, D.J.

WITTHOFF, D.J.

This is an appeal from an order of the Hall County District Court finding the third-party action of Geer-Melkus Construction Company, Inc., and United States Fidelity & Guarantee Company (Geer-Melkus) against Geo. A. Hormel & Company (Hormel) was barred by the statute of limitations.

FACTS

Appellant Geer-Melkus contracted with the City of Wood

River to construct a waste water treatment facility. Appellee Hormel manufactured and supplied the rotating media aeration system for the facility. The media system was delivered on or about September 14, 1976, and the plant became operational in the summer of 1977. In the following years, many repairs were made to the media system, and in December 1982 the system broke down completely and could not be repaired.

Wood River filed an action for breach of contract against Geer-Melkus on July 6, 1981. With the court's consent, on December 22, 1981, Geer-Melkus filed a third-party complaint against Hormel, alleging that if it was found liable to Wood River, Hormel was liable to it for breach of warranty.

Specifically, Geer-Melkus complained (1) Hormel warranted the rotating media aeration system would, without further modification, provide a minimum of 22,000 square feet of biological support media in each of the first two stages and 33,000 square feet in the final two stages, for a total of 110,000 square feet of biological support media; (2) Geer-Melkus installed the waste water treatment facility in exact accordance with the plans and specifications; (3) the waste water treatment facility was made operational on or about July 27, 1977; (4) the media rotary disk unit deteriorated and shifted on its shaft; (5) the deterioration and shifting subsequently caused damage to the bearings of the shaft and the shaft itself; (6) the shifting and deterioration required Wood River to replace portions of the waste water treatment system; and (7) the deterioration and shifting were contrary to the specifications for the fixed media rotating disk unit. Geer-Melkus attached, and incorporated by reference, a copy of Wood River's petition as an exhibit to their third-party complaint, and alleged that

> if the allegations of the Plaintiff's Petition are found to be true and if the Plaintiff recovers a judgment against the Defendants and Third Party Plaintiffs, the Third Party Defendant would be liable to the Defendants and Third Party Plaintiffs for the entire amount of the Plaintiffs [sic] claim against them for the reason that said allegations constitute a breach of the Third Party Defendant's express warranty set forth in paragraph 8 hereof.

On February 12, 1982, Hormel filed a demurrer, based primarily upon the statute of limitations defense, which the court overruled. Hormel filed an answer to the third-party complaint on March 5, 1982, admitting it manufactured and supplied the rotating system and stating the system was delivered on February 12, 1978. Hormel raised as affirmative defenses that (1) the action was barred by the statute of limitations; (2) the amount of the claim exceeded the coverage of the warranty; (3) Wood River failed to properly operate and maintain the system; (4) Hormel was not notified of the alleged breach of warranty; and (5) the warranty expired on February 12, 1978. Geer-Melkus filed a reply, alleging the statute of limitations had not run because they were asking for indemnity.

Hormel then moved for summary judgment, once again asserting the statute of limitations. The motion for summary judgment was overruled.

On November 12, 1985, a separate trial was held on the issue of the statute of limitations. At trial, Hormel demurred ore tenus, which demurrer the court also overruled. At the conclusion of this trial, the judge ruled the statute of limitations was tolled because of repairs and replacements made by Hormel.

Trial on the merits was held on October 28, 1986. The court found for Wood River and against Geer-Melkus in the amount of $57,379.54 on the original petition. On the third-party petition, the court found for Hormel and against Geer-Melkus, holding that the third-party action was barred by the statute of limitations. Pursuant to statute, the court allowed attorney fees of $19,000 to Wood River against Geer-Melkus. Geer-Melkus appeals the court's ruling on their third-party complaint, and Hormel cross-appeals the earlier failures to dismiss the action.

ASSIGNMENTS OF ERROR ON APPEAL

Geer-Melkus assigns as error (1) the trial court's failure to direct a verdict in favor of Geer-Melkus and against Hormel at the close of the evidence; (2) the trial court's entry of judgment generally in favor of Hormel and against Geer-Melkus; (3) the trial court's failure to enter judgment against Hormel on the theory of indemnity; (4) the trial court's finding, after the trial

on the merits, that Geer-Melkus' claim was barred by Neb. U.C.C. § 2-725 (Reissue 1980), and reversing its previous finding in favor of Geer-Melkus following a separate trial on the issue of the statute of limitations; and (5) the trial court's failure to determine Neb. Rev. Stat. § 25-224(3) (Reissue 1985) applied to Geer-Melkus' claim.

On cross-appeal, Hormel claims the trial court erred (1) in overruling Hormel's demurrer and (2) in denying Hormel's demurrer ore tenus and admitting evidence at trial on the nature of the statute of limitations issue, over Hormel's objection.

LOSS OF JURISDICTION BY THE DISTRICT COURT TO MODIFY ITS OWN ORDERS

The term of court ended after the trial on the statute of limitations and the court's ruling against Hormel. Geer-Melkus claims the court was therefore without authority to modify this ruling after the trial on the merits.

This court has previously stated that a Neb. Rev. Stat. § 25-221 (Reissue 1985) statute of limitations determination is an interlocutory order which is not subject to appeal. *Wulf v. Farm Bureau Ins. Co.*, 188 Neb. 258, 196 N.W.2d 164 (1972).

Wulf dealt with an appeal from a § 25-221 statute of limitations decision prior to the resolution of the remaining issues. The appellee moved to dismiss the appeal based on the fact that a final judgment or determination of the case had not been entered. The motion was sustained.

> [I]t seems clear that section 25-221, R.S. Supp., 1971, intends that an order entered denying relief on a plea of the statute of limitations is to be treated as an interlocutory order and that any error in the ruling made may be presented in an appeal taken after final disposition of the case. It is in the same relative position as is faced when the court overrules a demurrer, a plea in abatement, a motion to amend, or a motion to dismiss.

Id. at 260, 196 N.W.2d at 165-66.

The special bifurcation of the trial does not create a separate judgment when the trial court determines the action is not barred by the statute of limitations. Nebraska law generally does not distinguish between types of interlocutory orders for

purposes of appeal or jurisdiction.

> In *Huffman v. Rhodes,* 72 Neb. 57 [100 N.W. 159 (1906)], it was held that an interlocutory order may be vacated at a subsequent term by the same court, without compliance with the provisions of section 602 of the code [Ann. Stat. §§ 1612 et seq. (1903)]. No special procedure therefor is required on the part of the trial court in dealing with such orders, and unless an abuse of discretion is shown the reviewing court will not interfere . . . .

Godfrey v. Cunningham, 77 Neb. 462, 465, 109 N.W. 765, 766 (1906). The statutes at issue in *Godfrey* deal with procedures for appeal and vacation of judgments. There was no motion before the trial court at the end of the term, and the issue of the modification of the interlocutory order was raised entirely in the subsequent term. The result in *Godfrey* is consistent with the inherent power of the court to control its own proceedings and the policy favoring appeal only at the end of all lower court proceedings. Further, this court has stated: "No court is required to persist in error, and, if he concludes that a former ruling was wrong, he may correct it at any time while the case is still in his control." *Tady v. Warta*, 111 Neb. 521, 526, 196 N.W. 901, 903 (1924).

In conclusion, the district court had jurisdiction to modify its earlier orders on the statute of limitations issue.

ISSUE OF INDEMNITY RAISED BY THE PLEADINGS

Before we can determine whether the statute of limitations bars Geer-Melkus' third-party claim, we must determine whether Geer-Melkus seeks damages on a breach of warranty or seeks indemnification. Geer-Melkus does not specifically ask for "indemnity," but, instead, asks for damages for breach of warranty. The third-party complaint specifically set forth the problems with the "rotating media aeration system" manufactured by Hormel. It incorporated Wood River's petition and all its allegations. Finally, the third-party complaint alleged that if Wood River recovered a judgment against Geer-Melkus, Hormel would be liable to Geer-Melkus for the entire amount of Wood River's claim because of the expressed warranty.

While the term "indemnity" is not specifically used,

> [t]he essential character of a cause of action or the remedy or relief it seeks, as shown by the allegations of the complaint, determines whether a particular action is one at law or in equity, unaffected by conclusions of the pleader or what the pleader calls it, or the prayer for relief.

Waite v. Samson Dev. Co., 217 Neb. 403, 408, 348 N.W.2d 883, 887 (1984); *Brchan v. The Crete Mills*, 155 Neb. 505, 52 N.W.2d 333 (1952).

Even if the pleading mistakenly identifies a cause of action, the right to recover under the facts alleged is not affected.

> In order to decide the form of the redress, whether contract or tort, it is necessary to know the source or origin of the duty or the nature of the grievance. Attention must be given to the cause of the complaint; in other words, the character of the action must be determined from what is asserted concerning it in the petition in the cause. It is not important what the plaintiff calls his action. If he does attempt to identify it and is mistaken, that is immaterial. This is the rationale of the code provision that a petition is a statement of facts constituting a cause of action in ordinary and concise language.

Fuchs v. Parsons Constr. Co., 166 Neb. 188, 192, 88 N.W.2d 648, 651 (1958).

It is evident from the pleadings Geer-Melkus claims that (1) appellant Geer-Melkus purchased the rotary system from Hormel; (2) Hormel manufactured the same to meet certain specifications; (3) the system did not meet those specifications; and (4) if Geer-Melkus suffered damages because of the failure of Hormel to fulfill its contractual obligation, they would look to Hormel for payment of their loss. The third-party complaint sets out specifically what Hormel's aeration system did wrong. A duty to indemnify will always arise out of another more basic obligation whether it arises on contract or tort. Although Utah chose to bring sales indemnification actions within § 2-725 of the Uniform Commercial Code, the Utah Supreme Court identified an allegation of a breach of warranty as raising the issue of indemnification.

> Perry argues that [§ 2-725] does not apply because his action is in reality one for indemnity, not one for breach of warranty. We consider this argument in the context of the undeniable fact that the subject matter of this entire lawsuit is the sale of goods, which will be governed where applicable by the Utah version of the Uniform Commercial Code. . . . *The underlying action was for breach of contract, and the amended third-party complaint alleges only a cause of action for breach of warranty. It nowhere mentions indemnity. Nonetheless, we look to the substance of Perry's claim, regardless of what he chose to call it.*

(Emphasis supplied.) *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 217 (Utah 1984).

Hormel cannot claim that it did not understand the theory upon which the third-party complaint was predicated or that it had no warning in time to defend itself. The motion for leave to file a third-party complaint against Hormel specifically stated that "a rotating media aeration system manufactured by George A. Hormel & Co. was defective and was not merchantable and if such allegations are true these Defendants would be entitled to indemnification from George A. Hormel & Co."

In addition thereto, the reply filed by Geer-Melkus specifically addressed § 2-725 and alleged that it did not apply

> for the reason that under the substantive law of the State of Nebraska the periods of limitation set forth in the foregoing statutes, if applicable in the instant case, do not start to run upon a claim for indemnity until such time as the indemnitee's liability has been fixed and discharged.

Therefore, the third-party complaint raised an indemnification cause of action.

APPLICABILITY OF § 2-725 TO INDEMNIFICATION CAUSES OF ACTION

All parties agree the sale which is the subject matter of the third-party complaint is a sale of goods within the meaning of the Uniform Commercial Code. As such, the original contract and warranty were covered by the statute of limitations of

contracts for sale.

In examining the statute and the proposed scope of the statute, it should be noted that any action for breach of contract must be commenced within 4 years after the cause of action has accrued. The statute further specifically defines accrual of a cause of action by saying that the breach occurs when a tender of delivery is made, except where a warranty specifically extends to future performance of the goods, and discovery of the breach must await time of such performance. In this case the warranty did not specifically extend to future performance.

We have not previously addressed the question of whether the limitation set out in § 2-725 applies to an indemnity claim. Other jurisdictions have split on the issue.

Georgia, Utah, Illinois, and Idaho have held indemnity claims are controlled and limited by § 2-725. *PPG Industries v. Genson*, 135 Ga. App. 248, 217 S.E.2d 479 (1975); *Perry v. Pioneer Wholesale Supply Co., supra*; *Anixter Bros, Inc. v. Cen. Steel & Wire*, 123 Ill. App. 3d 947, 463 N.E.2d 913 (1984); *Farmers Nat. Bank v. Wickham Pipeline*, 114 Idaho 565, 759 P.2d 71 (1988). These jurisdictions view the strict application of § 2-725 as necessary to avoid the problem of unending litigation.

> The four-year statute applicable to the indemnity theory does not apply in this case because a sale of goods occurred in 1974 with observable defects (if any), and any cause of action against Third-Party Defendants arose at that time. Otherwise, anyone buying defective goods could resell them before or after the statute had run, and upon being sued for the original defects, file a third-party complaint for indemnity and thus defeat the policy of repose underlying the statute of limitation.

Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 217 n.1 (Utah 1984).

Maryland, New Hampshire, Missouri, Maine, North Carolina, and New York have ruled indemnity claims do not come under the time limitation found in § 2-725. *McDermott v. City of N. Y.*, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980); *Walker Mfg. Co. v. Dickerson, Inc.*, 619 F.2d 305 (4th Cir. 1980) (applying North Carolina law); *Cyr v. Michaud*, 454

A.2d 1376 (Me. 1983); *City of Clayton v. Grumman Emer. Prod.*, 576 F. Supp. 1122 (E.D. Mo. 1983) (applying Missouri law); *Jaswell Drill Corp. v. General Motors Corp.*, 129 N.H. 341, 529 A.2d 875 (1987); *Hanscome v. Perry*, 75 Md. App. 605, 542 A.2d 421 (1988). These jurisdictions follow the reasoning advanced by the New York Court of Appeals in *McDermott v. City of N. Y., supra* at 216-17, 406 N.E.2d at 462, 428 N.Y.S.2d at 646:

> Conceptually, implied indemnity finds its roots in the principles of equity. It is nothing short of simple fairness to recognize that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity" (Restatement, Restitution, § 76). To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs (see, e.g., *Dunn v. Uvalde Asphalt Paving Co.*, 175 NY 214, 217-218; *Oceanic S. N. Co. v. Compania Transatlantica Espanola*, 134 NY 461, 465-468 . . .).

In deciding the statute of limitations question was governed by the indemnity rule rather than the contract or warranty rule, the Maryland Court of Special Appeals stated:

> In approaching this issue, both sides have focused their attention on when limitations begins to run in an action for indemnification and have given but scant consideration to the nature of the indemnity claim actually made by appellant. As to the limitations question, we think that appellant is correct in her view that an action for indemnification accrues and the limitations period commences not at the time of the underlying transaction but when the would-be indemnitee pays the judgment arising from the underlying transaction. That seems to be the majority view, and it is certainly in keeping with the nature of an indemnity action.

(Citations omitted.) *Hanscome v. Perry, supra* at 614, 542 A.2d at 425.

In applying the Missouri rule, the U.S. District Court used the same rationale. In *City of Clayton v. Grumman Emer.*

Prod., supra, the issue was which party was financially responsible for cracks in a firetruck frame. The firetruck was purchased by the city from Howe Fire Apparatus Co., Inc., which was subsequently merged into Grumman Emergency Products, Inc. The frame was manufactured by The Warner and Swayse Company. Clayton sued Grumman as the successor in interest to Howe, which brought in Warner and Swayse as third-party defendants. Warner and Swayse responded by pleading the statute of limitations.

> Although Grumman raises the issue of the future performance exception to § 2-725, the Court need not address that question. Counts I and III of Grumman's third-party complaint state causes of action for indemnity based on breaches of express and implied warranties. The statute of limitations for indemnity does not start to run until the indemnitee is found liable to a third party. *See Simon v. Kansas City Rug Co.*, 460 S.W.2d 596, 600 (Mo.1970). Therefore, Grumman's claims for indemnity from Warner are not time barred. This result does not imprudently enlarge the statute of limitations for breach of warranty. A party who buys and then resells a product is not in a position to discover the latent defect within the warranty's limitation period because the product is in the hands of the consumer during that time. Only when the consumer sues the retailer does the retailer gain notice of the latent defect. *See Walker Manufacturing Co. v. Dickerson, Inc.*, 619 F.2d 305, 310 (4th Cir.1980) (North Carolina U.C.C. law).

City of Clayton, supra at 1127.

Nebraska has long held a claim for indemnity accrues at the time the indemnity claimant suffers loss or damage. *City of Lincoln v. First Nat. Bank of Lincoln*, 67 Neb. 401, 93 N.W. 698 (1903).

In *Waldinger Co. v. P & Z Co., Inc.*, 414 F. Supp. 59 (D. Neb. 1976), the trial court held the underlying statute of limitations dealing with political subdivision tort claims did not apply to actions seeking contribution or indemnification. Waldinger Co. instituted an action on January 16, 1976, against P & Z, Metropolitan Utilities District of Omaha, and the City of

Omaha, alleging negligence proximately resulting in the collapse of a slurry trench wall which surrounded the Omaha-Douglas Civic Center. On May 3, 1976, the City of Omaha filed a third-party complaint against Hawkins Construction Company, Leo A. Daly Company, and Omaha-Douglas Public Commission for indemnification or contribution. Thereafter, the commission moved to dismiss the third-party complaint for failure to file a tort claim pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2401 et seq. (Reissue 1974). The commission argued that any claims not filed within 1 year of the injury were extinguished.

In interpreting Nebraska law on contribution and indemnity, the trial court held:

> These decisions are based on sound equitable principles. Contribution and indemnification are inchoate rights which do not arise until one tort feasor has paid more than his share of the damages or judgment. A plaintiff may sue one tort feasor or he may join all tort feasors in one suit. He may also wait more than a year to file his suit. To accept the Commission's argument that the claim for contribution or indemnification arises when the injury is incurred would allow plaintiff to choose which defendant would bear the burden by simply filing his lawsuit after the one year statute of limitations has run. The defendant joint tort feasor, having no prior knowledge of a claim, would be unable to file a claim prior to being joined in the lawsuit.

Waldinger Co. v. P & Z Co., Inc., supra at 60.

The reasoning in *McDermott*, *Hanscome*, and *City of Clayton* is consistent with Nebraska law. If we were to adopt the opposite position, a party who might have a claim for indemnification would have to bring his action before the underlying claim was brought to avoid the running of the statute of limitations. Therefore, we hold § 2-725 does not apply where a party is seeking indemnification.

The present case is a classic example of the inequity which would result from adopting the theory advanced by Hormel. Geer-Melkus could not have brought their cause of action for

indemnity until the original suit was brought by Wood River on July 6, 1981. The statute of limitations on the indemnity action would have expired on December 14, 1980. Geer-Melkus would be left with no recourse under these circumstances.

It is generally recognized that the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed. Therefore, it should recover from another. See, *Danny's Const. Co., Inc. v. Havens Steel Co.*, 437 F. Supp. 91 (D. Neb. 1977); *Barber-Greene Company v. Bruning Company*, 357 F.2d 31 (8th Cir. 1966); *Farmers Elevator Mut. Ins. Co. v. American Mut. Lia. Ins. Co.*, 185 Neb. 4, 173 N.W.2d 378 (1969). In this case, the product was manufactured and sold by Hormel. The evidence in the record indicates any problems with the product were directly attributable to Hormel, not to Geer-Melkus.

The trial court found that the statute of limitations question was resolved by *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). This action was to recover damages arising from a leaky roof installed upon a junior high school. The school district sued the general contractor, the architect, the subcontractors, and various and sundry bonding companies. One of the defendants was dismissed on a demurrer and the others on motions for summary judgment, on the basis that the various statutes of limitations had run. Because none of the defendants were liable, there was no issue of indemnity.

Geer-Melkus asserts the proper statute governing limitation of this action is Neb. Rev. Sat. § 25-224 (Reissue 1985). In the event § 25-224 were deemed applicable, subsection (3) removes the limitation on indemnity claims. We therefore need not address the question of whether the third-party complaint comes within § 25-224.

For the foregoing reasons, we find the statute of limitations does not bar the third-party complaint brought by Geer-Melkus.

CONCLUSION

The trial court's findings that the pleadings and evidence establish that Geer-Melkus Construction Company, Inc., and

United States Fidelity & Guarantee Company's claim was for a breach of warranty and not for a claim of indemnification and that the claim was barred by the statute of limitations, § 2-725, are reversed. As noted above, the uncontroverted evidence establishes that the loss was directly attributable to Hormel. The action is therefore remanded with instruction to enter judgment against Hormel.

REVERSED AND REMANDED WITH DIRECTION.

PUMP & PANTRY, INC., AND BOSSELMAN, INC., APPELLEES, V. CITY OF GRAND ISLAND, APPELLANT, NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE, WYMODAK, INC., A CORPORATION, DOING BUSINESS AS 7-ELEVEN STORE #712, ET AL., INTERVENORS-APPELLEES.

444 N.W.2d 312

Filed August 11, 1989. No. 87-1033.

1. **Declaratory Judgments.** A suit for declaratory judgment is an action sui generis and may involve questions of both law and equity.
2. _____. A declaratory judgment action to construe a statute presents a question of law.
3. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
4. **Statutes: Legislature: Intent.** One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question.
5. _____: _____: _____. When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
6. **Statutes: Legislature: Intent: Liquor Licenses.** The language of Neb. Rev. Stat. §§ 53-135 (Reissue 1984) and 53-150 (Reissue 1988) discloses a legislative intent to codify a practice of approving an application for continuation of an existing liquor license in the absence of a change of circumstances indicated on the licensee's renewal application.
7. **Statutes: Liquor Licenses.** As the result of the renewal privilege established by Neb. Rev. Stat. § 53-150 (Reissue 1988), a licensee is entitled to renewal of a

liquor license, that is, continuation of an existing license, if at the time for renewal the licensee meets the requirements which existed when the license to be renewed was initially issued.

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

Charles J. Cuypers, Assistant Grand Island City Attorney, for appellant.

Howard E. Tracy, of The Legal Professional Corporation of Howard E. Tracy, for appellees Pump & Pantry, Inc., and Bosselman, Inc.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee Nebraska Liquor Control Commission.

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

PER CURIAM.

Pump & Pantry, Inc. (Pump & Pantry), and Bosselman, Inc. (Bosselman), both licensed liquor retailers in Grand Island, Nebraska, brought a declaratory judgment action in the district court for Lancaster County against the Nebraska Liquor Control Commission (commission) and the City of Grand Island (city). In their action, Pump & Pantry and Bosselman sought a declaration that the provisions of the Nebraska Liquor Control Act authorized and required only a limited inquiry for renewal of a liquor license. Wymodak, Inc., Ted G. and Dorothy M. Schroeder, and Gas 'N Shop, Inc., intervened in the action and sought the same relief requested by Pump & Pantry and Bosselman. On April 3, 1987, the district court granted summary judgment to Pump & Pantry and Bosselman, declaring that a liquor licensee was entitled to renewal of a license when (1) the applicant demonstrated compliance with the requirements for issuance of a license as such license requirements existed when the applicant first received a license; (2) the premises sought to be licensed are the same as the premises covered by the initially issued license; and (3) the premises are suitable for "such purpose."

The city appeals and contends that the district court

incorrectly construed the statutes in question.

The facts are not in dispute. Pump & Pantry was granted an off-sale, beer only liquor license in 1971 and, after issuance of the initial license, has been issued a renewal license in every year before commencement of the declaratory judgment action in October 1986. Bosselman, Wymodak, and Schroeders were issued similar licenses, contrary to the city's recommendation against issuance of the licenses in 1986. Gas 'N Shop was granted a package liquor license in 1985, which was renewed in 1986. None of the licensees have been charged with violation of the Nebraska Liquor Control Act.

In October 1986, the city requested that the commission require a licensed retailer to submit a "long-form" application for renewal of an existing license. Anticipating enforcement of the city's ordinances prohibiting issuance of a license to "any business or establishment engaged principally in the sale of goods, wares, or merchandise other than alcoholic liquor" and requiring premises where alcohol is sold to be "separate and distinct from any other business activity," Pump & Pantry and Bosselman brought their declaratory judgment action on October 17, 1986. The licensees in the present case apparently feared that the city would recommend denial of their licenses, which recommendations, at that time, were purportedly binding on the commission.

In *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988), an ordinance of the city of Lincoln, Nebraska, which was an ordinance substantially similar to the ordinance in the present case, was declared unconstitutional on equal protection grounds. On December 2, 1988, this court issued its opinion in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), wherein 1986 Neb. Laws, L.B. 911, which gave local governing bodies the authority to make binding recommendations to the commission, was declared unconstitutional in its entirety. In May 1989, the Legislature enacted 1989 Neb. Laws, L.B. 780 and L.B. 781, which gave local governing bodies power, dependent on specified criteria, to make binding recommendations to the commission regarding issuance of a liquor license.

"A suit for declaratory judgment is an action sui generis and

may involve questions of both law and equity." *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 194-95, 318 N.W.2d 70, 72 (1982). A declaratory judgment action to construe a statute presents a question of law. In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *County of York v. Johnson*, 230 Neb. 403, 432 N.W.2d 215 (1988).

At issue in this case is certain language in Neb. Rev. Stat. §§ 53-150 (Reissue 1988) and 53-135 (Reissue 1984).

Section 53-150 provides:

> Any licensee may *renew* his license at the expiration thereof in the manner set forth in section 53-135; *Provided*, he is then qualified to receive a license and the premises for which such renewal license is sought are the same premises under the license to be renewed and are suitable for such purpose; *and provided further*, that the *renewal privilege* herein provided for shall not be construed as a vested right which shall in any case prevent the commission from decreasing the number of licenses to be issued within its jurisdiction.

(Emphasis supplied.)

In reference to the licensees involved in this appeal, the commission had not taken any action "decreasing the number of licenses to be issued within its jurisdiction."

Section 53-135, at the time of the declaratory judgment involved in these proceedings, provided in part:

> A retail or bottle club license issued by the commission and outstanding may be *automatically renewed* by the commission without formal application if the commission has on file a bond as required by section 53-138.02, upon payment of the state registration fee, and license fee if payable to the commission. The registration fee for license renewals may be paid by a personal or business check. The payment thereof shall be an affirmative representation and certification by the licensee that all answers contained in an application, if submitted, would be the same in all material respects as the answers contained in the last previous application. The commission may at any time

> require a licensee to submit an application and the commission shall at any time require a licensee to submit an application if requested in writing to do so by the local governing body.

(Emphasis supplied.)

The sole issue presented by this appeal concerns the requirements which a liquor licensee must satisfy before a license is renewed pursuant to §§ 53-135 and 53-150. Pump & Pantry and Bosselman claim that the statutes in question permit only a limited inquiry for renewal of a liquor license, that is, an inquiry whether the renewal applicant has satisfied the license requirements existing when a liquor license was initially issued to the licensee. The city, on the other hand, maintains that requirements for issuance of a liquor license might change after initial issuance of a license, and, as a result of the subsequent change in requirements for a license, a renewal applicant must meet the current statutory standards for issuance of a renewal license. The district court concluded that the limited inquiry suggested by the licensees in this case was the proper construction and application of §§ 53-135 and 53-150.

"One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. [Citation omitted.] To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Spence v. Terry*, 215 Neb. 810, 814-15, 340 N.W.2d 884, 886-87 (1983).

> To determine legislative intent we generally consider the subject matter of the whole act, as well as the particular topic of a statute containing the questioned language. [Citation omitted.] In judicial construction of a statute, the statutory language will be given its ordinary and popular meaning, and a statute is open to construction only if the statute is ambiguous.

Anderson v. Peterson, 221 Neb. 149, 154, 375 N.W.2d 901, 905 (1985). See, also, *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

"When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to

determine the intent of the Legislature, so that different provisions of the act are consistent and sensible." *In re Application U-2*, 226 Neb. 594, 610-11, 413 N.W.2d 290, 301 (1987).

There are acceptable, ordinary, and popular meanings attributed to *renew* and *privilege* as those words are used in § 53-150 and *automatically* as used in § 53-135. *Automatic* means "having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in operation." Webster's Third New International Dictionary, Unabridged 148 (1981). *Privilege* means "a right or immunity granted as a peculiar benefit, advantage, or favor." *Id.* at 1805. *Renew* means "to grant or obtain an extension of: continue in force for a fresh period." *Id.* at 1922. Thus, the phrase "renewal privilege," as those words are used in § 53-150, means a right or benefit granted in favor of a licensee seeking an extension or continuation of a previously issued license. Moreover, in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), we determined that a right-privilege dichotomy was no longer useful in reference to an issued liquor license and held that the holder of a liquor license has a constitutionally protected interest in obtaining renewal of an existing license.

Further, the official "Explanation" contained in the legislative history of 1959 Neb. Laws, L.B. 487, which established the renewal privilege existing today, contains the following:

> Although the license renewal feature of the bill constitutes the most extensive change from the existing Act, when we look through form to the substance it is readily perceived that the end result as to which licenses will be renewed will remain virtually unaffected. It is a fact that under the present law renewal applications which indicate no change in circumstances affecting the license are approved as a matter of course, after passing them through the ritualized procedures. As a practical matter, it is only where the application of the licensee discloses altered circumstances that the exercise of judgment is required.

The city claims that the legislatively established "renewal

privilege," expressed in § 53-150, merely allows an existing license holder to reapply for a new license, which will be granted if the renewal applicant demonstrates compliance with the licensure requirements governing a current first-time applicant. In reaching this conclusion, the city relies heavily on the language of § 53-150, which provides that a licensee may renew a liquor license provided "he is then qualified to receive a license." The city's interpretation of § 53-150 would nullify the "renewal privilege" established by § 53-150 and would place renewal applicants on the same footing with first-time applicants for a liquor license. We conclude that the result suggested by the city was not intended by the Legislature when it enacted § 53-150. Rather, we conclude that the legislative history and the language of §§ 53-135 and 53-150 disclose a legislative intent to codify a practice of approving an application for continuation of an existing liquor license in the absence of a change of circumstances indicated on the licensee's renewal application. Hence, §§ 53-135 and 53-150 establish a privilege or limited right of renewal pertaining to an existing liquor license. *Bosselman, Inc. v. State, supra.*

We therefore construe that part of § 53-150 which specifies that a renewal applicant must be "then qualified to receive a license" to mean that the licensee-applicant must meet the requirements of Neb. Rev. Stat. § 53-125 (Reissue 1988), which provides that "[n]o license of any kind shall be issued to" certain classes of applicants, such as convicted felons and certain convicted misdemeanants. An event occurring after the issuance of the initial license, such as the licensee's conviction for a felony, may disqualify the licensee from renewal of a license because the applicant would no longer be "then qualified to receive a license." However, as the result of the renewal privilege established by § 53-150, a licensee is entitled to renewal of a license, that is, continuation of an existing license, if at the time for renewal the licensee meets the requirements which existed when the license to be renewed was initially issued. Thus, if at the time of the initial licensure a licensee's prior felony conviction disqualified the licensee from receipt of a license, an intervening felony conviction would disqualify the licensee from renewal of an existing license.

Accordingly, we hold that a licensee may renew a liquor license provided (1) "he is then qualified to receive a license"; (2) "the premises for which such renewal license is sought are the same premises" designated in the initial license; and (3) the premises are suitable for the sale of alcoholic beverage in accordance with the initially issued license.

The provisions of § 53-135, requiring payment of the state registration fee and license fee, operate as "an affirmative representation and certification by the licensee that all answers contained in an application, if submitted, would be the same in all material respects as the answers contained in the last previous application." In essence, this "affirmative representation" merely reflects the requirements of § 53-150, but does not require that a renewal applicant satisfy additional requirements for issuance of a renewal license.

Our conclusion regarding the construction of the statutes in question concerning the license renewal privilege under the Nebraska Liquor Control Act is the same as that reached by the district court. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF WALTER SNOVER, DECEASED.
WILLIAM G. LINE, PERSONAL REPRESENTATIVE OF THE ESTATE OF WALTER SNOVER, DECEASED, APPELLANT, V. MERRILL SNOVER ET AL., APPELLEES.

443 N.W.2d 894

Filed August 11, 1989. No. 87-1058.

1. **Trial: Final Orders: Appeal and Error.** An order affecting a substantial right, when made in a special proceeding, is a final order and is appealable, even though it does not terminate the action nor constitute a final disposition of the case.
2. **Decedents' Estates: Words and Phrases.** A proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1985) to remove a personal representative for cause is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1985).

3. **Words and Phrases.** A substantial right is an essential legal right as distinguished from a mere technical one.
4. **Decedents' Estates: Pleadings.** Given the scope of the personal representative's power over the beneficiaries' and other interested parties' interests in an estate, the right conferred by Neb. Rev. Stat. § 30-2454 (Reissue 1985) to petition the county court to remove the personal representative for cause is a substantial right.
5. **Decedents' Estates: Appeal and Error.** The Supreme Court reviews probate cases for error appearing on the record.

Appeal from the District Court for Dodge County, ROBERT E. OTTE, Judge, on appeal thereto from the County Court for Dodge County, F.A. GOSSETT, Judge. Judgment of District Court affirmed.

William G. Line, of Kerrigan, Line & Martin, pro se.

Charles H. Wagner, of Edstrom, Bromm, Lindahl & Wagner, for appellees.

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

GRANT, J.

This is an appeal from the district court for Dodge County order reversing the order of the county court for Dodge County and removing appellant, William G. Line, as personal representative of the Walter Snover estate.

On January 10, 1986, Line was appointed personal representative of the Walter Snover estate. On March 11, 1986, appellees beneficiaries Merrill Snover and Dorothy Willnerd filed a petition for supervised administration of the estate. Although the transcript contains no written order, the record shows that supervised administration of the estate was ordered by the county court during a hearing on April 4, 1986. On May 12, 1987, appellees filed a motion to remove Line as personal representative and for the return of estate assets.

After a hearing, appellees' motion was overruled by the county court because "[t]he beneficiaries have failed to prove the delay in the administration of this estate is the fault of the personal representative." Appellees timely appealed to the district court. Line moved to dismiss the appeal for lack of a final order.

On October 2, 1987, the district judge found (1) that the decision of the county court overruling the beneficiaries' motion to remove Line as personal representative was a final appealable order; (2) that there was a valid order entered by the county court on January 23, 1987, with the consent and concurrence of Line, that Line would within 45 days resolve any problems concerning the estate, complete the federal estate tax return, and submit a proposed plan and proposed order of distribution or advise the county court and counsel of any adjustments necessary; (3) that Line failed totally to comply with the January 23 progression order; (4) that Line "failed to file a Federal Estate Tax Return and has failed to pay any tax due, which tax liability now continues to draw interest and penalties"; (5) that Line paid, without prior court approval, attorney fees and personal representative fees, contrary to the order for supervised administration; and (6) that Line breached his duty to the court and to the estate and should be removed. The district court reversed the county court ruling and remanded the cause to the county court with directions to remove Line as personal representative. Line timely appealed to this court.

In this court, Line assigns seven errors, which may be summarized as the district court's errors: (1) in finding that the order of the county court overruling appellees' motion to remove Line as personal representative was a final order which could properly be appealed to the district court; (2) in finding that court approval was necessary to pay attorney fees or personal representative fees or that payment of such fees was contrary to an order for supervised administration; and (3) in removing Line as personal representative absent any error on the record made in the county court. We affirm the action of the district court.

Line first contends that the order of the county court overruling appellees' motion to remove him as personal representative was not a final order appealable to the district court. This question is determinative of the district court's and our jurisdiction over this matter. See, *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989); *In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989); Neb. Rev. Stat.

§ 24-541.01(2) (Cum. Supp. 1988).

The Nebraska Probate Code is set out in Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 1985). Section 30-2217 provides that appellate review under the code is governed by Neb. Rev. Stat. § 30-1601 (Reissue 1985), which, in turn, provides that "[i]n all matters arising under the Nebraska Probate Code, appeals shall be allowed as provided in sections 24-541.01 to 24-541.10 and 24-551." Section 24-541.01(2) provides, "In cases of appeals from . . . proceedings under the Nebraska Probate Code, an appeal may also be taken by any person against whom the final judgment or final order may be made or who may be affected thereby." Neb. Rev. Stat. § 25-1902 (Reissue 1985) defines a final order as "an order affecting a substantial right made in a special proceeding . . . ."

The issue presented in Line's first assignment of error is whether the order of the county court dismissing appellees' motion to remove the personal representative was made in a special proceeding and affected a substantial right.

We have held:

> An order affecting a substantial right, when made in a special proceeding is a final order and is appealable, even though it does not terminate the action, nor constitute a final disposition of the case. A special proceeding may be said to include every special statutory remedy which is not in itself an action.

Sullivan v. Storz, 156 Neb. 177, 180, 55 N.W.2d 499, 502 (1952). See, also, *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980); *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948); *Turpin v. Coates*, 12 Neb. 321, 11 N.W. 300 (1882).

Neb. Rev. Stat. § 25-101 (Reissue 1985) provides that there is "but one form of action, which shall be called a civil action."

> The code [of civil procedure] does not contain a definition of an action or a special proceeding but it does declare that there is but one form of action to be called a civil action, and the procedure for commencing and pursuing it to a final conclusion is prescribed. . . .
>
> Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of

> a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. A special proceeding within the meaning of the statute defining a final order must be one that is not an action and is not and cannot be legally a step in an action as a part of it. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute. A special proceeding may be connected with an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action are [sic] made—as for instance garnishment or attachment—but it is not an integral part of or a step in the action or as it is sometimes referred to in such a situation a part of the "main case."

Rehn v. Bingaman, 157 Neb. 467, 478-79, 59 N.W.2d 614, 620-21 (1953) (Boslaugh, J., concurring).

The Nebraska Probate Code applies to the affairs and estates of decedents. Section 30-2454 confers upon persons interested in an estate the specific right to petition the county court to remove the personal representative for cause at any time. We hold that a proceeding under § 30-2454 to remove a personal representative for cause is a special proceeding within the meaning of § 25-1902.

This court also has stated that "[a] substantial right is an essential legal right as distinguished from a mere technical one." *Sullivan v. Storz, supra* at 180, 55 N.W.2d at 502; *Western Smelting & Refining Co. v. First Nat. Bank, supra*; *Egan v. Bunner*, 155 Neb. 611, 52 N.W.2d 820 (1952). Sections 30-2462 to 30-2482 confer upon the personal representative broad powers to administer and distribute a decedent's estate. Section 30-2465 provides that the personal representative may, in most cases, proceed without adjudication, order, or direction of the county court. Section 30-2464 provides that the personal

representative has a duty to settle and distribute the estate as expeditiously and efficiently as is consistent with the best interests of the estate and must use his authority for the best interests of successors to the estate.

Given the scope of the personal representative's power over the interests of the beneficiaries and other interested parties in an estate, the right conferred by § 30-2454 to petition the county court to remove the personal representative for cause is a substantial right.

In this case, after a hearing on the merits, appellees' motion to remove Line as personal representative was denied by the county court. The order of the county court was made in a special proceeding and affected the substantial rights of the appellees. As such, it was a final order appealable to the district court. Appellant's first assignment of error is without merit.

We determine that this court has jurisdiction and we review this probate case for error appearing on the record. *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989); *In re Estate of Miller*, 231 Neb. 723, 437 N.W.2d 793 (1989).

The record shows that the decedent, Walter Snover, had four children: W. Dale Snover, Clara Anson, and appellees Merrill Snover and Dorothy Willnerd. On January 7, 1981, Walter Snover, Merrill Snover, and Dorothy Willnerd filed a petition seeking protective proceedings under §§ 30-2631 et seq. The petition sought the appointment of a conservator for Walter Snover's affairs and alleged, in part, that appointment of a conservator was necessary because Walter Snover was unable to handle his affairs due to his age and physical condition. The petition prayed that First National Bank & Trust Company of Fremont be appointed conservator of the estate of Walter Snover. On January 22, 1981, however, Walter Snover (apparently with the support of his son Dale) filed an amended petition praying that Donald E. Morrow be appointed conservator of his estate. Line witnessed Walter Snover's signature on the amended petition. Over the objections of Merrill and Dorothy, Morrow was appointed conservator on February 9, 1981. Morrow subsequently retained Line as his counsel in the conservatorship proceedings.

The conservatorship file shows a history of conflict between

Dale, on the one hand, and Merrill and Dorothy, on the other, regarding the administration of their father's estate. These disputes included a sale of land by Morrow to Dale Snover at less than fair market value and the withdrawal of $225,000 from the First National Bank of Hooper and its subsequent reinvestment in a bank in Blair, where Dale Snover did business.

A journal entry dated March 31, 1982, shows that Morrow tendered his resignation "in the interest of the settlement of all disputes between the parties" and that the resignation would take effect when all applications for counsel fees and expenses were determined.

On April 16, 1982, the county court approved a family settlement agreement executed by Merrill, Dorothy, Clara, and Dale. These parties agreed (1) that Merrill, Dorothy, and Clara would not seek to set aside the sale of real property to Dale; (2) that Dale, Dorothy, and Merrill would continue to operate the farms of Walter Snover that "each of them now operates on the basis of an oral lease from year to year"; (3) that any claims and demands existing in favor of Walter Snover against his children, or in favor of the children against their father, or claims and demands among the children, would be treated as satisfied and discharged; and (4) that Line and appellees' attorney, Neil Schilke, would be appointed coconservators of the estate. The agreement also stated that the conservatorship

> proposes to make gifts equally to the families of Dorothy Willnerd, Merrill Snover, and Dale Snover, and to the family of Clara Anson . . . . Such gifts are to be in the amounts sufficient to take maximum advantage of federal gift and estate tax laws and in amounts consistent with the best interest of the protected person.

At this time, Walter Snover, the father of all the parties to the agreement and the owner of all the property involved, apparently was not able to play any role in the disposal of his property.

Morrow filed an application for fees on April 23, 1982, seeking a $5,000 conservator fee and attorney fees to Line's law firm in the amount of $4,289.38. On May 3, Schilke filed an application seeking $2,485.08 in attorney fees for his representation of Merrill and Dorothy in the conservatorship

proceedings. Predictably, a fee dispute followed. The county court eventually authorized fees in the amounts of $4,589.38 to Line's firm, $1,188 to Schilke, and $2,509.45 to Morrow. We note that out of a total of $15,877.38 in attorney fees, $11,289.38 was disbursed to Line's firm during the conservatorship.

Although Morrow's resignation became effective and Line and Schilke were appointed coconservators on July 30, 1982, no acceptance of appointment or letters of coconservatorship were filed until December 9, 1983, and Morrow continued to act as conservator and file reports in the conservatorship. After Merrill and Dorothy objected to Morrow's report of June 11, 1983, the county court appointed an accounting firm to examine the conservator's records. The court's order of September 19 further provided that no further acts be performed by Line, Schilke, or Morrow without the prior approval of the court.

The December 9, 1983, letters of coconservatorship provided, in part, that as coconservators, Line and Schilke "shall not exercise the following powers without prior order of the Court: 1. You shall not pay yourselves as Co-conservators. 2. You shall not pay yourselves attorney's fees. 3. You shall not sell real estate." Line and Schilke administered the estate until Walter Snover's death on December 24, 1985. Their final report was filed January 13, 1986, and Line, as personal representative of the Walter Snover estate, acknowledged receipt of the estate property on that date. On May 18, 1987, Schilke filed an "affidavit and application" in the conservatorship seeking conservator fees.

Walter Snover died on December 24, 1985. His last will and testament, executed February 21, 1980, and a codicil to that will were admitted to probate on January 10, 1986. The codicil, executed October 1, 1981, changed the original designated personal representative and nominated Morrow and Line as copersonal representatives. Although Morrow declined to serve, Line accepted the appointment. The letters of personal representative filed January 10, 1986, authorized Line "to do and perform all acts which may be authorized by law."

Walter Snover's will devised real estate to Merrill, Dale, and

Dorothy. In addition, Dorothy received the balance owed to her father from the sale to her of real property. Dorothy, Merrill, and Clara each received an interest in the balance of a contract for the sale of land to Dale on February 19, 1980. The residue of the estate, listed in the inventory as $40,099.78 in "Mortgages, Notes and Cash," was left to Merrill, Dale, and Dorothy in equal shares.

On March 11, 1986, Merrill and Dorothy filed a petition for supervised administration, alleging that supervised administration was necessary because Line had previously served as counsel for Dale in conjunction with disputes during the conservatorship, that various transactions involving Dale occurred during the conservatorship which should be reviewed or pursued by the personal representative, and that Line had a potential conflict of interest. Line had no objection to supervised administration, and supervised administration was ordered during the April 4, 1986, hearing on the petition. No written order of supervised administration was filed.

On January 8, 1987, Merrill and Dorothy filed a motion for accounting. An accounting filed by Line on January 16, 1987, reflected receipts of $41,862.23 and disbursements of $37,002.23, including $11,622 in attorney fees paid to Kerrigan, Line & Martin and a personal representative fee of $4,649 paid to Line. Line's accounting also stated that "[t]his estate cannot be closed immediately because I am defendant in a civil suit, Paul W. Morris, d/b/a Morris Oil Co. vs. Estate of Walter Snover, in the District Court of Dodge County, Nebraska, being Case No. 28464."

In a journal entry filed January 23, 1987, the county court approved Line's accounting, but ordered that Line resolve any remaining problems concerning closing the estate within 45 days. The order reflects that Line had advised the court that a federal estate tax return could be completed within this time and that Line would prepare a proposed plan and proposed order for distribution. The court further ordered that Line "shall comply with that time schedule or notify the Court and counsel for the beneficiaries of any necessary adjustment in that time schedule in a timely fashion."

On May 12, 1987, appellees filed a motion to remove Line as

personal representative and for the return of estate assets, alleging, in part, (1) that Line had paid personal representative and attorney fees without court approval, notwithstanding the order for supervised administration; (2) that said fees were excessive; (3) that Line failed to comply with the county court's progression order of January 23, 1987, by failing to file a federal estate tax return and failing to submit a proposed plan for distribution; and (4) that Line breached his duty to protect the estate by submitting and failing to contest untimely claims for additional attorney fees incurred during the conservatorship of the decedent. Attached to the motion was a copy of an application for conservator fees filed by Line and Schilke on May 8, 1987, in the conservatorship proceeding.

As an interested person, the trustee in bankruptcy of the estate of Dale Snover filed a "Statement of Support for Motion for Removal of Personal Representative and Return of Estate Assets," joining in the prayer of Merrill and Dorothy to remove Line.

At the May 29, 1987, hearing on the motion to remove, counsel for Merrill and Dorothy informed the court that the federal estate tax return should have been filed within 9 months of the death of Walter Snover, that the return had not been filed, that no extension had been filed, and that interest and penalties against the estate were accruing as a result of Line's failure to resolve the federal estate tax matter.

During the May 29 hearing, the county court also admitted in evidence Line's deposition taken April 10, 1987. During the deposition, Line testified that he had not completed a federal estate tax return, that there was no reason it was not done yet, and that it would be done "probably within the next couple of weeks." At the hearing, Line stated that the federal estate tax would be approximately $35,000 and that since the net estate assets were insufficient to pay the federal estate tax, "the easiest thing would be to just dispose of the land of Merrill and Dorothy," since Dale Snover had declared bankruptcy, and the trustee in bankruptcy claimed Dale's share of the estate. Line further informed the court that the return could be filed, "but we're going to need some contribution . . . as to the federal estate tax. . . ."

The record does not contain a federal estate tax return or notification from Line to the court or counsel regarding the status of the estate or reasons why the estate could not be completed and closed.

Section 30-2454(b) provides that cause for removal of a personal representative exists

> when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

With respect to Line's contention that the district court erred in finding that his payment of attorney and personal representative fees was contrary to an order for supervised administration, § 30-2439 provides:

> A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in this part, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

Section 30-2442 provides:

> Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this code, but he shall not exercise his power to make any distribution of the estate without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

In orally granting appellees' petition for supervised

administration, the county judge ordered only that "[t]he Court will grant the petition and order that the Estate No. 17011, In the Matter of the Estate of Walter Snover, Deceased, be handled by supervised administration." The record does not show that any other restrictions were ordered by the court or endorsed on Line's letters of appointment. Although an order for supervised administration may include a restriction that the personal representative may not pay attorney or personal representative fees without the prior order of the court (see § 30-2450), such relief was not requested in appellees' petition for supervised administration. The lack of appropriate restrictions in connection with Line's supervised administration has caused a substantial part of the problems in this estate. The record shows that Line retained all powers of personal representatives under the probate code except the power to make distributions of the estate without prior order of the court.

Section 30-2476(21) authorizes a personal representative to employ attorneys to assist the personal representative in the performance of his administrative duties. Section 30-2476(18) specifically provides that the personal representative may pay "compensation of the personal representative, and other expenses incident to the administration of the estate." Under § 30-2487(a), costs and expenses of administration have priority over all other claims against the estate. As defined in § 30-2209(11), a "distributee" is any person who receives property of the decedent from the personal representative other than as a creditor or purchaser.

We determine that Line's payments of attorney and personal representative fees were not "distributions" of the estate and that the payment of these fees did not violate the order for supervised administration. See *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988). Whether such payments were appropriate, in view of the heated nature of this probate proceeding, is not for this court to decide. The reasonableness of the compensation paid to Line and his law firm may be reviewed pursuant to § 30-2482. The payment of fees, therefore, did not constitute grounds for removal of the personal representative. The district court's finding to the

contrary was erroneous.

We do determine, however, that Line's inactivity with respect to the federal estate tax return and failure to provide a proposed plan and proposed order for distribution clearly violated the county court's progression order of January 23, 1987, and was not in the best interests of the estate. Where the county court had ordered a certain progression, such unexplained inactivity by the personal representative constituted grounds for removal. The personal representative "is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate." § 30-2464(a).

The record shows that the progression order was entered after Line informed the court that he could resolve problems with contested claims and the federal estate tax return within 45 days, that is, by March 9, 1987. During his deposition on April 10, Line stated that the federal estate tax return would be prepared within 2 weeks. At the May 29 hearing, Line admitted he had not yet prepared the federal estate tax return and stated that the federal estate tax would be approximately $35,000. Line also failed to advise the court and counsel for the appellees that any adjustment was needed with respect to the 45-day schedule.

In the absence of any communication from Line as to why he could not comply with the progression order, Line's conduct constituted a breach of his duty to the court and to the estate. It was shown at the May 29 hearing that Line failed totally to comply with the order of the court. Under these circumstances, the county court erred in failing to remove Line as personal representative, and the district court was correct in reversing the county court order and ordering Line removed as personal representative.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARD W. HAYDEN, APPELLANT.

444 N.W.2d 317

Filed August 11, 1989. No. 88-790.

1. **Insanity: Mental Health: Time.** The time limits set forth in Neb. Rev. Stat. §§ 29-3701 and 29-3702 (Reissue 1985) are directory, not mandatory, and dismissal of the proceedings is not a proper remedy for a nonprejudicial violation of §§ 29-3701 and 29-3702.
2. **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.
3. **Rules of Evidence: Expert Witnesses: Hearsay.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
4. **Mental Health: Final Orders: Proof: Appeal and Error.** The Supreme Court will not interfere on appeal with a final order of the district court in a mental health commitment proceeding unless, as a matter of law, the order is not supported by clear and convincing proof.
5. **Mental Health: Proof: Evidence: Time.** In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing. Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition.
6. **Mental Health: Proof: Evidence.** In order for a past act to have any evidentiary value, it must form some foundation for a prediction of future dangerousness and be, therefore, probative of that issue.
7. **Mental Health: Other Acts.** In determining whether an act is sufficiently recent to be probative of dangerousness, each case must be decided on the basis of the surrounding facts and circumstances.

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

Richard J. Epstein for appellant.

Robert M. Spire, Attorney General, and Vanessa R. Jones for appellee.

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

GRANT, J.

This is an appeal from the district court for Douglas County. Defendant, Ward W. Hayden, appeals his commitment to the

Lincoln Regional Center (Regional Center) in conjunction with his acquittal, by reason of insanity, of stabbing his ex-wife. The stabbing occurred on October 10, 1987.

On October 15, 1987, defendant was charged with second degree assault and use of a knife to commit a felony in violation of Neb. Rev. Stat. §§ 28-309 and 28-1205 (Reissue 1985). After a bench trial on March 16 and April 4, 1988, defendant was acquitted by reason of insanity. On April 5, defendant was ordered admitted to the Regional Center for a period not to exceed 90 days for the evaluation of his mental condition and for the preparation of a treatment plan pursuant to Neb. Rev. Stat. § 29-3701(4) (Reissue 1985). The district court further ordered that the evaluation and treatment plan be submitted to the court no later than June 24, 1988.

On July 8, 1988, defendant filed a motion to dismiss the commitment proceedings because the Regional Center had not submitted an evaluation and treatment plan to the court by June 24 and because the State failed to conduct an evidentiary hearing prior to the expiration of the 90-day evaluation period, in violation of Neb. Rev. Stat. § 29-3702 (Reissue 1985). During a hearing on July 14, the district court denied defendant's motion to dismiss and extended the evaluation period 60 days pursuant to defendant's § 29-3701(6) motion requesting a separate evaluation.

After an evidentiary hearing on August 18, 1988, the court ordered that defendant be committed to the Regional Center pursuant to the conditions set forth in the evaluation and individualized treatment plan (report) of Dr. Leonard Woytassek, dated June 23, 1988.

Defendant's motion for new trial was overruled. He timely appealed to this court, contending the district court erred in (1) failing to dismiss the commitment proceedings because the State and the Regional Center failed to meet the statutory time limits set forth in §§ 29-3701 and 29-3702, (2) allowing in evidence the report "containing hearsay" submitted by Dr. Woytassek, and (3) granting an unauthorized delegation of judicial authority to Dr. Woytassek to determine the conditions of defendant's confinement. Defendant further contends the State failed to prove by clear and convincing evidence that he

was dangerous to himself or others by reason of mental illness or would be dangerous in the foreseeable future as demonstrated by an overt act or threat. We affirm.

In his first assignment of error, defendant contends the commitment proceedings should have been dismissed because Dr. Woytassek's report was not received by the court "at least ten days prior to the expiration of the evaluation period" in violation of § 29-3701(5) and because he did not receive an evidentiary hearing "prior to the expiration of the evaluation period" provided for in § 29-3701.

The order directing that defendant be admitted to the Regional Center for purposes of evaluation was entered April 5, 1988. Under Neb. Rev. Stat. § 25-2221 (Reissue 1985), the 90-day evaluation period expired on July 5. During the July 14 hearing, the district judge noted that he and his staff had been on vacation from June 17 through July 4. When the mail was opened on July 5, the court found Dr. Woytassek's June 23 report and notified counsel that the evaluation had been received.

The district judge subsequently overruled defendant's motion to dismiss the commitment proceedings, but granted defendant's oral motion requesting an extension of time for additional evaluation by an expert of his own choice. The court then extended the original evaluation period an additional 60 days, pursuant to § 29-3701(6). The August 18 dispositional hearing was held more than 10 days prior to the expiration of the 60-day extension.

In conjunction with his first assignment of error, defendant claims the 90-day evaluation period should be analogized to his right to a speedy trial. In *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987), this court noted that while the Nebraska speedy trial statutes, Neb. Rev. Stat. §§ 29-1205 et seq. (Reissue 1985), provide for the sanction of dismissal if the defendant is not tried within the 6-month statutory period, §§ 29-3701 and 29-3702 do not. We held in *State v. Steele* that the time limits set forth in §§ 29-3701 and 29-3702 were directory, not mandatory, and that dismissal of the proceedings was not a proper remedy for a nonprejudicial violation of §§ 29-3701 and 29-3702. As in *State v. Steele, supra*, we find that defendant was not

prejudiced by a failure to meet the statutory time limit, especially in light of his own motion to extend the evaluation period another 60 days. His first assignment of error is without merit.

In his second assignment of error, defendant contends the admission in evidence of Dr. Woytassek's June 23 report was improper because the report contained inadmissible hearsay in the form of "various hearsay notations by support personnel who were not qualified to testify as expert witnesses." Brief for appellant at 34. 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. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989); *State v. McSwine*, 231 Neb. 886, 438 N.W.2d 778 (1989).

Section 29-3701(2) provides that the superintendent of the regional center or director of the facility to which the person has been committed for evaluation (in this case, Dr. Woytassek) is responsible for supervising the evaluation and the preparation of an individualized treatment plan. Section 29-3701(5) requires that the evaluation and treatment plan include the facts upon which conclusions stated therein are based. The statute also requires that the evaluation and treatment plan be submitted to the court. Section 29-3702 provides that a representative of the facility where the person was evaluated may testify as to the results of the evaluation and the contents of the treatment plan.

Neb. Evid. R. 703 (Neb. Rev. Stat. § 27-703 (Reissue 1985)) further provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See, also, *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985); *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978).

At the August 18 hearing, Dr. Woytassek testified that he was a psychiatrist and director of the security unit at the Regional

Center. Defendant stipulated to Dr. Woytassek's credentials. Dr. Woytassek testified that he and other staff members performed psychiatric interviews and laboratory examinations of defendant, that written reports of the results of the examinations were provided to and reviewed by Dr. Woytassek, and that the results of the examinations were reflected in Dr. Woytassek's June 23 report to the court. As to defendant's prior medical background, Dr. Woytassek testified that he reviewed reports from the Veterans' Administration and a report by Dr. Bruce Gutnik. Dr. Woytassek also reviewed information contained in the police reports regarding this incident.

We conclude that the statements complained of were admitted as foundation for Dr. Woytassek's diagnosis and opinion that defendant was mentally ill and dangerous. Section 29-3701(5) specifically requires that evaluations and treatment plans submitted to the court "include the facts upon which conclusions stated therein are based." Under rule 703, these facts or data, if of a type reasonably relied upon by experts in the field in forming opinions upon the subject, need not be admissible in evidence. The district judge did not abuse his discretion in admitting the evaluation and treatment plan in evidence. Defendant's assertion to the contrary is without merit.

Defendant further contends that the court's order of August 19, 1988, reflects "an unauthorized delegation of judicial authority to Dr. L. E. Woytassek of the Lincoln Regional Center to determine the conditions of the appellant's confinement," in violation of Neb. Const. art. I, § 13. Brief for appellant at 33. He also contends the August 19 order fails to specify the conditions of confinement regarding defendant's freedom of movement outside the locked facilities of the Regional Center, contrary to the requirements of § 29-3702.

Section 29-3702 provides, in part:

> The court shall specify the conditions of confinement regarding the person's freedom of movement outside locked facilities at the place of confinement, including whether or not the facility may grant the person leave into the community for any period of time, however short. The order of commitment specifying the conditions of

> confinement shall include a finding by the court that any freedom of movement accorded the person outside a locked facility is consistent with the safety of the public.

The August 19 court order states in part as follows:

> On August 18, 1988 an evidentiary hearing was held pursuant to Nebraska Revised Statutes 29-3702.
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Ward W. Hayden shall be committed to the Lincoln Regional Center pursuant to the conditions set forth in the report dated June 23, 1988 by Doctor L. E. Woytassek of the Lincoln Regional Center. Said report will be marked as Exhibit 1 and incorporated by reference and the treatment proposed in said report is hereby approved by the Court.

The issue we have been asked to decide is, apparently, whether the court's incorporation by reference of the conditions of confinement set forth in Dr. Woytassek's report somehow denies defendant access to the district court. See, e.g., *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980).

Unlike the situation in *Drennen v. Drennen, supra*, defendant has had access to the district court as trier of fact throughout these proceedings. We note that § 29-3701(4) provides that individualized treatment plans submitted to the court

> shall contain a statement of the nature of the specific mental and physical problems and needs of the person, a statement of the least restrictive treatment conditions necessary to achieve the purposes of the plan, a statement of the least restrictive treatment conditions consistent with the safety of the public, and a description of intermediate and long-range treatment goals and a projected timetable for their attainment.

Accordingly, the treatment plan submitted by Dr. Woytassek contained the following proposed conditions of confinement:

> LEAST RESTRICTIVE TREATMENT SETTING
>
> The Security Unit of the Lincoln Regional Center is the

least restrictive treatment center setting necessary for Mr. Hayden's treatment needs and the safety of the public.

PRIVILEGES REQUESTED 1. Permission is requested to take Mr. Hayden to medical appointments in the community and to a local general hospital for medical treatment in the event such treatment becomes necessary. This would include both emergency and non-emergency treatments. During these outings he would be under the supervision of the Lincoln Regional Center staff.

. . . .

3. Permission is requested to take Mr. Hayden out of the unit for activities on the grounds with a staff/patient ratio of 1:1. We designate this a Code 1 status. No additional privileges are being requested.

Defendant had the opportunity to, and did, offer evidence contesting these proposed conditions at the August 18 hearing.

Defendant states in his brief that "[t]he June 23, 1988 report from Dr. Woytassek only requested certain privileges be granted the Appellant. By the District Court failing to respond properly to the request of Dr. Woytassekit [sic] has, in effect, allowed Dr. Woytassek to make a judicial decision which was the District Court's to make." Brief for appellant at 33. This argument is without merit. In its August 19 order incorporating the June 23 report, the district court found that the security unit of the Regional Center was the least restrictive treatment center setting necessary for defendant's treatment needs and the safety of the public. The court granted permission for defendant to leave the locked facility (1) to seek medical treatment under the supervision of Regional Center staff and (2) to perform activities on the grounds with a staff/patient ratio of 1 to 1.

We further note that a person committed pursuant to § 29-3702 has access to the court to seek review of the conditions of his confinement, pursuant to § 29-3703.

In his final assignment of error, defendant claims the State failed to prove by clear and convincing evidence that he was dangerous to himself or others by reason of mental illness or would be dangerous in the foreseeable future as demonstrated by an overt act or threat. The Supreme Court will not interfere on appeal with a final order of the district court in a mental

health commitment proceeding unless, as a matter of law, the order is not supported by clear and convincing proof. *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987).

At the August 18 hearing, Dr. Woytassek testified that defendant suffered from "[']Axis I, Atypical Psychosis (principle diagnosis) (sic), 2. Cannabis Dependence, and 3. Alcohol Dependence; Axis II' . . . 'Personality Disorder, NOS, with antisocial, passive aggressive and unstable features.' " This diagnosis was based on the following information, which is contained in the June 23 report:

> [DR. WOYTASSEK]: The findings were that Mr. Hayden had "a history of psychotic episodes, one" of "which resulted in his being discharged from the military and one which occurred during" his "attack on his wife." It's also indicated [in the June 23 report] he lacked insight, his judgment was poor, and he tended "to minimize the importance of" the "attack on his wife. He has a history of hearing voices and" having "violent outbursts and has been previously diagnosed as . . . a schizophrenic, paranoid type . . . . He . . . has a long history of drug and alcohol abuse" and "[a] long history of violence . . . . He has failed to follow treatment and he denies that he has a drug or alcohol problem or that he is ill." Further, that he "is mentally ill . . . dangerous," and in need of a "period of treatment under close" observation "to develop . . . insight" into "his illness and control of his behavior."

Dr. Woytassek testified that defendant's alcohol and cannabis abuse tended to aggravate the conditions or behavior disorders but that defendant tended to deny that he had an alcohol problem, tended to deny that he abused cannabis, and tended to deny the importance of his assault of his ex-wife. Dr. Woytassek testified that defendant did not recognize the severity of the attack on his ex-wife. Dr. Woytassek also testified that he considered defendant to be "presently dangerous."

On cross-examination, Dr. Woytassek admitted that during the time defendant was in the Regional Center security unit, defendant had not suffered from hallucinations or delusions and was oriented to time, place, and person. He was not

depressed, was able to carry on rational conversations, was not a behavioral problem, and had responded to treatment.

Regarding the stabbing of defendant's ex-wife in October 1987, Dr. Woytassek testified that this incident would be only indirectly relevant to defendant's present status "because Mr. Hayden has been locked up for some of that period of time and he doesn't have access to substances, so I feel that that is an important issue to assess, his dangerousness." Dr. Woytassek also agreed that it would be a relevant factor in assessing dangerousness if a person was not confined and did not commit dangerous acts.

Dr. Woytassek was not aware that defendant had not been confined from November 6, 1987, through April 4, 1988.

Dr. Bruce Gutnik, a psychiatrist, testified that he performed a psychiatric examination of defendant on August 3, 1988. During a previous examination on March 23, 1988, Dr. Gutnik determined that defendant suffered from paranoid schizophrenia. Dr. Gutnik noted that between March 23 and August 3, defendant had been doing well without the use of any antipsychotic medication. The significance of this fact was that "one of two things is occurring: either his diagnosis would more appropriately have been schizophreniform psychosis back on March 23rd . . . or his diagnosis perhaps was schizophrenia, and he now is in remission . . ." A third possibility was that defendant suffered from atypical psychosis. Dr. Gutnik testified that defendant's condition had improved since March 1988 and that "[a]t the present time I found no signs of psychosis." Dr. Gutnik was of the opinion, based on his August 3 examination, that defendant did not suffer from atypical psychosis at that time, was not presently dangerous, and did not need to be hospitalized as an inpatient at the Regional Center.

Dr. Gutnik testified, however, that defendant "certainly is going to need to be monitored closely. He has several episodes in his history of having become psychotic . . . ." Dr. Gutnik suggested that defendant pursue "an outpatient-type commitment treatment program where someone can follow him on a close basis" and agreed that defendant needed to stay away from alcohol and drugs. Dr. Gutnik also agreed that defendant could become dangerous if he used alcohol and

drugs.

Defendant testified that from November 6, 1987, through April 4, 1988, he lived at his parents' home, within 1 mile of his ex-wife, but performed no further acts against her. He testified that during this time he had access to an automobile, worked as a nurse's aide, and attended classes at Bellevue College. Defendant admitted that he had a problem with alcohol and marijuana, but stated that he did not commit any violent acts, drink, or use drugs during this period and intended to seek outpatient treatment for his drug and alcohol problems.

Section 29-3702 provides that the court may enter an order of commitment if the court determines there is clear and convincing evidence that the person is dangerous to himself or others by reason of mental illness or defect, or will be so dangerous in the foreseeable future, as demonstrated by an overt act or threat.

At the August 18 hearing, both psychiatrists testified regarding their diagnoses of defendant's psychiatric disorders. Dr. Woytassek was of the opinion that defendant suffered from atypical psychosis. Dr. Gutnik testified that defendant possibly suffered from a type of schizophrenia, schizophreniform psychosis, or atypical psychosis. Although defendant contends that Dr. Woytassek's diagnosis was "seriously flawed," the court, as the trier of fact, was not required to take the opinion of either expert as binding. See *State v. Mayfield*, 212 Neb. 724, 325 N.W.2d 162 (1982). The record contains clear and convincing evidence that defendant has some form of mental illness.

The most recent overt act demonstrating defendant's dangerousness to others occurred on October 10, 1987, when defendant stabbed his ex-wife. Defendant contends this incident was too remote to be probative of his dangerousness to others.

In appeals from proceedings under the Nebraska Mental Health Commitment Act, we have stated:

> "In determining whether a person is dangerous, the focus must be on the subject's condition at the time of the hearing. Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the

> hearing are probative of the subject's present mental condition. 'But a mere recitation of past acts, in the absence of a showing that such clearly forms the foundation for a prediction of future dangerousness, cannot serve as the basis for a finding that one is a mentally ill person . . . .' . . .
>
> In order for a past act to have any evidentiary value it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue."

In re Interest of McDonell, 229 Neb. 496, 499, 427 N.W.2d 779, 781 (1988) (quoting *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981)). This court also has stated that in determining whether an act is sufficiently recent to be probative of dangerousness, "[e]ach case must be decided on the basis of the surrounding facts and circumstances." *Hill v. County Board of Mental Health*, 203 Neb. 610, 615-16, 279 N.W.2d 838, 840-41 (1979).

In the case at bar, defendant kicked in the door of his ex-wife's home and assaulted her violently, both physically and verbally, in the presence of two of their children. He eventually stabbed her with a knife, causing a deep laceration in the buttock and rear of the upper thigh. She also suffered a defensive wound to the hand. Defendant and his ex-wife had been divorced in August 1987. During the time of the divorce, defendant had verbally and physically assaulted his ex-wife several times and had destroyed some of her property. There is clear and convincing evidence that defendant suffers from some form of mental illness. There also is evidence that defendant has a history of cannabis and alcohol abuse, that he lacks control and insight over these problems, and that he tends to become violent after using these substances. Drs. Woytassek and Gutnik both testified that defendant should be closely monitored and needs treatment with respect to his abuse of drugs and alcohol. Defendant has a history of psychotic episodes.

Under the circumstances of this case, we cannot say, as a matter of law, that the October 1987 stabbing incident was too remote to be probative of defendant's dangerousness to others. We determine that the order of the district court is supported by

clear and convincing proof.

The judgment of the district court is affirmed.

AFFIRMED.

LARRY R. DEMERATH, APPELLANT, V. DELORES A. DEMERATH, APPELLEE.

444 N.W.2d 325

Filed August 18, 1989. No. 87-723.

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

Larry R. Demerath, pro se.

James J. Frost, of North & Black, P.C., for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

PER CURIAM.

Larry R. Demerath appeals a judgment of the district court for Douglas County authorizing his former wife, Delores A. Demerath, to remove the children from the state.

"Generally, before the court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent." *Vanderzee v. Vanderzee*, 221 Neb. 738, 739-40, 380 N.W.2d 310, 312 (1986); *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986). The record shows that Delores has remarried and that she and her new husband wish to move to another state for business reasons.

> "As a general rule, all other circumstances being equal, legitimate career changes of the custodial parent, whether they be job-related or matrimonial in nature, will support an application for changing the residence of a child placed in that parent's custody." . . . If there is a legitimate reason

> for the custodial parent's decision to leave the jurisdiction, the minor child will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the child to continue to live with that parent. . . . Custody is not to be interpreted as a sentence to immobility.

(Citations omitted.) *Hicks v. Hicks*, 223 Neb. 189, 195, 388 N.W.2d 510, 515 (1986).

Based on our de novo review of the record, we conclude that allowing Delores to retain custody and remove the children is consistent with the best interests of the children. The trial court did not abuse its discretion in granting Delores' motion. In the absence of an abuse of discretion, a trial court's decision bearing upon the custody of minor children will not be disturbed on appeal. *Maack v. Maack, supra.*

The decision of the district court is affirmed.

AFFIRMED.

D. D. LEMKE AND FRIEDA LEMKE, APPELLEES, V. NORTHWESTERN PUBLIC SERVICE COMPANY, A FOREIGN CORPORATION, APPELLANT.
444 N.W.2d 326

Filed August 18, 1989. No. 87-903.

1. **Motions for New Trial: Proof: Appeal and Error.** Where a district court grants a new trial without stating its reasons, an appellant fulfills its burden to attack that ruling by submitting the record to the Supreme Court with the contention that there is no prejudicial error; the burden then shifts to the appellee to identify any prejudicial error in the record which justified the granting of a new trial.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling will be upheld on appeal; however, a motion for new trial is to be granted only where there is error prejudicial to the rights of the unsuccessful party.
3. **Judgments.** A party who has sustained the burden and expense of trial and has succeeded in obtaining judgment has the right to keep the benefit of that judgment.
4. **Motions to Dismiss.** In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.

5. _____. In considering the evidence for the purpose of ruling on a motion to dismiss, the party against whom a motion is made is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed.

John A. Wolf, of Shamberg & Wolf, for appellant.

Stephen L. Ahl, of Wolfe, Anderson & Beverage, for appellees.

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

CAPORALE, J.

In this appeal from a bench-tried negligence action, defendant-appellant, Northwestern Public Service Company, assigns error to the district court's order granting plaintiffs-appellees, D.D. Lemke and his wife, Frieda Lemke, a new trial. We reverse.

The Lemkes owned an apartment building at Grand Island, Nebraska, to which Northwestern supplied natural gas. The building sustained fire damage, which the Grand Island deputy fire chief attributed to a natural gas explosion. In his opinion, the regulator attached to the rear of the building, which abutted a sidewalk adjacent to a parking lot, had been damaged, and, as a result, gas was permitted to flow into the building at an excessive pressure, thereby causing various pilot lights to become extinguished and gas to accumulate in the structure until it was ignited by some source. No barricades or other equipment protected the regulator.

The district court received in evidence a Grand Island ordinance which required that when "exposed to probable vehicular damage due to proximity to alleys, driveways or parking areas, aboveground gas . . . regulators . . . shall be suitably protected." The district court also received in evidence §§ 192.351, 192.353(a), and 192.357(a) of subpart H of part 192 of the U.S. Department of Transportation Pipeline Safety

Regulations, adopted pursuant to 49 U.S.C. §§ 1671 et seq. (1982), and 49 C.F.R. § 1.53 (1988), which mandate that regulators be "protected from corrosion and other damage." In addition, the district court received in evidence § 2.7.2(b) of National Fire Protection Association Pamphlet No. 54, adopted by the Nebraska State Fire Marshal pursuant to Neb. Rev. Stat. § 81-502 (Reissue 1987), which related to the location and protection of gas meters.

The district court sustained Northwestern's objection to a report apparently prepared by one or more members of the State Fire Marshal's office on the ground that the report contained hearsay. This state report recites that it encloses the report of one Jay Determan, an employee of Northwestern. No such document is in fact a part of the state report. A document purporting to be signed by Determan is, however, attached to the Grand Island deputy fire chief's report. A part of that report was received by the district court with the following words: "The Court is receiving that aspect from the report that the [deputy] fire chief testified to and nothing else." Thus, the Determan document is not part of the evidence. That document states that the regulator shown Determan by Grand Island's deputy fire chief "appeared to have been hit by a vehicle."

At the close of the Lemkes' evidence, Northwestern moved for dismissal of the action. After the district court took that motion under advisement, Northwestern rested without adducing any evidence and renewed its motion for dismissal. The court again took the matter under advisement and, in due course, sustained Northwestern's motion to dismiss "at the conclusion of the [Lemkes'] case in chief." In its memorandum, the district court, in sum, reasoned that while the Lemkes proved Northwestern negligently failed to protect the regulator, they failed to prove that such negligence was the proximate cause of the fire.

Northwestern correctly maintains that where, as here, a district court grants a new trial without stating its reasons, an appellant fulfills its burden to attack that ruling by submitting the record to the Supreme Court with the contention that there is no prejudicial error; the burden then shifts to the appellee to identify any prejudicial error in the record which justified the

granting of a new trial. *Belitz v. Suhr*, 208 Neb. 280, 303 N.W.2d 284 (1981). While it is true that a motion for new trial is addressed to the discretion of the trial court and that absent an abuse of that discretion the trial court's ruling will be upheld on appeal, it is also true that a motion for new trial is to be granted only where there is error prejudicial to the rights of the unsuccessful party. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). This is so because a party who has sustained the burden and expense of trial and has succeeded in obtaining judgment has the right to keep the benefit of that judgment. *Id.*

The Lemkes assert that the district court's failure to receive the report containing the Determan document constituted prejudicial error such as to justify the grant of a new trial. They claim the questioned report was admissible because at a pretrial conference Northwestern had waived any objection to its receipt. Since the Determan document is attached to the Grand Island deputy fire chief's report, the question becomes what the record shows as to the waiver of objections to the receipt of that report. The bill of exceptions reflects that the district court accepted the statement of Northwestern's counsel that he had not seen the report and thus concluded that the admissibility of the report "wasn't agreed upon" at the pretrial conference. The Lemkes establish no other basis on which the report containing the Determan document should have been received. Thus, the portion of the deputy fire chief's report containing the Determan document was properly excluded from the evidence.

However, that determination does not end our inquiry, for the district court resolved the case by sustaining Northwestern's motion to dismiss made at the close of the Lemkes' evidence. It is important not to confuse the function of a district court in ruling on a motion to dismiss with its function as the finder of fact in adjudicating the controversy in an action at law tried without a jury. In sustaining a motion to dismiss, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. In considering the evidence for the purpose of such a motion, the party against whom a motion is made is entitled to have every controverted fact resolved in its favor and to have

the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989); *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986).

We recognize that in *Butorac v. Dixon County*, 232 Neb. 598, 441 N.W.2d 620 (1989), because the trial court as the trier of fact had the benefit of all the evidence, we treated the sustainment of a motion to dismiss as a disposition on the facts. However, the tenor of the district court's memorandum in this case does not permit us to conclude that it resolved the case on a basis other than one of law. Thus, the question becomes whether the record presented the district court with an issue of fact.

The proximity of the regulator to a parking lot does not in and of itself, as the Lemkes suggest, support a factual inference that the damage was caused by a motor vehicle and that, thus, violation of the Grand Island ordinance was necessarily the proximate cause of the explosion and resultant fire. Whatever may be the applicability of the state pamphlet or the import of the federal regulations, their provisions cannot be read so broadly as to make Northwestern an insurer that its regulator will never sustain damage from any source. Thus, under the circumstances of this case, the Lemkes' failure to establish the cause of the regulator damage results in a failure to prove a prima facie case.

Accordingly, Northwestern's motion to dismiss at the close of the Lemkes' evidence was properly sustained. It therefore follows that the district court abused its discretion in granting a new trial.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. LORI A. CULVER, APPELLANT.

444 N.W.2d 662

Filed August 18, 1989. No. 88-419.

1. **Verdicts: Appeal and Error.** 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. **Theft: Value of Goods: Words and Phrases.** Under Neb. Rev. Stat. § 28-511(1) (Reissue 1985), theft consists of taking or exercising control over movable property of another with intent to deprive him or her thereof. The value of the property stolen is no longer an element of the crime and is important only in determining the penalty.
3. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race for the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.
4. **Trial: Juries: Discrimination: Appeal and Error.** A trial court's determination as to whether a defendant has established purposeful discrimination in the selection of a jury is a finding of fact which will not be reversed on appeal unless clearly erroneous.
5. **Constitutional Law: Equal Protection: Jurors.** The equal protection clause does not prohibit peremptory challenges against jurors on the basis of gender.
6. **Constitutional Law: Juries.** The fair cross-section principle, derived from the sixth amendment to the Constitution of the United States, does not apply to the use of peremptory challenges in the selection of petit juries.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

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

BOSLAUGH, J.

After trial to a jury, the defendant, Lori A. Culver, was convicted on four counts of misdemeanor theft and was

sentenced to probation for 2 years. As part of the sentence, the defendant was to be confined in the county jail for 90 days, with credit for 51 days, and was required to make restitution to the victims.

Upon appeal, the defendant contends that the evidence was not sufficient to sustain the verdicts of guilty and that the trial court erroneously permitted the State to exercise peremptory challenges upon the basis of gender.

The offenses consisted of stealing purses from a dressing room at a church wedding. The victims were the bride, Diane Quesada, and her attendants at the wedding on November 30, 1985, which took place at the Berean Fundamentalist Church in Lincoln, Nebraska. The room used as a dressing room was a classroom on the south hall of the church. The thefts were discovered just before the ceremony was to begin. At about that time, the defendant and a man, neither of whom were guests at the wedding, were seen leaving the church in a suspicious manner. The defendant was carrying a large, cylindrical-shaped gym bag over her shoulder, which appeared to be full.

Most of the victims and other persons who saw the defendant leaving the church were unable to make a positive identification of the defendant. However, Beth McCulley, who was a bridesmaid and whose purse was stolen, testified that at about 1:30 p.m., when she returned to the dressing room to get a Kleenex from her purse, she noticed two individuals in the doorway of the dressing room who were in the process of leaving the room. She described the individuals as a male, with light-brown hair and a mustache, who was wearing a tan trenchcoat. The other individual was a large-framed woman with very dark brown hair, wearing a royal-blue and black cape. Her observations were made from within a few feet of these individuals. After watching the individuals walk down the hall, she entered the dressing room and found her purse missing.

After the wedding, McCulley gave a brief description of the incident and the suspects to a police officer and on several occasions thereafter met with the sheriff's office in an attempt to identify the defendant. She first looked at individual photographs and then at a photographic lineup. Several weeks after the wedding, McCulley made a positive identification of

the defendant and the man that she had seen leaving the dressing room at the church on November 30, 1985. At trial, however, McCulley was unable to positively identify the defendant as the individual she had seen at the church and had no recollection independent from the photographs from which she had made her earlier identification.

There was other evidence that connected the defendant with the thefts through the use, on the day of the theft, of bank and credit cards which were stolen from McCulley. The defendant's companion, Allen Robinson, was identified through photographs made at the time the stolen bank and credit cards were used at an automatic teller machine in Lincoln. The defendant and Robinson were living together in Manhattan, Kansas, and a search of their residence resulted in the discovery of physical evidence which matched items shown in the photographs taken at the Bank-In-The-Box location in Lincoln.

Joseph Splichal, a detective sergeant in the Lancaster County Sheriff's Department, participated in the followup investigation of the thefts and specifically assisted in the execution of the search warrant. Splichal had shown McCulley a photographic lineup of possible suspects and testified that McCulley had identified the defendant as the woman she had seen leaving the dressing room at the church. McCulley had also identified the defendant's companion as Robinson.

Although much of the evidence was circumstantial, it was sufficient, if believed, for the jury to find beyond a reasonable doubt that the defendant had participated in each of the thefts. 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. Bowen,* 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Andersen,* 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Wickline,* 232 Neb. 329, 440 N.W.2d 249 (1989).

The defendant also contends that the evidence was not sufficient to support the finding by the jury that the items

stolen from Marissa Brownawell, a bridesmaid in the wedding, had a value of $40, and the items stolen from Barbara Morrison, the maid of honor, had a value of $50.

Neb. Rev. Stat. § 29-2026.01 (Reissue 1985) provides: "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."

Brownawell valued her purse at $15, and the contents, which included socks, new makeup, and an address book, at about $20. Morrison testified that her purse was a black leather clutch purse with a zipper across the top and contained $10 to $15, a checkbook, a J.C. Penney credit card, a Bank-In-The-Box card, a Wesleyan identification card, and a Sports Courts membership card.

Theft consists of taking or exercising control over movable property of another with intent to deprive him or her thereof. Neb. Rev. Stat. § 28-511(1) (Reissue 1985). The value of the property stolen is no longer an element of the crime and is important only in determining the penalty. See, *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983); *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988); *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). To the extent that *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987), and *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987), state that the value of the property stolen is an element of the crime charged, that language is disapproved. The determination of the value of the property stolen, of course, remains a question to be determined by the jury.

Neb. Rev. Stat. § 28-518(4) (Reissue 1985) provides: "Theft constitutes a Class II misdemeanor when the value of the thing involved is one hundred dollars or less."

The finding by the jury as to the value of the items stolen from the victims Brownawell and Morrison, even if erroneous, was not prejudicial, since any finding of a value of $100 or less would support verdicts of guilty of Class II misdemeanor theft.

The defendant's other assignment of error relates to the State's exercise of its peremptory challenges.

The record shows that of the 24 persons selected to be examined in voir dire, 11 were men and 13 were women. During the examination, the State exercised six peremptory challenges to exclude men. Defense counsel objected that these challenges had been made on the basis of gender discrimination and asked the trial court to require the State to explain why those individuals were struck. The defendant's request was denied.

In *State v. Thompson*, 231 Neb. 771, 779, 438 N.W.2d 131, 138 (1989), we held:

> "In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race for the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race."

Quoting *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). Ultimately, we held that a "trial court's determination as to whether a defendant has established purposeful discrimination in the selection of a jury is a finding of fact which will not be reversed on appeal unless clearly erroneous." *Thompson, supra* at 780, 438 N.W.2d at 138.

In this case, the trial court made no finding that the defendant had made the required prima facie showing of discriminatory intent. In fact, the assignment of error could be disposed of on the basis that the trial court's implied finding of no showing of a discriminatory intent was not clearly erroneous. *State v. Rowe, supra*; *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987).

Our decision in *Thompson* relied on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The defendant argues that *Batson* should be extended to apply to discriminatory practices based on gender as well as race.

The Supreme Court of Rhode Island in *State v. Oliviera*, 534 A.2d 867 (R.I. 1987), held that *Batson* does not extend to gender-based discrimination. In that case, the defendant, Oliviera, was convicted on two counts of assault with intent to

commit sexual assault and on one count of second degree child molestation. On appeal, he contended that the prosecution had discriminated against male members of the jury panel in exercising peremptory challenges in violation of the equal protection clause of the 14th amendment. During voir dire, the State had exercised six of its seven peremptory challenges to strike male members of the jury panel. The defendant objected, asserting gender-based discrimination contrary to the holding of *Batson*. The court in *Oliviera* specifically held that *Batson* did not extend to gender-based discrimination because of the fact that throughout the decision, the Court in *Batson* refers exclusively to discrimination based upon *race*. In referring to the *Batson* decision, the court stated:

> It clearly preferred to limit the new standard to racially-based discrimination.
>
> . . . .
>
> . . . [I]f the use of gender as a criterion for exercising peremptory challenges is prohibited, *all* such challenges will become inherently suspect. Opposing counsel could demand an alternative explanation for every challenge exercised. The damage to the peremptory challenge, a vital component of trial by jury, would be enormous, if not fatal.

State v. Oliviera, supra at 870.

Similarly, in *U.S. v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988), the court held that a prosecutor's use of peremptory challenges to exclude women from a criminal petit jury because of their sex did not violate the right of a defendant to an impartial jury and to a jury drawn from a cross section of the community under the 6th and 14th amendments. The court also found that the equal protection clause does not prohibit peremptory challenges against jurors on the basis of gender.

Although the appellate court concluded that the government had exercised several of its peremptory challenges based on sex, it found

> no authority to support an extension of *Batson* to instances other than *racial* discrimination. . . .
>
> . . . .
>
> Although the Court in *Batson* relaxed the evidentiary

> burden of *Swain*, it offered no intimation that it was extending the equal protection safeguards involving peremptory strikes to gender . . . . While the strictures of the Equal Protection Clause undoubtedly apply to prohibit discrimination due to gender in other contexts, there is no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges.
>
> . . . .
>
> Clearly, if the Supreme Court in *Batson* had desired, it could have abolished the peremptory challenge or prohibited the exercise of the challenges on the basis of race, gender, age or other group classification. A careful examination of the *Batson* opinion, however, leads this Court to the firm conclusion that, in light of the important position of the peremptory challenge in our jury system, the Court intended *Batson* to apply to prohibit the exercise of peremptory challenges on the basis of race only.

850 F.2d at 1042-43.

In regard to the sixth amendment claim, the court relied on *Lockhart v. McCree*, 476 U.S. 162, 173-74, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), where the U.S. Supreme Court stated that it had

> never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. . . . [A]n extension of the fair cross-section requirement to petit juries would be unworkable and unsound . . . .

In *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), the Court said:

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular

composition, *Fay v. New York*, 332 U.S. 261, 284 (1947); *Apodaca v. Oregon*, 406 U.S. at 413 (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

See, also, *Teague v. Lane*, ____ U.S. ____, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNIE W. CHAMBERS, APPELLANT.

444 N.W.2d 667

Filed August 25, 1989. No. 88-341.

1. **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.
2. **Motor Vehicles: Words and Phrases.** A battery-operated stopwatch is not an "electronic speed measurement" device within the purview of Neb. Rev. Stat. § 39-664 (Reissue 1988).
3. **Convictions: Proof.** To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly.
4. **Trial: Evidence: Proof.** To present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Ernie W. Chambers, pro se.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

SHANAHAN, J.

After a bench trial in the county court for Lancaster County, Ernie W. Chambers was found guilty on the charge of operating a motor vehicle at the speed of 70 miles per hour in a 55-mile-per-hour zone and was fined $25, plus costs. Chambers appealed to the district court for Lancaster County, which affirmed the county court's decision; hence, Chambers' appeal to this court.

Trooper Robert Stivers of the Nebraska State Patrol, a pilot since 1975, was trained and certified by the State Patrol to use an aircraft for detection of vehicular speed. On September 11, 1986, Stivers was officially maintaining an aircraft patrol of Interstate 80 in Lancaster County, which had a speed limit of 55 miles per hour at the patrol site, when he observed a blue Honda automobile, later determined to be driven by Chambers, passing other cars on the Interstate. Stivers believed that the Honda was "running in excess of the speed limit." By using an "Accusplit 735XP" battery-powered stopwatch, Stivers timed Chambers' vehicle as the car traveled the State Patrol's predetermined course of 5,400 feet 7 inches between two 3- by 4-foot white rectangles painted on the shoulder of the Interstate. According to Stivers' stopwatch, Chambers' car traveled the measured course in 50.61 seconds. In view of the fractional or decimal figure for the time indicated on the stopwatch and consistent with State Patrol policy, Stivers rounded off the time for Chambers' vehicle at 51 seconds and consulted a "speed chart" to convert the determined time into miles per hour. Based on the chart used by Stivers, Chambers' car was traveling 70 miles per hour. Stivers then radioed Sgt. Robert Cruise, who was in his cruiser on the Interstate, and told Cruise that Chambers' Honda was traveling 70 miles per hour on the Interstate. From the aircraft, Stivers helped Cruise

identify Chambers' car and confirmed that Cruise had correctly identified and stopped the vehicle clocked at 70 miles per hour. Cruise testified that in his opinion formed during his observation of Chambers' moving vehicle, Chambers was "traveling in excess of the 55 mile-per-hour speed limit" shortly before Cruise signaled Chambers to pull to the Interstate's shoulder, where Cruise issued Chambers a citation for driving 70 miles per hour in a 55-mile-per-hour zone.

At trial, over Chambers' objection (foundation), only Stivers testified that Chambers was driving at 70 miles per hour. Stivers also testified that the Accusplit stopwatch used to clock Chambers' car was checked for accuracy by Fred Wilson Jewelers on August 18, 1986, and again on December 9, 1986. The State called Fred Wilson, a jeweler, who testified that he used a "Q.T. 10 Quartz Tester" to ascertain the accuracy of Stivers' stopwatch used to time Chambers' car. When asked on direct examination whether "other jewelers, to your knowledge, use a machine just like that [Q.T. 10 Quartz Tester] to check the accuracy of Quartz watches," Wilson responded, "Similar, I'm not sure though." Later, during direct examination of Wilson, when the State offered Wilson's "Stop Watch Certifications" for Stivers' watch, Chambers was allowed to interrogate Wilson, an interrogation which included:

> [CHAMBERS:] And you also don't know whether this machine that you use [the quartz tester] is the one that jewelers in the trade use for the purpose that you stated?
>
> [WILSON:] There's probably a dozen different companies that sell machines that do the same thing.
>
> [CHAMBERS:] But you don't know and you've already testified to that, but I wanted — in response to my question to you, you don't know whether jewelers in the trade use this particular machine as the machine for testing these watches?
>
> [WILSON:] No, I don't.
>
> [CHAMBERS:] Mr. Wilson, when was the last time that your machine was tested to determine whether or not it was accurate?
>
> [WILSON:] As far as I know, it never has been.

Asserting an insufficient evidential foundation, Chambers then objected to introduction of the certification documents. The court overruled Chambers' objection, received the certification documents, and, at the conclusion of evidence, found Chambers guilty of speeding, that is, operating a motor vehicle at 70 miles per hour in a 55-mile-per-hour zone.

Chambers assigns five errors, each of which questions the admissibility of evidence concerning the speed of Chambers' vehicle, which was determined by reference to Stivers' battery-powered stopwatch. Chambers' argument boils down to a contention that the State's evidence of his driving 70 miles per hour, determined by Stivers' timed observation, was inadmissible because the State failed to produce a foundation establishing the accuracy of Stivers' stopwatch.

"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. Olsan*, 231 Neb. 214, 220, 436 N.W.2d 128, 133 (1989).

Much of Chambers' brief revolves around the assertion that Stivers' stopwatch is an "electronic speed measurement" device within the purview of Neb. Rev. Stat. § 39-664 (Reissue 1988), which provides in part:

> (1) Determinations made regarding the speed of any motor vehicle based upon the visual observation of any law enforcement officer may be corroborated by the use of radio microwaves or other electronic device. The results of such radio microwave or other electronic speed measurement may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. Before the state may offer in evidence the results of such radio microwave or other electronic speed measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:
>
> (a) The measuring device was in proper working order at the time of conducting the measurement;
>
> (b) The measuring device was being operated in such a manner and under such conditions so as to allow a

minimum possibility of distortion or outside interference;

(c) The person operating such device and interpreting such measurement was qualified by training and experience to properly test and operate the device; and

(d) The operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order.

In Chambers' previous appeal of a speeding conviction, *State v. Chambers*, 207 Neb. 611, 299 N.W.2d 780 (1980), we determined that § 39-664 was not applicable when the defendant's speed was "determined by use of a mechanical stopwatch." *Chambers, supra* at 614, 299 N.W.2d at 782.

We conclude that § 39-664 is equally inapplicable in the present case. Although the battery-operated stopwatch used by Stivers to time Chambers' car is properly characterized as an "electronic" device, Chambers' argument that the stopwatch is a "speed measurement" device ignores laws even more fundamental and universal than the laws of the State of Nebraska, namely, the laws of physics. Speed, or more correctly, velocity, is a function of distance and time. Time is one of the two elements in the formula v(elocity) = d(istance)/t(ime). A device which measures only one of the two elements utilized in the foregoing formula is not a "speed measurement device," but is either a device to measure time (more commonly known as a clock or watch) or a device to measure distance. Therefore, we conclude that a battery-operated stopwatch is not an "electronic speed measurement" device within the purview of § 39-664.

Acknowledgment of the laws of physics does not end our inquiry in Chambers' appeal. At trial, Chambers objected to introduction of Wilson's "Stop Watch Certifications," which purportedly verified the accuracy of Stivers' stopwatch used to time Chambers' car, and also objected to Stivers' testimony regarding the time registered by the stopwatch for the resultant calculation of Chambers' speed. We must, therefore, consider whether the State established a sufficient evidential foundation for admission of the stopwatch results as evidence that

Chambers' car was traveling 70 miles per hour.

In *State v. Chambers, supra*, we considered the use of a mechanical stopwatch in a speeding case, upheld the defendant's conviction, and stated:

> We believe the foundation evidence was sufficient to allow the State to establish the speed of the defendant's vehicle by use of the stopwatch. The evidence was that Lt. Donald Grieser, the officer flying the airplane, had been trained and certified for clocking ground vehicles from aircraft. The stopwatch had been tested on July 19, 1978, and again on August 25, 1978, and found to be accurate within 1 second per 24 hours or $^{6}/_{10,000}$ of a second per minute. Fred A. Wilson, the jeweler who performed the tests on the stopwatch, testified that the stopwatch had been tested on a Vibrograph machine which was an accepted method for determining the accuracy of watches. The Vibrograph machine was tested occasionally with another Vibrograph machine and other watches whose timekeeping accuracy was verified by a digital watch or an electronic clock.

Id. at 612-13, 299 N.W.2d at 781.

To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be "[r]easonable proof that the . . . machine was accurate and functioning properly." *State v. Kudlacek*, 229 Neb. 297, 301, 426 N.W.2d 289, 292 (1988) (foundation relating to accuracy of radar unit and Intoxilyzer machine). See, also, *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969). In *Snyder* and *Kudlacek*, we rejected the argument that for admissibility of information from a primary instrument, the accuracy of the primary instrument, such as a measuring device, must be established by an appropriate testing device which itself has been tested for accuracy, lest such evidence of testing and the testing itself "might have to proceed ad infinitum" to verify the accuracy of all instruments used. *State v. Snyder, supra* at 466, 168 N.W.2d at 531. See, also, *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957) (an officer's testimony that he drove his patrol car at 60 miles per hour, indicated by the car's speedometer, through the testing range for the radar device used to prove the speed of

the defendant's vehicle was sufficient foundation for admissibility of the radar-determined speed without proof of the speedometer's accuracy). Thus, although we have rejected a requirement that any testing device used to establish the accuracy of a primary measurement device must itself be independently tested, we have recognized such a procedure to thwart a foundational challenge to the primary device's accuracy. See *State v. Chambers*, 207 Neb. 611, 299 N.W.2d 780 (1980) (mechanical stopwatch tested with a Vibrograph, which was in turn itself tested against another Vibrograph).

Without some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise. Undoubtedly, a meaningless test for accuracy in Stivers' stopwatch does not supply the "reasonable proof of accuracy" required for the permissible introduction of evidence concerning information derived from the stopwatch. The test of the stopwatch in the present case somewhat resembles the situation in the apocryphal story of the cannon and the clock, recounted by our Chief Justice. The cannoneer was responsible for firing the cannon in the village square at 6 o'clock each day. When asked how he knew it was time to fire the cannon, the cannoneer answered that he simply looked at the clock in the tower of the village hall at the other end of the street which ran from the square to the hall. When the tower clock indicated 6 o'clock, he fired the cannon. However, when the clockkeeper was asked how he checked the tower clock's accuracy, he said that every time the village cannon fired, he looked up to verify the time, which was always 6 o'clock. In any event, we hold that to present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

In the present case, there is no evidence on either of the bases which we have mentioned for verified accuracy in a stopwatch.

Wilson testified that his Q.T. 10 Quartz Tester had never, to his knowledge, been tested for accuracy. Also, exactly what is a Q.T. 10 Quartz Tester? There is no evidence explaining the nature, function, or operation of a Q.T. 10 Quartz Tester. Further, Wilson testified that he did not know whether other jewelers used the Q.T. 10 Quartz Tester to verify the accuracy of stopwatches. Consequently, in view of the record presented to us, there is no "reasonable proof" of accuracy in the stopwatch used to clock Chambers' car. Evidence that Chambers' car took 51 seconds to travel the predetermined distance on Interstate 80 and was, consequently, traveling at 70 miles per hour was improperly received by the trial court. Evidence based on Stivers' stopwatch was used to prove the charge against Chambers and, therefore, constitutes reversible error. For that reason, we reverse the judgment of the district court, which affirmed the county court's decision, and remand this matter to the district court with the direction that the district court order a new trial for Chambers in the county court.

The county court's reversible error in admitting evidence of speed calculated through information from Stivers' stopwatch is properly characterized as "trial error," which does not bar retrial of Chambers after this reversal of his conviction. See, *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (retrial after reversal of a defendant's conviction, when the reversal resulted from "trial error," that is, "a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct," 437 U.S. at 15); *Lockhart v. Nelson*, ____ U.S. ____, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988) (double jeopardy clause of the fifth amendment to the U.S. Constitution does not bar retrial of a defendant if all the evidence, whether erroneously admitted or not, supports the action of the trial court or jury). See, also, *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

REVERSED AND REMANDED FOR A NEW TRIAL.

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

The majority cites *Burks* and *Lockhart* for the proposition that mere trial error does not bar retrial if all the evidence, whether erroneously admitted or not, supports the action of the

trial court or jury. Both cases are based upon the 5th and 14th amendments to the U.S. Constitution and thus comprise federal constitutional law.

I believe the better approach would be to follow this court's decision in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), where we considered whether the remaining evidence was sufficient, absent the procedural or "trial error." Although in *Palmer* we did not explicitly base our ruling on Neb. Const. art. I, § 12, today's decision overrules *Palmer*.

I would reverse and dismiss.

STATE OF NEBRASKA, APPELLEE, V. RICHARD W. WILLETT, APPELLANT.

444 N.W.2d 672

Filed August 25, 1989. No. 88-853.

1. **Criminal Law: Intent.** When a person threatens to commit a crime of violence and has the intent to terrorize another as the result of the threat, he or she violates Neb. Rev. Stat. § 28-311.01(1)(a) (Cum. Supp. 1988).
2. **Criminal Law: Indictments and Informations.** To charge a defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime or in language equivalent to the statutory terms defining the crime charged.
3. **Criminal Law: Prosecuting Attorneys.** When more than one statute prohibits criminal conduct, a prosecutor may select any violated statute as the basis for prosecuting a defendant so long as the prosecutor's selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

Willis G. Yoesel for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

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

SHANAHAN, J.

Richard W. Willett was charged with threatening "to commit a crime of violence with the intent to terrorize [his wife] Jill Lee Willett by stating he was going to kill her," that is, a violation of Neb. Rev. Stat. § 28-311.01 (Cum. Supp. 1988), which provides: "(1) A person commits terroristic threats if he or she threatens to commit any crime of violence: (a) With the intent to terrorize another; (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation . . . ." "Terroristic threats," described in § 28-311.01(1), is a Class IV felony, see § 28-311.01(2), which has no minimum prescribed penalty, but which is punishable by a maximum sentence of 5 years, a $10,000 fine, or both such imprisonment and fine. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985). A jury found Willett guilty of the charge. On September 22, 1988, the district court for Richardson County sentenced Willett to imprisonment for 5 years. Willett appeals, contending that (1) his conviction is void because his conduct does not come within the purview of § 28-311.01; (2) the evidence is insufficient to sustain his conviction; and (3) the sentence imposed is excessive.

Starting at 11 a.m. on February 21, 1988, Richard Willett, who was cutting wood with a friend, began drinking alcoholic beverages. By 5 p.m. that day, Willett had consumed in excess of 12 cans of beer and an unidentified quantity of other alcoholic beverage. Sometime in the evening of February 21, Jill Willett, assuming and fearing that her husband would return home drunk and commence a quarrel, decided to go to her mother's (Betty Lee's) house and took her 8-year-old daughter, Megan Lee, and her 6-month-old son, William Lee Willett, with her.

Around 3 a.m. on February 22, 1988, Richard Willett, after a full day and evening of drinking alcohol and having become intoxicated, returned to his home and discovered that Jill and the children were gone. Richard Willett then placed a telephone call to Betty Lee's house and spoke with Lee, who told him not to come to her house for his son, or she would call the police. Lee hung up the phone and then called the police.

Richard Willett went to Lee's house and was "beatin' " on

the locked doors when the police arrived. The police briefly spoke with Willett, who told the police that he wanted to take his son home. The police escorted Willett from Lee's premises and returned to Lee's house, where Jill Willett told the officers that she was afraid that the intoxicated Richard Willett would injure her.

While the police were at the Lee residence, Richard Willett again phoned and spoke with Jill Willett while Officer Marty Eickhoff was listening to the conversation on another phone at Lee's. In this conversation, Willett demanded that Jill return his son or Willett would "hunt her down and kill her." Richard Willett also told Jill not to send police to their residence because, if she did, "somebody was going to get killed." During that telephone conversation, both Eickhoff and Jill Willett heard a "clicking" noise in the background at the other end of the line, which they identified as the pumping action of a shotgun. Jill was not afraid that Richard Willett would kill her, but was frightened by his threats of violence.

Police then proceeded to the Willetts' apartment and waited outside. Willett came out of the apartment and started to walk to his car. Officers approached Willett and arrested him. In a subsequent search of the Willetts' apartment, police discovered a pump-action shotgun on the kitchen table near the telephone. Four live shotgun shells were in the gun's magazine. Willett testified that in reference to his telephonic statements to Jill Willett, including his comment that he would "hunt her down and kill her," it was "possible" that he intended to intimidate Jill Willett to return their son, William, to the Willett residence.

In addition to instructing on "terroristic threats," § 28-311.01, the court also gave an instruction on the offense of "intimidation by phone call," a violation of Neb. Rev. Stat. § 28-1310 (Reissue 1985), which provides:

> (1) A person commits the offense of intimidation by phone call if with intent to terrify, intimidate, threaten, harass, annoy, or offend, he:
>
> . . . .
>
> (c) Telephones another and threatens to inflict injury to any person or to the property of any person;
>
> . . . .

(4) Intimidation by phone call is a Class III misdemeanor.

Richard Willett did not object to the instructions given. The jury found Willett guilty of "terroristic threats" (§ 28-311.01). After Richard Willett was evaluated at the diagnostic and evaluation center and a presentence report was submitted on Willett, the court found that Willett was not a suitable candidate for probation and sentenced him to 5 years' imprisonment.

Richard Willett does not challenge the validity of § 28-311.01, but, rather, argues that the evidence does not support his conviction because the statute was intended to be a deterrent to bomb threats and was not intended to apply to the conduct on which his conviction is based. Willett contends that he may have violated § 28-1310, the statutory proscription against "intimidation by phone call," and even suggests that the court may have committed reversible error by "failure to direct a possible verdict of guilty under Section 28-1310." Brief for appellant at 11. Willett's contention about a directed verdict of a defendant's guilt is, to say the least, novel in the annals of American jurisprudence.

Willett's argument concerning the charge against him ignores the unequivocal language of § 28-311.01(1)(a), which provides that a person violates the statute by threatening to commit a crime of violence with the intent to cause terror in another. Without doubt, a threat of murder is a threat to commit a "crime of violence." While § 28-311.01(1)(b) applies to conduct such as a bomb threat, § 28-311.01(1)(a) applies to any threatened commission of a violent crime for the purpose of causing terror to another. Therefore, when a person threatens to commit a crime of violence and has the intent to terrorize another as the result of the threat, he or she violates § 28-311.01(1)(a).

To charge a defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime or in language equivalent to the statutory terms defining the crime charged. *State v. Golgert*, 223 Neb. 950, 395

N.W.2d 520 (1986).

The fact that Willett's conduct may have also contravened § 28-1310 is not a ground for reversing his conviction. When more than one statute prohibits criminal conduct, a prosecutor may select any violated statute as the basis for prosecuting a defendant so long as the prosecutor's selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). See, also, *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986). Willett has not alleged that the prosecutor relied on any "unjustifiable standard" in deciding to charge Willett with a violation of § 28-311.01.

There is no merit in Willett's assigned error concerning the charge against him.

Next, Willett contends that the State failed to prove his requisite intent to terrorize Jill Willett. In his testimony, Willett acknowledged that by his threat to Jill Willett, namely, he would "hunt her down and kill her," it was "possible" that he intended to intimidate Jill into returning the boy, William, to the Willett residence. "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*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987).

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Brown, 225 Neb. 418, 428, 405 N.W.2d 600, 606 (1987).

> On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Robertson, 223 Neb. 825, 830, 394 N.W.2d 635, 638 (1986).

The evidence supports the jury's factual conclusion that Richard Willett intended to terrorize Jill Willett for the purpose of her bringing William to the Willett residence. There is no merit in Richard Willett's assignment of error concerning sufficiency of evidence to sustain his conviction.

Willett also contends that the district court imposed an excessive sentence. "[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). See, also, *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988); *State v. Hoffman, supra*; *State v. Brown, supra*. The presentence report on Willett shows an extensive history of criminal violations, including Willett's convictions for criminal mischief, trespass, resisting arrest, and third degree assault, the last offense and conviction having occurred within the few months preceding the offense and conviction in the present case. Furthermore, we note that the sentence imposed did not contain or specify a minimum sentence to be served. See Neb. Rev. Stat. § 83-1,110(1) (Reissue 1987) (minimum term; eligibility for release on parole). We conclude that the district court did not abuse its discretion in the sentence imposed on Willett.

Therefore, Willett's conviction and sentence are affirmed.

AFFIRMED.

ALLSTATE INSURANCE COMPANY, PLAINTIFF, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, DEFENDANT.

444 N.W.2d 676

Filed August 25, 1989. No. 88-1004.

1. **Insurance: Contracts.** An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.

2. _____: _____. Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.
3. _____: _____. An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
4. _____: _____. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
5. **Insurance: Motor Vehicles: Liability: Public Policy.** A clause in an automobile liability insurance policy excluding coverage under the liability portion of the policy for bodily injury to the named insured is not invalid in Nebraska as against public policy.

Certified Questions from the U.S. Court of Appeals for the Eighth Circuit. Judgment entered.

Waldine H. Olson, of Schmid, Mooney & Frederick, P.C., for plaintiff.

Eugene P. Welch and Susan E. Fieber, of Gross, Welch, Vinardi, Kauffman & Day, P.C., for defendant.

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

BOSLAUGH, J.

The U.S. Court of Appeals for the Eighth Circuit has certified two questions of law to this court concerning the coverage under an automobile liability insurance policy issued by the Farmers Mutual Insurance Company of Nebraska. The policy was issued to L.A. Bethune to insure a 1977 Oldsmobile and provided bodily injury liability insurance of $100,000 for each person and $300,000 for each occurrence.

On March 9, 1985, Sylvia T. Miller was driving Bethune's 1977 Oldsmobile in New Mexico with his permission. The automobile was involved in an accident in which both Bethune and Miller received injuries from which they ultimately died. Bethune's estate made a claim for damages against Miller's estate, alleging that Miller's negligence was the proximate cause of the accident.

Prior to the accident, Allstate Insurance Company had issued an automobile liability policy to Miller, which provided

bodily injury liability insurance of $50,000 for each person and $100,000 for each occurrence.

In settlement of the Bethune claim, and without prejudice to any claims the companies might have against each other, Allstate and Farmers each paid $12,500 to Bethune's estate. Allstate then brought a declaratory judgment action in the U.S. District Court against Farmers to determine whether the household exclusion clause in the Farmers policy was valid and excluded coverage to Miller for liability to Farmers' insured, Bethune.

The exclusion clause with which we are concerned is sometimes called the "household exclusion clause" because it commonly excludes coverage for liability for injuries to members of the family of the insured residing in the same household of the insured. In this case, however, we are concerned only with that part of the clause which excludes coverage for liability for bodily injuries to the named insured.

Allstate contended that its named insured, Miller, was driving Bethune's car as a permissive driver; that she was an omnibus insured under the Farmers policy; that the Farmers policy provided primary coverage for the accident; and that the Allstate policy provided excess coverage. Farmers concedes that Miller was a permissive driver and as such would have been an omnibus insured under the Farmers policy, but contends that the household exclusion in Bethune's policy issued by Farmers excluded coverage to Miller for injuries sustained by Bethune.

The case was submitted to the district court upon an agreed statement of facts. The district court found that under the Farmers policy Miller was an omnibus insured and that the policy contained exclusions from coverage, some of which referred to "the named insured" and others to "the insured." The court noted that the household exclusion referred to "the insured" and that Farmers had agreed "to pay on behalf of the insured all sums which the insured became legally obligated to pay as damages because of . . . bodily injury sustained by other persons." The court found the express language of the Farmers exclusion meant that the policy "does not apply under Coverage A to bodily injury to [Ms. Miller] or to any member of the family of [Ms. Miller] residing in the same household as

[Ms. Miller]." The district court further found that the claim against Miller's estate was made by Bethune's estate and that "Mr. Bethune is not Ms. Miller and is not a member of Ms. Miller's family residing in her household." The district court concluded that Miller was not excluded from coverage under the exclusion, and Farmers was ordered to pay Allstate $12,500 for Allstate's contribution to the settlement of Bethune's claim.

Farmers appealed to the U.S. Court of Appeals. Finding no controlling Nebraska precedent, the court of appeals certified the following two questions to this court:

> (1) Under Nebraska law, does the Farmers Mutual household exclusion by its terms exclude liability coverage for bodily injury to the named insured when those injuries are caused by the negligence of a permissive operator?
>
> (2) If coverage is excluded by the policy terms, may the exclusion be enforced under Nebraska law?

There is no issue of fact because the parties submitted the case to the district court upon an agreed statement of facts.

The policy issued by Farmers to Bethune contained the following language:

> Coverages A and B - (A) Bodily Injury Liability and (B) Property Damage Liability.
>
> (1) To pay on behalf of any insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury sustained by other persons . . . arising out of the ownership, maintenance or use, including loading or unloading of the owned automobile. . .
>
> . . . .
>
> EXCLUSIONS-INSURING AGREEMENTS I AND II
>
> This insurance does not apply under:
>
> . . . .
>
> (i) coverage A, to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured. . .
>
> DEFINITIONS - INSURING AGREEMENTS I AND II.
>
> Insured- Under coverages A, B and C the unqualified

> word "insured" includes
>
> (1) the named insured, and
>
> . . . .
>
> (4) any other person while using the owned automobile, provided the operation and the actual use of such automobile are with the permission of the named insured or such spouse and are within the scope of such permission. . . .

The answer to the first question is found by applying the language of the policy issued by the defendant to the facts of the case in accordance with the following rules.

An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976). Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning. *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988); *Waylett v. United Servs. Auto. Assn.*, 224 Neb. 741, 401 N.W.2d 160 (1987); *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985); *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 381 N.W.2d 117 (1986); *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986); *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982); *Rodriguez v. Government Employees Ins. Co.*, 210 Neb. 195, 313 N.W.2d 642 (1981). An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. *Lumbard v. Western Fire Ins. Co., supra*; *Rodriguez v. Government Employees Ins. Co., supra.* The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Waylett v. United Servs. Auto. Assn., supra*; *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985); *Pettid v. Edwards, supra*; *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982); *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456

(1984); *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 281 N.W.2d 539 (1979).

Contrary to the contention of the plaintiff, Allstate, we find the language of the policy issued by the defendant to be clear. As such, it should be given its plain and ordinary meaning.

The exclusion provides that the unqualified word "insured" includes the named insured, who is Bethune. Thus, although Miller was otherwise an "insured" under the policy, the exclusion specifically excludes coverage for the liability of Miller to Bethune for bodily injury. The finding of the U.S. District Court to the contrary was erroneous. The answer to the first question is yes.

The answer to the second question depends upon whether there is any statute or public policy in Nebraska that prevents the policy issued by the defendant from being enforced according to its plain and ordinary meaning.

The plaintiff concedes that the 1985 amendment to Neb. Rev. Stat. § 60-302 (Reissue 1988) requiring proof of financial responsibility for registration of a motor vehicle was not in effect on the date of the accident in this case. We have previously held that the Nebraska financial responsibility act has no application to an insurance policy that has not been used as proof of financial responsibility in the future. *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967).

Although the courts in other jurisdictions that have considered the question of whether such an exclusion is contrary to public policy have reached different conclusions, see Annot., 52 A.L.R.4th 18 (1987), we find that the exclusion involved in this case is not contrary to the public policy of this state upon the facts of this case.

In *Allstate Insurance Company v. Boles*, 587 F. Supp. 807 (S.D. Ind. 1984), the plaintiff had commenced an action for a declaratory judgment to determine whether the household exclusion in a policy that it had issued was valid. The accident involved in that case occurred when the named insured was operating the automobile in which his wife was a passenger. The issue was whether the language of the policy excluded coverage for the liability of the named insured for the injuries to his wife. The court held that although the doctrine of interspousal

immunity had been abrogated in Indiana in 1972, the exclusion in the policy issued by the plaintiff was not contrary to the public policy of Indiana. The court stated:

> The citations to the Court of Appeals of Indiana reflect the well-established judicial support for allowing parties to insurance contracts to determine what risks are to be afforded coverage in a particular transaction. In the absence of statutory requirements, Indiana courts have been reluctant to assume legislative power and require that particular types of insurance coverage be purchased. Likewise, the Courts have often refused to provide coverage that was clearly not intended to be purchased by the insured or provided by the insurer. The Supreme Court of Indiana would not characterize the household exclusion clause now before this Court as contrary to public policy, and therefore invalid, because to do so would contravene the well-established rule of law that where the terms of an insurance contract are clear and unambiguous the parties are bound by those terms. Furthermore, the household exclusion clause does not contravene a positive statute.
>
> . . . .
>
> . . . Just as a woman that is married may contract to sell or purchase real estate, for example, she may contract for insurance protection. To conclude that the Supreme Court of Indiana intended to force husbands to purchase insurance protection for their wives would thus be contrary to both statutory and the well-established rule of law that a female spouse is no longer chattel of her husband. And, it would be contrary to the very nature of the Court's decision: married women have individual rights separate from their spouses. "The right to sue a spouse for injuries caused by that spouse is an entirely separate matter from the contractual obligation of an insurance company to pay for those injuries." *Porter v. Farmers Insurance Co.*, 102 Idaho 132, 627 P.2d 311, 315 (1981).

Allstate Insurance Company, supra at 812-13.

Later in the same case, upon certification of a question of

state law from the U.S. Court of Appeals for the Seventh Circuit, the Indiana Supreme Court reached the same result. In *Allstate Insurance Company v. Boles*, 481 N.E.2d 1096, 1098-99, 1101 (Ind. 1985), the court said:

> This Court is of the opinion that the insurance policy provision commonly referred to as the "household exclusion clause" does not contravene any public policy of Indiana, explicitly or implicitly expressed in case or statutory law. Accordingly, the household exclusion clause in insurance contracts are [sic] valid and enforceable such that it may preclude liability coverage of injuries sustained by the spouse of an insured.
>
> . . . .
>
> . . . We are now confronted with whether the right of a spouse to sue another spouse in tort should supercede the latter spouse's right to freely contract with an insurance company. We think not and agree with the following rationale stated by the Idaho Supreme Court in *Porter v. Farmers Insurance Co.*, (1981) 102 Idaho 132, 627 P.2d 311, when that Court was confronted with this same issue:
>
> "The right to sue a spouse for injuries caused by that spouse is an entirely separate matter from the contractual obligation of an insurance company to pay for those injuries."
>
> . . . .
>
> Whenever a court considers invalidating a contract on public policy grounds, it must always weigh in the balance the parties' freedom to contract. Although special rules of construction of insurance contracts have been developed due to the disparity in bargaining power between insurers and the insured's [sic], if a contract is clear and unambiguous, the language therein must be given its plain meaning. *Vernon Fire and Casualty Co. v. American Underwriters, Inc.*, (1976) 171 Ind. App. 309, 356 N.E.2d 693. The household exclusion clause is clear and unambiguous. Further, as seen in our analysis, it does not contravene public policy reflected in our case law or motor vehicle statutes. Accordingly, our answer to the certified question is that a household exclusion provision

> of an automobile insurance policy is not contrary to public policy of Indiana, as expressed in statute or case law, when applied to preclude liability coverage of injuries sustained by the spouse of an insured.

See, also, *Porter v. Farmers Ins. Co. of Idaho*, 102 Idaho 132, 627 P.2d 311 (1981); *Walker v. American Family Mut. Ins. Co.*, 340 N.W.2d 599 (Iowa 1983); 12 G. Couch, Cyclopedia of Insurance Law, §§ 45:486-87 (rev. 2d ed. 1981); 6C J. & J. Appleman, Insurance Law and Practice, § 4409 (R. Buckley ed. 1979).

For the reasons stated, the answer to the second question is also yes.

JUDGMENT ENTERED.

WHITE, J., dissenting.

The Farmers' policy use of the imprecise term "insured" interchangeably with the exact term "named insured" has compounded the difficulties inherent in attempting any rational understanding of the meaning of the classic example of legal obfuscation, the American automobile liability insurance contract.

Having created this tangle, Farmers urges us to apply the most restrictive possible meaning to the document. The majority dutifully complies.

That the document is ambiguous, I submit, is obvious; therefore, the meaning most favorable to the policyholder should be adopted.

I dissent.

CONNEE L. YUSTEN, APPELLEE, V. CY R. YUSTEN, APPELLANT.
444 N.W.2d 681

Filed August 25, 1989. No. 89-043.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

James R. Wefso, of Crites, Shaffer, Connealy, Watson & Wefso, for appellant.

Michael V. Smith, of Smith and King, P.C., for appellee.

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

PER CURIAM.

Cy R. Yusten appeals the award of alimony to his ex-wife, Connee L. Yusten.

As required in cases of this nature, we have reviewed the record de novo to determine whether the district court abused its discretion in the alimony award. *Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986).

Upon a de novo review of this case, we find no patent unfairness in the alimony award. Therefore, there was no abuse of discretion by the trial court, and its decree should be affirmed.

Each party shall pay his or her own costs and attorney fees in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. STEVEN M. BENTSON, RESPONDENT.

444 N.W.2d 681

Filed August 25, 1989. No. 89-748.

Original action. Judgment of disbarment.

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

PER CURIAM.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), the respondent, Steven M. Bentson, filed a voluntary surrender of license with this court.

A disciplinary complaint was filed against Bentson with the Counsel for Discipline of the Nebraska State Bar Association. The respondent admits that he knowingly violated Canon 1,

DR 1-102(A)(1), (4), (5), and (6), of the Code of Professional Responsibility. He also freely and voluntarily waives all proceedings against him in connection with the pending disciplinary complaint.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STEPHANIE WRIGHT, APPELLANT, V. GLEN FORNEY ET AL., APPELLEES.

444 N.W.2d 895

Filed September 1, 1989. No. 87-220.

1. **Trial: Evidence.** The admission or exclusion of evidence is initially left to the discretion of the trial court, which must determine the relevancy and possible prejudicial effects of the proffered evidence.
2. _____: _____. Rebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party.

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

Michael J. Javoronok, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., and Tamara M. Haas, of Collins, Ribble, Meyer & Wood, for appellant.

William P. Mueller and Rita C. Grimm, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., and William M. Lamson, Jr., and Patricia A. Zieg, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

WHITEHEAD, D.J.

The plaintiff, Stephanie Wright, appeals from a jury verdict for the defendants, Glen Forney and Gerhard Schmitz, individually and doing business as Scottsbluff Surgical

Associates, and West Nebraska General Hospital. The issue presented on appeal is whether or not the district court committed error in refusing the introduction of rebuttal evidence offered by the plaintiff.

In the abbreviated record presented to the court, it appears the facts are that the appellant was treated by the appellee Glen Forney, M.D. On January 31, 1983, Forney performed a loop gastrojejunostomy on the appellant, who was an obese person. The procedure is designed to create a stomach with a very small capacity. The small stomach pouch is created by stapling off a substantial portion of the patient's stomach. The small intestine is then attached to the newly created stomach pouch, with a small opening connecting the two. The newly created stomach has only a very limited capacity and empties quite slowly. The result is weight loss.

Following the surgery, the appellant's hospital course of recovery was essentially normal. From the beginning, she had nausea and difficulty keeping liquids down, but this was not abnormal for people having this type of surgery. It appeared she was making steady improvement until the evening of February 8, when she began vomiting more substantial amounts of green liquid, at which time the appellee Forney ordered that she be given nothing by mouth and that x rays of the upper gastrointestinal tract be taken the morning of February 9.

Before these procedures could be performed, the appellant experienced cardiopulmonary arrest in the early morning of February 9. It appears that a leak had occurred, allowing the stomach contents to spill into the peritoneum (the sac surrounding the intestines). These contents contaminated the abdomen, and peritonitis developed. The appellant developed a very rapid pulse, a drop in blood pressure, and a high temperature. She apparently breathed vomit into her lungs and went into cardiac arrest. At that point, appropriate measures were taken to revive the appellant and deal with the crisis, and her life was saved.

At the conclusion of the defendants' case, the appellant requested that Dr. Roy Cohn, who testified in the appellant's case and had returned to California, be deposed over the phone to offer evidence in rebuttal testimony to the appellees' experts.

Appellant suggested that Cohn be put under oath in California and the testimony be transcribed in Gering, Nebraska. As an alternative, the appellant's counsel requested that the audiotape of the deposition be played. Over objections of the appellees, the court ordered the deposition be taken, but did not rule at the time whether it would be permitted to be presented to the jury. After reading the telephonic deposition, the court refused the offer of the rebuttal testimony.

The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion. The admission or exclusion of evidence is initially left to the discretion of the trial court, which must determine the relevancy and possible prejudicial effects of the proffered evidence. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982). Rebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party. *Cromer v. Farmland Service Coop, Inc.*, 198 Neb. 355, 252 N.W.2d 635 (1977); *McClellan v. Hein*, 56 Neb. 600, 77 N.W. 120 (1898). Rebuttal is not intended to give a party an opportunity to tell his story twice or to present evidence that was proper in his case in chief.

From a search of the record, we conclude that the evidence offered was cumulative and not proper rebuttal; its admission was directed to the discretion of the trial court; and there was no abuse of discretion. See, *Nusz v. Wells Mfg. Corp.*, 214 Neb. 1, 332 N.W.2d 204 (1983); *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977); Neb. Rev. Stat. §§ 27-401 and 27-402 (Reissue 1985).

AFFIRMED.

PATRICIA J. HALLAN, APPELLEE, V. RICHARD HALLAN, APPELLANT.
444 N.W.2d 896

Filed September 1, 1989. No. 87-336.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

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

Steven H. Heldt, of Smith, Smith & Heldt, for appellee.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

PER CURIAM.

In this dissolution of marriage case, respondent husband appeals from the trial court's division of property, asserting insufficiency of the interest awarded him in his wife's retirement funds and objecting to the trial court's inclusion as a marital asset of a portion of a settlement he received from an action he had filed against a former employer, following his sixth and final involuntary termination of employment.

The ultimate test in determining the appropriateness of the division of property is reasonableness as determined by the facts in each case. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987). We have reviewed the record de novo as we are required to do, and we have determined that the trial court did not abuse its discretion with regard to either of the matters of which complaint is made. The decree of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ROBERT M. SPIRE, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY ET AL., APPELLEES.

445 N.W.2d 284

Filed September 1, 1989. No. 87-425.

1. **Declaratory Judgments: Judicial Construction: Statutes.** A declaratory judgment action, pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute.
2. **Declaratory Judgments.** In a declaratory judgment action involving the determination of factual issues, such issues may be tried and determined as in other civil actions.
3. **Declaratory Judgments: Appeal and Error.** In appellate review of an action for a declaratory judgment in a law action, factual findings by the trier of fact will not be set aside unless the findings are clearly erroneous.
4. **Declaratory Judgments: Equity: Appeal and Error.** In appellate review of an action for declaratory judgment in an equity action, the standard of review for an equity case applies.
5. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
6. **Equity: Appeal and Error.** In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
7. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional.
8. **Constitutional Law: Public Service Commission: Jurisdiction: Legislature.** Although the Public Service Commission is an independent regulatory body under the Nebraska Constitution, Public Service Commission jurisdiction to regulate common carriers may be restricted by the Legislature through "specific legislation." Neb. Const. art. IV, § 20.
9. _____: _____: _____: _____. The Legislature cannot constitutionally divest the Public Service Commission of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, except the Legislature, with control over the class of common carriers.
10. _____: _____: _____: _____. A legislative act or statute may constitutionally divest the Public Service Commission of jurisdiction over common carriers to the extent that the Legislature, through specific legislation, has preempted the

Public Service Commission in control of common carriers.

11. _____: _____: _____: _____. While the Legislature may constitutionally occupy a regulatory field, thereby specifically and preemptively excluding the Public Service Commission from some control over a class of common carriers, the Legislature cannot absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers.
12. **Constitutional Law: Property: Due Proces.** A ratepayer's right to a fair and reasonable rate is a property entitlement protected by the due process clauses of the U.S. and Nebraska Constitutions.
13. **Constitutional Law: Due Process: Notice.** Only governmental decisions adjudicative in nature are subject to the procedural due process requirement of notice and hearing; legislative action is exempt from the constitutional protection of procedural due process.
14. **Constitutional Law: Property: Due Process: Notice: States.** Where the state grants its citizens a statutory right to notice and hearing on a matter or in a proceeding, the state, in making legislative determinations affecting a citizen's property right, must adhere to a procedure which comports with the requirements of the due process clauses of the U.S. and Nebraska Constitutions.
15. **Constitutional Law: Statutes.** When a fundamental right or suspect classification is not involved in legislation, a legislative act is a valid exercise of a state's police power if the act is reasonably related to a legitimate governmental interest.

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

Robert M. Spire, Attorney General, John R. Thompson, Dale A. Comer, and L. Jay Bartel for appellant.

J. Taylor Greer, Bert L. Overcash, and Paul M. Schudel, of Woods, Aitken, Smith, Greer, Overcash and Spangler; Harold L. Rock, David A. Jacobson, Maureen E. McGrath, and Nancy L. Dickhute, of Kutak Rock & Campbell; Richard A. Peterson, of Peterson Nelson Johanns Morris & Holdeman; and Mark E. Belmont for appellees.

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

SHANAHAN, J.

The Attorney General of the State of Nebraska, as relator, brought a declaratory judgment action in the district court for Lancaster County to have 1986 Neb. Laws, L.B. 835 (the act), now codified as Neb. Rev. Stat. §§ 86-801 et seq. (Reissue 1987), declared unconstitutional on a number of grounds. The

respondents, Northwestern Bell Telephone Company (NWB), Lincoln Telephone and Telegraph Company (LT&T), and AT&T Communications of the Midwest, Inc. (AT&T), which have litigable interests in the validity of the challenged act, contended that L.B. 835 was constitutional in all the provisions challenged by the Attorney General. The district court declared that L.B. 835 is "valid, constitutional, validly enacted and of lawful force and effect."

The Attorney General appeals, assigning as error the district court's (1) failure to hold that L.B. 835 unconstitutionally divests the Nebraska Public Service Commission (PSC) of its regulatory authority, granted in Neb. Const. art. IV, § 20, over telecommunications companies; (2) erroneous conclusion that L.B. 835 constituted valid "specific legislation" under Neb. Const. art. IV, § 20; (3) erroneous conclusion that telephone subscribers are not entitled to procedural due process in connection with telephone rate review proceedings conducted pursuant to L.B. 835; (4) erroneous conclusion that L.B. 835 contains adequate due process safeguards for telephone subscribers, assuming that subscribers are entitled to such protection; and (5) erroneous conclusion that the legislatively expressed goals of L.B. 835 may be fulfilled as a valid exercise of the state's police power.

STANDARD OF REVIEW

A declaratory judgment action, pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute. *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986).

In a declaratory judgment action involving the determination of factual issues, such issues may be tried and determined as in other civil actions. § 25-21,157; *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*, 226 Neb. 50, 409 N.W.2d 574 (1987). In appellate review of an action for a declaratory judgment in a law action, factual findings by the trier of fact will not be set aside unless such findings are clearly erroneous. *Heimbouch v. Victorio Ins. Serv., Inc.*, 220 Neb.

279, 369 N.W.2d 620 (1985). In appellate review of an action for declaratory judgment in an equity action, the standard of review for an equity case applies. *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *County of York v. Johnson*, 230 Neb. 403, 432 N.W.2d 215 (1988).

A declaratory judgment that L.B. 835 is unconstitutional might be a basis for injunctive relief against enforcement of the act and, unrelated to a claim for damages, is more akin to relief through an equity action rather than relief through a law action. Cf. *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987) (action for a declaratory judgment that a statute was unconstitutional and for an injunction against enforcement of the unconstitutional statute). Consequently, in the present appeal we apply the standard for review of an equity appeal:

> "In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another."

Frenzen v. Taylor, 232 Neb. 41, 42, 439 N.W.2d 473, 474-75 (1989).

One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988); *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984).

ACRONYMS AND TELEJARGON

As the result of *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd* 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983), divestiture of AT&T caused dramatic changes in the telecommunications industry. The

nation was divided into telephone service geographic areas called LATAs, an acronym for "Local Access and Transport Areas." The Bell operating companies, such as NWB, became subsidiaries of a regional holding company. Each holding company, through its subsidiaries, was allowed to provide only local exchange service by nontoll local calls or "POTS" ("Plain Old Telephone Service"), intraLATA toll service (long-distance toll calls to areas within a customer's LATA), exchange access service (customer access to long-distance carriers allowed for LATA to LATA, or "interLATA," service), and directory services. AT&T was free to enter and compete in all markets and, in fact, was granted authority by the PSC to serve Nebraska as an intrastate interLATA long-distance carrier.

Nebraska was divided into three LATAs—one LATA centered around Omaha, another around Lincoln, and the third LATA encompassed the balance of Nebraska.

BACKGROUND FOR L.B. 835

The Federal Communications Commission controls interstate interexchange long-distance service. Consequently, before L.B. 835, the PSC controlled three basic types of telecommunications in Nebraska: (1) local exchange service, or "POTS"; (2) intraLATA interexchange service (toll calls within the LATA from exchange to exchange); and (3) intrastate interLATA service (toll calls within the state from LATA to LATA). Before L.B. 835, the PSC had authority to approve telephone rates submitted by applications from telecommunications companies, to control entry into and exit from the market by a telecommunications supplier, and to control the quality of service provided by telecommunications companies.

In 1985, the Legislature commissioned the Arthur Andersen Accounting firm to prepare a survey of the telecommunications industry in Nebraska. Andersen's "major observations" were reflected in the "Executive Summary" of its report:

> [1.] Further competition within the telecommunications industry in Nebraska is inevitable. . . .
>
> [2.] The main influence behind increased competition is technology. . . .

> [3.] Based on historical activity, it appears that further changes in the industry and the technologies which support the industry will be at least as rapid and dramatic as changes in the last decade. . . .
>
> [4.] Under the present regulatory framework and pricing structure, bypass of the traditional telephone system is likely to continue and may accelerate as technology advances and competition increases. . . .
>
> [5.] As the industry changes and competition increases, the shifting of revenues may create difficulties for some service providers and opportunities for others. . . .
>
> [6.] The pricing of telephone services has undergone changes and will continue to change.

Andersen's report expressed concern over a recently developing telecommunications phenomenon known as "bypass," when a current customer forgoes service by a local or long-distance telephone company and obtains service through facilities of another company. A microwave system is an illustration of technology which may be involved in a bypass. If a customer, motivated by economic incentive based on the customer's substantial requirements for telephone service, elects to bypass the customer's telephone company, the bypassed company's other customers will pay higher rates "to help support the [bypassed] system's fixed costs" because there are fewer customers.

THE ACT: L.B. 835

In response to the concerns expressed in Andersen's report and by the telecommunications industry, the Legislature, after much debate, enacted L.B. 835.

Statutory Objectives of L.B. 835

Section 1 of L.B. 835 (§ 86-801)

> declares that it is the policy of the state to:
>
> (1) Preserve affordable telecommunications services;
>
> (2) Maintain and advance the efficiency and availability of telecommunications services;
>
> (3) Ensure that consumers pay only reasonable charges for telecommunications services; and
>
> (4) Promote diversity in the supply of telecommuni-

cations services and products throughout the state.

PSC's Regulatory Power

Section 3, subsection (1), of L.B. 835 (§ 86-803(1)) concerns the scope of PSC regulation over telecommunications companies:

> Except as provided in sections 1 to 11 of this act, telecommunications companies shall be subject to regulation by the commission [PSC]. Telecommunications companies shall not, however, be subject to any rate regulation by the commission and shall not be subject to provisions as to rates and charges prescribed in Chapter 75, articles 1 and 6. Telecommunications companies shall, instead, file rate lists for their telecommunications services which shall be effective after ten days' notice to the commission with the exception of monthly rates for basic local exchange services.

Thus, for intraLATA interexchange and interLATA service, rates submitted to the PSC become effective after 10 days, and, as the result of L.B. 835, the PSC has no power to review those rates.

PSC Rate Authority over "POTS"

Section 3, subsection (2), of L.B. 835 (§ 86-803(2)) allows telecommunications companies to change local exchange rates only after 60 days' notice to subscribers affected by the rate change. The requisite notice to customers must include:

> (a) the reasons for the rate increase, (b) a description of the affected service, (c) an explanation of the right of the subscriber to petition the commission for a public hearing on the rate increase, (d) a list of exchanges which are affected by the proposed rate increase, and (e) the dates, times, and places for the public informational meetings required by this section.

L.B. 835 substantially changed the previous PSC regulatory scheme by restricting the situations in which the PSC was empowered to review reasonableness of certain rates charged by telephone companies. Under L.B. 835, the PSC has power to review rates for basic local exchange service only (1) when a complaint, signed by a specified percentage of subscribers

(from 2 percent to 5 percent, depending on the number of subscribers affected by the rate in question), is filed within 60 days after notice has been sent to the subscribers, and (2) on PSC's own motion if a telecommunications company has increased basic local exchange rates by more than 10 percent in any 12-month period. L.B. 835, § 3(3) and (7) (§ 86-803(3) and (7)). Under both rate review procedures, the PSC must hold a hearing within 90 days after (1) the subscribers' complaint has been filed (customer-instigated review) or (2) notice to the telecommunications company (PSC-initiated review), and determine whether the proposed rates are "fair, just, and reasonable." Within 60 days after the hearing, the PSC may enter "an order adjusting the rates and charges at issue, except that the [PSC] may not set any rate or charge below the actual cost of providing such service . . . ." L.B. 835, § 3(7). If the PSC fails to issue an order within 60 days after the hearing, the rates placed in effect by the telecommunications company are deemed approved. L.B. 835's provision for customer-initiated rate review by the PSC terminates August 31, 1991.

Company-Initiated Review

A telecommunications company may file an application with the PSC and request the PSC to prescribe fair and reasonable rates for the company. L.B. 835, § 3(4) (§ 83-803(4)).

Quality of Service

Subsection (6) of § 3 in L.B. 835 provides that the PSC "shall retain quality of service regulation over the services provided by all telecommunications companies . . . ." § 86-803(6).

Change in Rates Set by PSC

In L.B. 835, subsection (10) of § 3 provides: "No telecommunications company may change its basic local exchange rate within ninety days after entry of a final order adjusting such rate pursuant to subsections (3), (4), and (7) of this section." § 86-803(10).

Monitoring by PSC; Annual Report to Legislature

Section 4 (§ 86-804) of the act pertains to the PSC's continued monitoring of the telecommunications industry:

The commission shall provide the Legislature with an

annual report on or before January 5 of each year on the status of the Nebraska telecommunications industry. The report shall describe: (1) The quality of telecommunications services being provided to the citizens of Nebraska; (2) the availability of diverse and affordable telecommunications services to all of the people of Nebraska; and (3) the level of rates of local exchange companies and interexchange telecommunications companies. The report shall also address the question of the need for further legislation to achieve the purposes of sections 1 to 11 of this act.

PSC Control over Entry into the Market; Record Keeping

Section 5 of L.B. 835 (§ 86-805) authorizes the PSC to issue a certificate to a telecommunications company for interLATA interexchange service within Nebraska and to deny certification to any telecommunications company which:

(a) Does not provide the information required by the commission;

(b) Fails to provide a performance bond, if required;

(c) Does not possess adequate financial resources to provide the proposed service; or

(d) Does not possess adequate technical competency to provide the proposed service.

Section 7 of the act (§ 86-807) provides:

(1) Except for requirements established by statute, the commission may limit, remove, or waive regulatory requirements for telecommunications companies when it determines that competition will serve the same purposes as public interest regulation. The commission may revoke any waivers it grants or reinstate regulations if such revocation or reinstatement would protect the public interest upon a finding that the telecommunications company is restricting market output, impairing customer interest, or engaging in unlawful anticompetitive activity.

(2) A telecommunications company shall at a minimum:

(a) Keep its accounts according to rules and regulations adopted and promulgated by the commission;

(b) File financial reports with the commission as required by and in a form and at times prescribed by the commission;

(c) Keep on file at the commission such current price lists and service standards as the commission may require; and

(d) Cooperate with commission investigations of customer complaints.

Nonregulated Activities

Section 8 of the act (§ 86-808) exempts "[o]ne-way broadcast or cable television transmission of television or radio signals," mobile radio service, radio paging service, and cellular services from regulation by the PSC.

Actions Against Telecommunications Companies

Section 11 of L.B. 835 (§ 86-811) allows "any interested person" to file an action in the district court concerning a telecommunications company's alleged violation of L.B. 835. If the company has violated the act, "the court may issue an injunction or other proper process to restrain the telecommunications company . . . from continuing such violation and may order additional relief."

Severability

Section 16 of the act provides: "If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof."

L.B. 835'S ECONOMIC IMPACT ACCORDING TO EXPERTS

Conflicting testimony from two experts in telecommunications economics was the focal point of the declaratory judgment action. Dr. Walter Bolter, a certified public accountant and engineer, who also holds a Ph.D. in economics, expressing his opinion whether L.B. 835 advanced the four goals listed in the statute's "policy statement," testified that the act would neither preserve affordable telecommunications service in Nebraska nor advance efficiency and availability of telecommunications service. Dr. Bolter based his opinion on the

"very monopolistic" state of the telecommunications industry in Nebraska, which, coupled with PSC's diminished power to regulate rates and L.B. 835's barriers for entry into the marketplace, accorded telecommunications companies an unrestricted ability to raise rates. In essence, Dr. Bolter questioned the wisdom of leaving price control to market forces when, in his view, such forces were too insignificant to exert any influence on the major telecommunications companies.

Dr. Bolter further testified that under L.B. 835, consumers would "only by happenstance" pay reasonable rates for their telecommunications services. Once again, Dr. Bolter based his opinion on the absence of market forces as a substitute for regulation and control of prices for telecommunications. Finally, Dr. Bolter testified that he did not believe that L.B. 835 would "promote diversity in the supply of telecommunications services and products" in view of a new supplier's difficulty which would be experienced in entering and competing within the telecommunications industry. Dr. Bolter also testified about the condition of competition in three areas of the telephone market: interLATA; intraLATA interexchange; and intraLATA local exchange, or "POTS." Despite the presence of other interLATA suppliers, AT&T's dominance prevented competition in the interLATA market. The intraLATA interexchange market is much more concentrated than the interLATA market and is, therefore, more vulnerable to "price leadership" by a large, monopolistic supplier. Dr. Bolter noted, however, that the PSC had received applications from new entrants into the intraLATA market—applicants which could provide some competition to existing suppliers. Although there have been no applications for local telephone service by new entrants which could compete with existing suppliers, some technological developments, such as private microwave systems and cellular phones, may provide customers with local exchange service. According to Dr. Bolter, statistics regarding revenues lost by major telecommunications companies as the result of bypass are "very sketchy."

John Vondras, executive assistant to the president of NWB and a NWB employee for 16 years, testified regarding "bypass," the most significant form of competition

confronting NWB. Bypass occurs when a customer of NWB, AT&T, or LT&T uses another company's facilities to complete a telephone call. In a study of NWB's 149 largest customers, NWB determined that 140 customers had a volume and pattern of telecommunications usage which made bypass economically attractive. According to Vondras, NWB's study revealed that bypass could result in lost revenue of $27 million for NWB. Vondras testified that on account of a number of technological advances during the past few years, NWB faces competition in the local exchange market.

Dr. Frank Alessio, who has a Ph.D. in economics and is a lecturer in the public utilities program at Stanford University, performed his own analysis of the telecommunications industry's condition in Nebraska. Dr. Alessio focused on "revenue vulnerability," a telephone company's traditional revenue which a new competitor might be able to "pick off." Dr. Alessio testified that because high-volume customers in both Omaha and Lincoln were clustered in relatively small geographic areas, a new entrant into the market could easily obtain a substantial volume of business without incurring inordinately high costs for entering the market. Based on his analysis, Dr. Alessio concluded that the telecommunications market in Nebraska was "technically contestable, rivalrous and workably competitive."

Referring to L.B. 835, Dr. Alessio testified that as a result of changes in technology and customer needs, "traditional public utility regulation is no longer workable in the current environment in telecommunications." Dr. Alessio characterized L.B. 835 as "a refreshingly realistic view of what regulator oversight needs to be in the dynamic market time we are seeing." Regarding L.B. 835's policy statement, Dr. Alessio disagreed with Dr. Bolter's opinion that customers would pay reasonable telephone rates only by happenstance. According to Dr. Alessio, to preserve affordable telephone rates for consumers, existing telecommunications companies needed competitive freedom which was unobtainable under previous telephone regulation by the State of Nebraska. Dr. Alessio also expressed his belief that L.B. 835 will foster diversity in telecommunications service, may encourage new competitors

to enter the market, and will advance availability and efficiency in telecommunications services throughout Nebraska.

CONSTITUTIONAL AUTHORITY OF THE PSC

The Attorney General's first two assignments of error relate to the application of Neb. Const. art. IV, § 20, which outlines the constitutional authority of the PSC:

> The powers and duties of such commission [the PSC] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

The Attorney General claims that L.B. 835 unconstitutionally divests the PSC of its authority to regulate rates because the act does not constitute "specific legislation" by which the Legislature may restrict the authority exercisable by the PSC.

PSC authority over telephone companies is rooted in legislative, judicial, and electoral activities during the early 1900s. In the election of November 6, 1906, the forerunner of Neb. Const. art. IV, § 20, was added by amendment to the state Constitution, an amendment which created the "State Railway Commission" with authority to regulate "common carriers." Comp. Stat. § 421a (1909). In 1907, the Legislature enacted statutes "creating and defining the Powers, Duties and Qualifications of the State Railway Commission" and which included telephone companies within the definition of "common carriers." Rev. Stat. § 6124 (1913). See, also, *Marquis v. Polk County Telephone Co.*, 100 Neb. 140, 144, 158 N.W. 927, 928 (1916): "[B]y section 6124, Rev. St. 1913, the term 'common carrier' is expressly made to include telephone companies." PSC control over rates and service of telephone companies has been repeatedly recognized by this court. See, *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N.W. 674 (1914); *Marquis v. Polk County Telephone Co., supra*; *Farmers & Merchants Telephone Co. v. Orleans Community Club*, 116 Neb. 633, 218 N.W. 583 (1928); *Block v. Lincoln Tel. & Tel. Co.*, 170 Neb. 531, 534, 103 N.W.2d 312, 314-15 (1960) ("Within the meaning of the Constitution

telephone companies are common carriers").

Before the constitutional amendment establishing the PSC, the Legislature was the sole repository for control over telephone company rates. The constitutional amendments of 1906 and 1907 extended to the PSC the regulatory power which was previously exercisable only by the Legislature. *Marquis v. Polk County Telephone Co., supra.*

> Briefly stated, the railway commission [PSC] is created by section 20, article IV, of the Constitution. It is granted powers and duties which include the regulation of rates, service, and general control of common carriers as directed by the Legislature. In a field where the Legislature has not acted, the commission is authorized to exercise the powers and perform the duties enumerated in the constitutional provision. This means, of course, that the Legislature may properly enact specific legislation limiting the scope of the commission's powers.

Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 283, 34 N.W.2d 363, 365 (1948). See, also, *State, ex rel. Missouri P. R. Co., v. Clarke*, 98 Neb. 566, 153 N.W. 623 (1915); *In re Lincoln Traction Co.*, 103 Neb. 229, 171 N.W. 192 (1919); *Blackledge v. Farmers Independent Telephone Co.*, 105 Neb. 713, 181 N.W. 709 (1921); *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 25 N.W.2d 824 (1947); *Dahlsten v. Harris*, 191 Neb. 714, 217 N.W.2d 813 (1974). As a result of specific legislative action,

> the Legislature has the right by law to prescribe how the commission shall proceed and what authority it may exercise in the regulation and general control of common carriers. Therefore, when specific legislation is enacted upon a subject in relation thereto, such legislation preempts the field so occupied and thereby prescribes and controls the powers and duties of the commission.

Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 653, 28 N.W.2d 396, 400 (1947). See, also, *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 337, 37 N.W.2d 502, 506 (1949) ("The commission [PSC] is a regulatory body of constitutional origin not amenable to legislative interruption or limitation of its status or powers

except by specific legislation . . ."). Although the PSC is an independent regulatory body under the Nebraska Constitution, PSC jurisdiction to regulate common carriers may be restricted by the Legislature through "specific legislation." Neb. Const. art. IV, § 20.

L.B. 835 undoubtedly restricts the PSC's power. For that reason, under Neb. Const. art. IV, § 20, validity of L.B. 835 turns on the question whether the act constitutes "general" or "specific" legislation. As noted in *State ex rel. State Railway Commission v. Ramsey, supra*:

> The right to regulate "as" the Legislature may provide means the right to regulate in the manner in which the Legislature provides. . . . The word "specific" in the phrase "in the absence of specific legislation" is synonymous with the word "particular." The term implies a definite restriction on the kind and extent of legislation over common carriers which is permissible by the Legislature. It [specific] is defined in 58 C. J., Specific, p. 826 as follows: "Definite, or making definite; limited or precise; precisely formulated or restricted; tending to specify or make particular. Although the term is a relative one, it is limited to a particular, definite, or precise thing, and hence is the very opposite of 'general'." It was not intended by the use of these words to authorize unlimited, broad, general legislation in reference to the control and regulation of common carriers.

Id. at 344, 37 N.W.2d at 509.

Our prior decisions regarding interpretation of Neb. Const. art. IV, § 20, seem to draw a distinction between statutes by which the Legislature attempted to transfer regulation of common carriers to an agency distinct from the PSC and statutes by which the Legislature itself "occupies the field" and becomes, in effect, the regulatory body which exercises control over common carriers. The Legislature cannot constitutionally divest the PSC of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, except the Legislature, with control over the class of common carriers. *State ex rel. State Railway Commission v. Ramsey, supra* (unconstitutional legislative

attempt to vest the Nebraska Department of Aeronautics with power to "control common carriers by air"); *Rivett Lumber & Coal Co. v. Chicago & N. W. R. Co.*, 102 Neb. 492, 167 N.W. 570 (1918) (statute designed to produce reasonable rail service did not authorize the court to exercise control over service by a railroad as a common carrier). However, a legislative act or statute may constitutionally divest the PSC of jurisdiction over common carriers to the extent that the Legislature, through specific legislation, has preempted the PSC in control of common carriers. See, *Rodgers v. Nebraska State Railway Commission*, 134 Neb. 832, 844, 279 N.W. 800, 807 (1938) ("[T]he plenary power of the railway commission may only be curtailed or diminished where the legislature has, by specific legislation, occupied the field"); *State v. Chicago & N. W. Ry. Co., supra* at 977, 25 N.W.2d at 828 ("The legislative act under consideration clearly deprives the Nebraska State Railway Commission of any power to act to the extent that it occupies the field").

Thus, while the Legislature may constitutionally occupy a regulatory field, thereby specifically and preemptively excluding the PSC from some control over a class of common carriers, the Legislature cannot absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers. For example, legislation which directs that the PSC cannot exercise its constitutionally granted power over a particular common carrier or a class of common carriers, or which dictates that the Legislature shall not enact regulatory statutes concerning a common carrier or class of common carriers, violates Neb. Const. art. IV, § 20. If such abandonment or abolition of regulatory control were permitted, the protection afforded to Nebraska citizens by the constitutionally created and empowered PSC would cease to exist. Neb. Const. art. IV, § 20, requires that the power to regulate common carriers exist either in the PSC or the Legislature.

L.B. 835 does not totally divest the PSC of jurisdiction over telecommunications companies, completely preclude the PSC's regulation of telecommunications companies, or transfer regulatory control to a governmental agency, body of

government, or branch of government except the Legislature. Instead, L.B. 835 restricts the situations and manner in which the PSC may exercise its regulatory power over rates of telecommunications companies. Regarding basic local exchange service, L.B. 835 expressly and precisely delineates the situations and manner in which the PSC may exercise its power in relation to its duties. See L.B. 835, § 3(3) and (7) (§ 86-803(3) and (7)). Concerning intrastate toll calls, however, L.B. 835 completely divests the PSC of its regulatory control over rates. L.B. 835, § 3(1) (§ 86-803(1)). The constitutionality of these restrictions on the PSC's regulatory power depends on the characterization of the statute as either specific legislation or general legislation.

Although L.B. 835 restricts the PSC's authority over the rates set by telecommunications companies, the act leaves intact PSC control over the quality of service provided by telecommunications suppliers, and retains the PSC's power to allow entry into and exit from the marketplace. L.B. 835, § 3(6) (§ 86-803(6)); L.B. 835, §§ 5 and 6 (§§ 86-805 and 86-806). Thus, the PSC will "investigate and resolve subscriber complaints concerning quality of telecommunications service, subscriber deposits, and disconnection of service." L.B. 835, § 3(6) (§ 86-803(6)). If informal resolution of the complaint is not accomplished, the customer may file a petition with the PSC, which will then hold a hearing on the customer's complaint, and may enter an order granting such relief as the PSC deems necessary. Furthermore, the PSC is empowered to control entry into the "interLATA interexchange" market through the "certificate" process, that is, the PSC may authorize a telecommunications company which has supplied the requisite information to supply "interLATA interexchange" service. L.B. 835, § 5 (§ 86-805). The PSC also retains the power to determine whether and when a telecommunications company may abandon or discontinue service to a local exchange area. L.B. 835, § 6 (§ 86-806).

L.B. 835 further requires that the PSC report annually to the Legislature and suggest additional legislation, if any, which may accomplish the goals of the act. L.B. 835, § 4 (§ 86-804).

The Legislature has not abandoned or abolished all PSC

regulation of telecommunications companies. Rather, through L.B. 835, the Legislature has restricted or limited the regulatory power of the PSC concerning rates and has provided a means by which the system of limited rate regulation may be evaluated by the Legislature. L.B. 835, § 4 (§ 86-804). The act preserves the PSC's regulatory jurisdiction regarding quality of service and entry into the telecommunications market and, therefore, does not divest the PSC of its regulatory power over telephone companies. The provisions in L.B. 835 concerning rate review in the various telecommunications markets are specific legislation rather than general. We therefore hold that L.B. 835 constitutionally divests the PSC of rate review jurisdiction over intraLATA interexchange and interLATA intrastate telephone service, and constitutionally limits PSC rate review jurisdiction over local exchange service rates.

L.B. 835 does not violate Neb. Const. art. IV, § 20, by nullifying PSC jurisdiction over telecommunications companies. Rather, the act constitutes specific legislation prescribing the method and manner in which the PSC will exercise its regulatory activities concerning telephone companies. The district court correctly concluded, and we also conclude, that L.B. 835 is specific legislation which constitutionally restricts the PSC's regulatory power pursuant to the Nebraska Constitution.

PROCEDURAL DUE PROCESS FOR TELEPHONE SUBSCRIBERS

The Attorney General also contends that L.B. 835 unconstitutionally denies due process to telephone subscribers regarding PSC proceedings for review of a telephone company's rates and maintains that (1) the 60 days allotted for subscribers to gather signatures necessary to challenge a proposed rate is constitutionally insufficient and that (2) the 90-day period prescribed between the ratepayers' filing a complaint and the PSC's hearing does not provide adequate time for subscribers to prepare opposition to the rate proposal. See L.B. 835, § 3(3) (§ 86-803(3)).

Setting a rate for a common carrier is a legislative act. *Nebraska Limestone Producers Assn. v. All Nebraska*

Railroads, 168 Neb. 786, 97 N.W.2d 331 (1959); *Bard v. Cox Cable of Omaha, Inc.*, 226 Neb. 880, 416 N.W.2d 4 (1987). On the ground that a legislatively determined rate was "confiscatory" or "unreasonable, arbitrary and capricious," courts have invalidated rates set for a common carrier. Before 1975, only common carriers had successfully challenged rates which denied a reasonable return on investment in the carrier. See, *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970); *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975); *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986).

Beginning with *Myers, supra*, this court has recognized an apparent species of protectable property interest in ratepayers relative to common carriers. In *Myers*, Blair Telephone Company appealed from the PSC's order that the company lower its rates and partially return overcharges attributable to the company's inadequate service. The company challenged the new rate on the ground that it was "confiscatory so as to deprive the utility of property without compensation." *Myers v. Blair Tel. Co., supra* at 62, 230 N.W.2d at 195-96. The court held that the PSC cannot set a confiscatory rate applied to the common carrier and further noted:

> As a corollary thereto, however, neither should the utility be permitted to confiscate the ratepayers' fees without giving the reasonably adequate service for which those rates were set. The commission can no more permit the utility to have confiscatory rates for the service it performs than it can compel a utility to provide service without just and equitable compensation. As a matter of elemental justice, consumers of utility services are entitled to the same protection against confiscation of property or arbitrary action on the part of the utility as are the utilities.

Id. at 62, 230 N.W.2d at 196. Unfortunately, the *Myers* court did not indicate the particular constitutional or statutory right of a customer protected against a common carrier's "confiscatory" rate. The court's focus in *Myers* on confiscation of property, however, suggests that the right to a fair and reasonable rate of return may have been based on the "takings clause" of the U.S. Constitution. U.S. Const. amends. V and

XIV. See, also, Neb. Const. art. I, § 21.

The protection afforded telephone ratepayers in *Myers* was extended to natural gas customers in *Reimer v. K N Energy, Inc., supra*, when ratepayers of a natural gas company, which was the franchised supplier of natural gas for the city in which the ratepayers lived, challenged the company's imposition of a $4 per month minimum customer service charge. After the district court sustained the gas company's demurrer (subject matter jurisdiction, plaintiff's lack of capacity to maintain the suit, and failure to state a cause of action) and dismissed the action, the ratepayers appealed. In upholding jurisdiction over the dispute, this court reversed and, after citing *Myers v. Blair Tel. Co., supra,* held that

> just as the district court has the power to protect a supplier of natural gas from municipal action which deprives it of a fair, reasonable, and compensatory rate, so, too, does the district court have the power to protect a consumer of such gas from an arbitrary, unreasonable, and confiscatory rate.

Reimer v. K N Energy, Inc., supra at 145, 388 N.W.2d at 482.

In neither *Myers* nor *Reimer* did this court rely on a lack of procedural due process as the basis for a ratepayer's challenge to a common carrier's rate, but did recognize protection against a confiscatory rate notwithstanding that a ratepayer has had the opportunity to be heard in opposition to the rate set. Thus, after *Myers* and *Reimer*, the protection in Nebraska against a confiscatory rate seemed more a matter of substantive due process than procedural due process.

The only Nebraska decision involving due process concerns regarding "ratepayers' rights" is *Bard v. Cox Cable of Omaha, Inc., supra*. Cox Cable had been granted a franchise by the city to supply the city's residents with cable television services. Bard, a subscriber of cable television service, brought suit and claimed that the cable television rates set by the city, and accordingly charged by Cox Cable, were excessive. The district court sustained demurrers (subject matter jurisdiction) filed by the city and Cox Cable, and, after dismissal of the action on account of the demurrers, Bard appealed. We summarized Bard's challenge to the rates approved by the city:

> Bard further alleges, however, that Cox Cable's rates violate the due process clause of the 14th amendment to the U.S. Constitution and several provisions of the Nebraska Constitution, including the due process clause contained in article I, § 3, thereof. The constitutional argument she makes limits itself to those due process clauses, and we, therefore, likewise limit our analysis to due process concerns.
>
> Because the setting of rates for a regulated industry is a legislative act, the courts of this state lack the power to set rates. [Citation omitted.] The courts do, however, have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus *unconstitutionally take property without due process of law*. [Citations omitted.]
>
> Thus, in the absence of overriding federal law, the district court possesses subject matter jurisdiction to determine whether Cox Cable's rates are so arbitrary and unreasonable as to be confiscatory.

(Emphasis supplied.) *Bard v. Cox Cable of Omaha, Inc.*, 226 Neb. 880, 886, 416 N.W.2d 4, 8 (1987). After holding that federal law did not preclude a state court's review of Cox Cable's rates, this court analyzed the allegations in Bard's petition and concluded that the allegations

> support an inference that Cox Cable's subscribers are paying a rate which includes a charge for something that is not being delivered to them and that, to that extent, the rate is arbitrary and unreasonable such as to be confiscatory and therefore in violation of the due process clauses of the state and federal Constitutions.

226 Neb. at 889, 416 N.W.2d at 10.

In *Bard*, however, we did not definitively characterize the due process concern as procedural or substantive. The analysis in *Bard* seems to focus on the content of the legislative enactment, that is, rates set by the city, rather than the procedure by which the rates were set inasmuch as Bard's claim did not relate to an alleged lack of notice, or a denial of an adequate opportunity to oppose the rate, but did relate to an imposed rate alleged to be unreasonable and confiscatory.

Although telephone subscribers undoubtedly have the right to be free from "arbitrary, unreasonable, and confiscatory" rates when state action is required for implementation of those rates, we interpret that right as a substantive limitation on the power of the governmental entity exercising the ratesetting function. Thus, the state is not entitled to set a rate for telephone service which effectuates a taking of property without just compensation, whether the property taken belongs to a telephone company or to a subscriber. As a trio of decisions concerning "ratepayers' rights," *Myers*, *Reimer*, and *Bard* do not relate to procedural due process in rate regulation. However, by reason of those decisions, ratepayers have a legitimate claim of entitlement to reasonable rates for telecommunications service supplied to the ratepayers. See *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Thus, a ratepayer's right to a fair and reasonable rate, a right which has emerged from the decisions of this court, is properly classified as a "property" entitlement protected by the due process clauses of the U.S. and Nebraska Constitutions. See *Board of Regents v. Roth, supra*.

Our holding that ratepayers have a constitutionally cognizable property entitlement to reasonable telephone rates, when government involvement is necessary to implement those rates, resolves only the threshold issue whether the due process clause is applicable to the facts of this case. The question remains: What process is due? Before L.B. 835, our decisions made clear that the ratesetting authority of the PSC is legislative in character, which, if properly exercised, has the effect of a

statute on the subject of reasonable rates. *Nebraska Railroads of Omaha v. Nebco, Inc.*, 194 Neb. 322, 231 N.W.2d 505 (1975); *United Mineral Products Co. v. Nebraska Railroads*, 175 Neb. 285, 121 N.W.2d 492 (1963).

If the PSC's ratemaking authority remains legislative in nature after enactment of L.B. 835, customers have no due process right to notice and hearing on ratemaking as a legislative function. "There is no constitutional due process requirement of notice and hearing applicable to legislative matters." *Barnett v. Boyle*, 197 Neb. 677, 679, 250 N.W.2d 635, 637 (1977). The rationale underlying a refusal to recognize a constitutional right to notice and hearing in legislative matters was first expressed by the U.S. Supreme Court in *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915), when Justice Holmes, speaking for the Court, stated:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Accord, *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223 (1973); *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944). Only governmental decisions adjudicative in nature are subject to the procedural due process requirement of notice and hearing; legislative action is exempt from the constitutional protection of procedural due process. *Horn v. Cty. of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979).

> It is most common for the government to affect the life, liberty or property interest of a great number of people through its legislative functions. When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the

> legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees. Similarly, an administrative agency may make decisions that are of a legislative or general rulemaking character. When an agency promulgates generalized rules there is no constitutional right to a hearing for a specific individual. However when the agency makes rules that might be termed adjudicative in that they affect a very defined group of interests, then persons representing those interests should be granted some fair procedure to safeguard their life, liberty or property.

J. Nowak, R. Rotunda, & J. Young, Constitutional Law § 13.8 at 485 (3d ed. 1986). See, also, *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir. 1986) ("When the legislature enacts a law, or a state agency adopts a regulation, that affects a general class of persons, all of those persons have received procedural due process by the legislative process itself and they have no right to individual attention"). See, further, *Nolan v. Ramsey*, 597 F.2d 577 (5th Cir. 1979).

In *City of Scottsbluff v. United Tel. Co. of the West*, 171 Neb. 229, 240, 106 N.W.2d 12, 18-19 (1960), after noting the legislative nature of the PSC's ratesetting function, this court held that

> no notice to plaintiff was required to be given by the commission before it acted legislatively in permitting defendant [telephone company] to revise and amend its rate rules and regulations to permit it to collect pro rata from its subscribers within the city the occupation tax imposed by the city unless a statute specifically required notice.

Thus, before enactment of L.B. 835, a telephone subscriber had no due process right to notice and hearing regarding ratemaking because the PSC's action in setting rates was classified as a legislative function.

The Attorney General concedes that the PSC's function in ratemaking before L.B. 835 was legislative. The Attorney General contends, however, that the changes in PSC review effectuated by L.B. 835 have altered the nature of the PSC's

role in the rate regulation process. We disagree. L.B. 835 merely prescribes the situations in which the PSC will perform its ratemaking function, and does not modify the nature of the inquiry made by the PSC in rate cases before the commission. Both before and after enactment of L.B. 835, the PSC's function in ratemaking is to determine what rates are "fair, just, and reasonable." L.B. 835, § 3(3), (4), and (7) (§ 86-803(3), (4), and (7)). As a result of L.B. 835, the fact that the PSC performs its ratemaking function only in limited circumstances does not affect or change the legislative character of the PSC's power. Because a reasonable rate, determined by the PSC, affects a large number of Nebraska citizens, and not a rather limited number of specifically identifiable individuals, the PSC's activity is properly characterized as legislative. Furthermore, the PSC's determination of a reasonable rate does not resolve a past dispute between identified parties. Rather, PSC determination of a reasonable rate merely sets a rate for the future. Whether activated by the PSC itself, by a telecommunications company, or by a company's subscribers, the PSC's ratemaking power remains legislative under L.B. 835.

The Attorney General next contends that L.B. 835 grants subscribers a right to notice and hearing regarding rates, a right which must comport with the constitutional concept of due process. In *State v. Kelley*, 198 Neb. 805, 809, 255 N.W.2d 840, 843 (1977), we held that although a criminal defendant has no due process right to an appeal, "when the Nebraska Constitution grants appeal as a matter of right, the procedure afforded must accord with the federal constitutional concepts of due process." See *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (a state-granted right must be accorded due process protection). While *Kelley* and *Griffin* concerned due process in criminal matters, the principle announced in those cases seems equally compelling in civil cases. We therefore hold that where the state grants its citizens a statutory right to notice and hearing on a matter or in a proceeding, the state, in making legislative determinations affecting a citizen's property right, must adhere to a procedure which comports with the requirements of the due process clauses of the U.S. and Nebraska Constitutions.

In the present case, the due process clauses of the state and federal constitutions did not obligate the Legislature to grant telecommunications subscribers notice and hearing for a rate determination by the PSC. However, when the state conferred the right to notice and hearing regarding the ratemaking process, the Legislature was obligated to assure that such process is fundamentally fair and meaningful. The Attorney General contends that L.B. 835 offends due process by unfair time limits in the 60-day period for obtaining signatures on a petition to trigger subscriber-initiated ratemaking by the PSC and in the 90-day hearing after the subscriber's petition has been filed or a telecommunications company has filed an application for a rate increase in excess of 10 percent. See L.B. 835, § 3(3) (§ 86-803(3)).

> " ' "* * * The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it." . . .' "

Hroch v. City of Omaha, 226 Neb. 589, 591, 413 N.W.2d 287, 288 (1987) (quoting *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951)).

We believe that the procedure outlined in L.B. 835 provides an adequate opportunity for telecommunications customers to protect their property entitlement to a reasonable telecommunications rate through subscriber participation in the PSC ratemaking hearings. For the two largest telecommunications suppliers in Nebraska, namely, NWB and LT&T, the 60-day petition process for subscriber initiation of PSC review requires that customers daily obtain 115 signatures on the petition pertaining to NWB and 88 signatures on the petition pertaining to LT&T. Given the availability of potential signatories, that is, all the telecommunications subscribers affected by the proposed rate, the Attorney General has failed to demonstrate that the 60-day time limit is unreasonable in the constitutional context of due process.

Also, the Attorney General has failed to demonstrate that

the 90-day period is inadequate for preparation of ratepayer opposition to be presented at the PSC hearing. Due to the legislative nature of the PSC's ratemaking task, L.B. 835, as a matter of constitutional consideration, need not confer on ratepayers a right to present evidence or relevant information at the PSC hearing. Notwithstanding the complexity of issues frequently involved in a rate case before the PSC, the 90-day period is ostensibly sufficient for taxpayers to gather information to challenge a telephone company's proposed rate and, therefore, gives consumers a "reasonable opportunity to be heard" and present their opposition to the proposed rate. Combined with the 60-day period to gather signatures, a consumer group could have as much as 5 months to prepare for the PSC rate hearing. Furthermore, the PSC has authority to require a telecommunications company to submit its financial reports, which would undoubtedly facilitate inquiry into reasonableness of the rates proposed by the telecommunications company. In view of the PSC's role in protecting the public interest by assuring that the rates are "fair, just, and reasonable," we are unable to conclude that the 90-day period prescribed by L.B. 835 unconstitutionally deprives telecommunications subscribers of due process. Neither the U.S. Constitution nor the Nebraska Constitution requires that telecommunications subscribers be granted any additional procedural protection beyond that embodied in L.B. 835. The Attorney General's claim that L.B. 835 violates telephone subscribers' due process rights is, therefore, without merit.

L.B. 835 AND THE STATE'S POLICE POWER

The Attorney General's final contention is that L.B. 835 is unconstitutional because the act bears no real or substantial relationship to the general health, morals, or welfare of the public, and, therefore, is not a valid exercise of the state's police power.

> The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and

> generally for the public welfare. [Citation omitted.] Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. [Citation omitted.]

Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm., 217 Neb. 487, 489, 351 N.W.2d 701, 703 (1984). Thus, when a fundamental right or suspect classification is not involved in legislation, a legislative act is a valid exercise of a state's police power if the act is reasonably related to a legitimate governmental interest. See *People v. Pharr*, 696 P.2d 235 (Colo. 1984).

The language of a legislative enactment may provide a manifest indication of the objective to be achieved through the legislation. See *Schaffer v. City of Omaha*, 197 Neb. 328, 248 N.W.2d 764 (1977). However, with or without an expression of the legislatively avowed objective, a court has the duty to determine whether the Legislature has exercised the state's police power in a manner reasonably related to the general health, morals, or welfare of the state's citizens. If the legislative enactment furthers a governmental interest in the well-being of the citizenry, the act must be upheld regardless of whether the Legislature contemplated the exact nature of the benefit accorded by the legislation.

The Attorney General has made no argument that L.B. 835 endangers a fundamental right or results in a suspect classification. Therefore, the act is a valid exercise of police power if the legislation is reasonably related to the general welfare of the people of Nebraska.

Without again setting forth in detail the conflicting testimony of the two economic experts presented by each side, we find that L.B. 835 is reasonably related to legitimate governmental interests of the State of Nebraska. Dr. Alessio's testimony indicates that Nebraska's regulatory structure before L.B. 835 did not provide existing telecommunications companies with the pricing flexibility needed to respond to an increasingly competitive market. Without this flexibility, telecommunications companies would likely lose, and in fact have lost, revenue previously derived from a number of their

larger subscribers. Furthermore, L.B. 835 allows the PSC to "limit, remove, or waive regulatory requirements for telecommunications companies when it determines that competition will serve the same purposes as public interest regulation." L.B. 835, § 7 (§ 86-807).

A legislature has discretion in determining what measures are reasonably necessary to protect public health, safety, and welfare, and, in reviewing a legislative act, a court should not substitute its own judgment for that of the Legislature merely because the court may believe that the Legislature acted unwisely or improvidently. See *State v. Yu*, 400 So. 2d 762 (Fla. 1981). By enacting L.B. 835, the Legislature has made a policy pronouncement that the flexibility of free competition is sometimes preferable to regulation as a method of controlling telecommunications rates. We cannot say that this conclusion is so fundamentally flawed as to constitute an unconstitutional exercise of the state's police power.

CONCLUSION

The Attorney General has failed to demonstrate the unconstitutionality of L.B. 835. The legislation does not contravene Neb. Const. art. IV, § 20, nor does the act facially deny due process of law for telecommunications customers. Finally, the act is a valid exercise of the state's police power. Therefore, we conclude that L.B. 835 is constitutional in all challenged respects. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I dissent. Laissez-faire may be an acceptable doctrine in some theories of government regulation, but I do not think the Nebraska Constitution permits that approach to setting rates for telecommunications companies in Nebraska.

I feel that 1986 Neb. Laws, L.B. 835, codified as Neb. Rev. Stat. §§ 86-801 et seq. (Reissue 1987), violates Neb. Const. art. IV, § 20, which provides:

> There shall be a Public Service Commission . . . . The powers and duties of such commission shall include the regulation of rates, service and general control of

> common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

A portion of § 86-803 provides: "Telecommunications companies shall not, however, be subject to any rate regulation by the commission and shall not be subject to provisions as to rates and charges prescribed in Chapter 75, articles 1 and 6." I believe that provision renders the whole of L.B. 835 unconstitutional.

The history of the adoption of Neb. Const. art. IV, § 20, is set out in *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949). Included in that history is the court's conclusion:

> The language finally adopted [in the Nebraska Constitution] positively provides that the powers of the commission shall include the regulation of all the enumerated matters with the right of the Legislature to control the manner in which the commission shall perform its independent constitutional duties, or to enter the field itself to the extent of "specific legislation." The conclusion is logical, if not inescapable, that the Legislature would not have proposed, and the people would not knowingly have approved, an addition to the Constitution creating a commission with power only to regulate and control common carriers to the extent and for the time provided or permitted by the Legislature . . . .

151 Neb. at 343, 37 N.W.2d at 508.

In construing the meaning of "general" and "specific" as used in Neb. Const. art. IV, § 20, the *Ramsey* court stated: "It was not intended by the use of these words to authorize unlimited, broad, general legislation in reference to the control and regulation of common carriers." 151 Neb. at 344, 37 N.W.2d at 509.

In my judgment, L.B. 835 constitutes unlimited, broad, general legislation in purporting to free telecommunications companies from any rate regulation.

The *Ramsey* opinion referred to *State, ex rel. Missouri P. R. Co., v. Clarke*, 98 Neb. 566, 153 N.W. 623 (1915). In that case,

the Legislature, by statute (commonly called the "Two-cent Fare Act"), had fixed a maximum rate of 2 cents per mile for railroad passenger rates and then, 21 days later, had enacted a statute granting the Legislature the power "to fix all necessary rates, charges and regulation to govern and regulate the freight and passenger tariffs of railway companies . . . ." Rev. Stat. § 6109 (1913). The relator contended the later statute authorized the commission to raise the rates beyond 2 cents. The *Clarke* court held to the contrary, stating: "The general power of the state railway commission, as applied to passenger traffic, is limited to rates below the maximum fixed by the two-cent fare law." 98 Neb. at 571, 153 N.W. at 625. In my opinion, this holding determines that "specific legislation," in this area of the law, is the setting of rates and not the outlawing of rate regulation.

I construe the *Ramsey* and *Clarke* cases to mean that if the Legislature preempts the rate field by setting specific rates, it has enacted the "specific legislation" referred to in article IV, § 20. In my judgment, the authority to set a specific rate does not extend the authority of the Legislature to say "no one shall regulate rates." In their Constitution, the people of the State of Nebraska have expressed their decision that either the Legislature or the commission shall regulate the rates of common carriers. I do not believe that constitutional directive can be thwarted by legislative action abolishing rate regulations as to specific common carriers.

In enacting §§ 86-801 et seq., the Legislature has attempted to repeal Neb. Const. art. IV, § 20. I do not believe the Legislature can do that. I would reverse the judgment of the trial court and hold that §§ 86-801 to 86-811 are unconstitutional as violating Neb. Const. art. IV, § 20.

BOSLAUGH, J., joins in this dissent.

LAVINA SEVIER ET AL., APPELLEES, V. SCHOOL DISTRICT HC 1, HOOKER COUNTY, MULLEN, NEBRASKA, ET AL., APPELLANTS.

444 N.W.2d 897

Filed September 1, 1989. No. 87-837.

1. **Administrative Law: Schools and School Districts: Records.** The petitions and the order of the county superintendent are the official public records of a merger of school districts.
2. **Administrative Law: Estoppel.** The doctrine of equitable estoppel ordinarily cannot be invoked against a governmental entity in the exercise of governmental functions. Exceptions to the rule are made only where right and justice so demand; the doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice.

Appeal from the District Court for Hooker County: DONALD E. ROWLANDS II, Judge. Reversed and remanded with directions.

Philip M. Martin, Jr., of Paine, Huston, Higgins & Martin, for appellants.

Gregory H. Perry, of Perry, Guthery, Haase, & Gessford, P.C., and Warren R. Arganbright for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

MULLEN, D.J.

On February 9, 1987, the board of education of school district HC 1 of Hooker County passed a resolution to close the elementary school attendance center located in Seneca, Nebraska. The plaintiffs commenced an action seeking an injunction to prevent school district HC 1 from closing the Seneca attendance center until the legal voters served by the school voted by a majority vote for discontinuance of the school. The case was tried to the court upon a stipulated set of facts. The district court found for the plaintiffs and permanently enjoined the closing of the attendance center until and unless the school district complied with the majority vote requirements of Neb. Rev. Stat. § 79-402.07 (Reissue 1987). Additionally, the district court declared the school district's resolution to close the elementary school attendance center null

and void. We reverse.

The appellants' assignments of error can be summarized as follows: The trial court erred in finding that the reorganization of school districts was not solely controlled by the reorganization petitions and final order of the county superintendent, and in failing to find that the county reorganization committee lacked legal authority when the committee's action went beyond the express terms of the petitions. Secondly, the court erred in imposing the extreme sanction of injunction against the school district.

In 1965, school district HC 1 in Hooker County at Mullen, Nebraska, and school district No. 6 in Thomas County determined that a school reorganization would be to their mutual benefit. Prior to the reorganization, school district No. 6 had operated an elementary school in Seneca. As a result of the reorganization, school district No. 6 merged into school district HC 1. School district HC 1 continued to operate the elementary school attendance center in Seneca until its attempted closing by the school district, which precipitated this lawsuit.

On May 31, 1965, the board of education of school district No. 6 signed the boundary change petition. On June 1, 1965, the board of education of school district HC 1 signed a similar petition. Although not reflected in the petition, the minutes of the meeting of the board of school district HC 1 includes the following:

> It was moved by John Munn and seconded by Don Mallory to officially declare that there be a K-6 ward school located at Seneca as long as the majority of the patrons of that community, presently designated as School District Number 6 of Thomas County desire a K-6 ward school, and in accepting the merger of the Seneca Districts this is to be a part of the agreement. . . .

The special committee of Hooker and Thomas Counties met for the purpose of reviewing the proposed reorganization on June 10, 1965.

The special committee passed a resolution which contained the following:

> (3) Following is a summary of the terms on which

reorganization is to be made between the reorganized districts:

. . . .

(f) A K-6 elementary school shall be located at Seneca as long as the majority of the patrons of that community so desire.

(4) . . . It is proposed that a K-6 elementary school remain at Seneca. They have an excellent elementary plant. . . .

On June 17, 1965, the reorganization petition proposal was approved by the state school district reorganization committee.

On August 5, 1965, the county superintendent of Hooker County certified that the boundary lines of the school districts had been changed.

As it affects this case, the statutory reorganization structure is unchanged since 1965 and was codified at § 79-402.07 (Reissue 1981), which statutory reference was used by the trial court.

In *School Dist. of Gering v. Stannard*, 193 Neb. 624, 228 N.W.2d 600 (1975), school district boundaries were sought to be changed based upon a petition which did not conform to statutory requirements. A duly adopted resolution of the plaintiff's board of education was filed, and the county superintendent considered them together when he effected the requested change in boundaries. The court said: "Plaintiff contends there was no petition from the board of education filed with the county superintendent and that the resolution is insufficient for this purpose. We disagree. The resolution clearly approves and requests the transfer of the land and it was filed." *Stannard* at 629, 228 N.W.2d at 605. "No petition as such was so filed but a certified copy of the resolution was." *Id.* at 626, 228 N.W.2d at 604.

In *Stannard*, the filed resolution was allowed to stand in the place of a petition. In the instant case, the resolution which was not filed is offered to augment the petitions.

There is no evidence that the special committee of Hooker and Thomas Counties filed the resolution as in *Stannard*, or in any actual or constructive manner notified the state school district reorganization committee. Exhibit E of the stipulation

contains the general plan of reorganization (Form D). At the end of Form D is the statement, "Remarks: A copy of this Form D is being mailed to Henry C. Ebmeier along with copies of the petitions, minutes, resolutions, and other documents relative to this reorganization." The record shows that Henry C. Ebmeier was the State Department of Education consultant for school district reorganization. The stipulation does not indicate that the minutes, resolutions, and other documents were in fact sent to the State Department of Education or received by it. There is no other evidence that the State Department of Education received the minutes and resolution which contain the special committee's agreement to maintain an attendance center at Seneca.

Warren v. Papillion School Dist. No. 27, 199 Neb. 410, 418, 259 N.W.2d 281, 286 (1977), states, "The petitions and the order of the county superintendent are the official public records of the merger . . . ." The resolution may state underlying reasons for the proposed merger, but it cannot stand in the place of a petition filed according to statutory mandate.

Supporting this rationale is *Osmera v. School Dist. of Seward*, 216 Neb. 261, 343 N.W.2d 886 (1984), in which the school districts of Ulysses and Seward filed petitions for consolidation of the Ulysses school district into the Seward school district. Cooperative Reorganization Commitments were entered into by certain Class I districts and Seward. Ulysses did not participate in the negotiations, and the commitments were not incorporated into the petitions. In affirming the trial court's decision denying injunctive relief, the court stated: "Neither Ulysses' nor Seward's petition refers to the Cooperative Reorganization Commitments . . . . Further, neither petition contained any other condition or exception." *Osmera* at 263, 343 N.W.2d at 889.

As noted in *Stannard*, there are instances when the school reorganization statutes would not be strictly construed. However, in those instances other documents were filed which gave notice to all of the intent of the parties.

The consequences of the evidence failing to demonstrate notice to the State Department of Education are reflected in *Warren, supra,* in which the plaintiffs sought to enforce an oral

promise of the Papillion school district to provide bus service for students in the Ireland school district. Although the districts had merged, the court held that the Papillion school district could not be estopped from terminating the bus service, because the oral promise was not a part of the written records of the reorganization. As in *Warren*, there is no evidence showing that those persons empowered by statute to make decisions regarding the reorganization had the specific agreement before them now sought to be enforced.

The plaintiffs further contend that the defendants should be estopped from closing the attendance center since the agreement has been relied on since 1965.

The elements constituting equitable estoppel are recited in *Osmera v. School Dist. of Seward, supra* at 266, 343 N.W.2d at 890, which states that the elements are:

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

The defendants did not engage in conduct which would amount to a false representation or conceal a material fact.

" 'Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. . . . Exceptions are made only where right and justice so demand. . . .' " *Osmera v.*

School Dist. of Seward, supra at 265, 343 N.W.2d at 890; *Christian v. Geis*, 193 Neb. 146, 225 N.W.2d 868 (1975); *Warren v. Papillion School Dist. No. 27, supra.*

It is undisputed that all of the facts relating to the merger were disclosed and understood by the parties. The doctrine of equitable estoppel is inapplicable.

Since the case is resolved on appellants' first assignment of error, discussion of the remaining assignment of error is unnecessary.

The cause is remanded to the district court with directions to dissolve the permanent injunction imposed on the defendants and to render judgment for the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

JOAN F. JANIK AND NORMAN L. JANIK, APPELLANTS, V. JOHN W. GATEWOOD, M.D., APPELLEE.

444 N.W.2d 900

Filed September 1, 1989. No. 87-891.

1. **Evidence: Verdicts: Appeal and Error.** Insofar as the sufficiency of the evidence is concerned, a verdict based on conflicting evidence will not be set aside unless clearly wrong.
2. **Evidence: Testimony: Witnesses.** Where testimony is given by a witness on direct examination and that testimony creates an inference favorable to the party producing the witness, anything within the knowledge of that witness tending to rebut the inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for a new trial.

Dana C. Bradford III, of Bradford, Coenen, Ashford & Stangl, for appellants.

Patrick G. Vipond, of Sodoro, Daly & Sodoro, for appellee.

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

GRANT, J.

Plaintiff-appellant Joan F. Janik filed this malpractice action against defendant-appellee, John W. Gatewood, M.D. Although plaintiff's husband was named as an additional plaintiff, this opinion will be written as if Joan Janik were the sole plaintiff. On May 10, 1984, defendant performed a bilateral subcutaneous mastectomy with reconstruction on plaintiff. The surgery was necessitated by a medical condition called fibrocystic disease, which had manifested itself in the form of reoccurring cysts in plaintiff's breasts. Plaintiff alleged in her petition that defendant deviated from the standard of care required of him in the surgery and postoperative treatment. Defendant denied any negligence.

After the jury returned a verdict in defendant's favor, plaintiff moved for a new trial, and the motion was denied. Plaintiff then timely appealed, assigning the following as error: (1) that the jury "disregarded material and uncontroverted evidence which clearly showed that the Appellee had breached the standard of care he owed the Appellant . . ." and (2) that the trial court erred in limiting the scope of plaintiff's cross-examination of defendant's expert witness.

The record shows that on May 1, 1984, plaintiff agreed to have defendant perform the surgery at the suggestion of her physician, John W. Monson, who was also defendant's associate. Defendant did not discuss the risk of complications with her, but Monson testified that he discussed with her the possibility that the prostheses might be rejected by her body. Defendant performed the operation on May 10, 1984.

Thereafter, on May 18, 1984, defendant examined plaintiff in his office. He removed staples from the surgery wounds and observed a discharge of fluid from the wound on the left breast. He testified that he thought it was serum, a normal byproduct of surgery. Plaintiff testified that the left prosthesis was exposed through the wound at this time, although defendant stated that he first observed the prosthesis through the wound on June 12, 1984, during plaintiff's seventh postoperative visit. Defendant resutured the wound at that time in an attempt to save the prosthesis. A few days later the wound had enlarged, and defendant resutured it a second time.

Monson examined plaintiff on June 21 and 28, 1984, because defendant was out of the office. Upon defendant's return, Monson and defendant agreed that the left wound should be sutured once more. Defendant resutured it on July 3, 1984. Shortly thereafter, defendant examined plaintiff and discovered that the wound still had not closed. Defendant resutured it a fourth time.

By July 18, 1984, the left wound had closed and appeared to be healing. The wound continued to look good on plaintiff's next two visits. On August 8, 1984, all but one suture had been removed. Still, a drop of clear yellow fluid was discharged from the left wound. Plaintiff testified that she told the defendant that every few days she would experience swelling and a discharge of fluid from the wound.

On August 17, 1984, the last suture was removed. A small opening in the left wound remained. Plaintiff testified that she again informed defendant that every few days she would experience swelling and a discharge of fluid from the left wound. The wound was resutured with a single suture on August 27, 1984. That suture had to be replaced the following week when the wound failed to remain closed.

On September 20, 1984, Monson examined plaintiff at her request. The last time he had seen her was on June 28, 1984. Monson testified that the left wound, which had swelled considerably since that time, broke open during his examination, discharging a large amount of fluid. He stated that he thought the prosthesis was infected and had to come out. He later discussed this with the defendant, who removed the left prosthesis on October 3, 1984.

On October 22, 1984, plaintiff visited defendant's office for the last time and asked for and obtained her medical files. On November 2, 1984, she consulted Steven Black, M.D., a plastic and reconstructive surgeon. Black advised her that reconstructive surgery on the left breast should wait until the inflammation subsided and that the right prosthesis was riding high and eventually would have to be lowered.

On December 28, 1984, plaintiff visited Black again, complaining of a discharge of fluid from her left breast. Black recommended a biopsy, and he took a culture on January 10,

1985. No culture had been taken by defendant before that time because defendant thought a culture was unnecessary as a part of plaintiff's postoperative treatment. On the same day Black took the culture, Black also placed plaintiff on antibiotics. Defendant testified that he had not previously placed plaintiff on antibiotics because he thought antibiotics were not necessary, other than immediately following surgery when he prescribed the antibiotic Keflex.

The culture revealed that an atypical microorganism was growing in plaintiff's left breast. Philip W. Smith, M.D., a specialist in infectious diseases, confirmed that plaintiff had an uncommon infection. Smith subsequently treated plaintiff's infection with various antibiotics. On January 22, 1985, Black removed the right prosthesis to eradicate the entire infection. Plaintiff was placed on intravenous antibiotics and remained in the hospital for 30 days. Later that year, she moved with her family to Pennsylvania, where she came under the care of Richard M. Levine, M.D., a plastic and reconstructive surgeon.

Plaintiff's first assignment of error merely states that "[t]he jury disregarded material and uncontroverted evidence which clearly showed that the Appellee had breached the standard of care he owed the Appellant Joan Janik." Such a statement does not direct us to what action of the trial court plaintiff considers erroneous and makes the assignment almost impossible to consider. We have determined, however, that if plaintiff is contending that the evidence is insufficient to support a verdict for defendant, that contention has no merit. The evidence supporting a verdict for plaintiff was contested in every respect, and evidence was offered on behalf of defendant controverting evidence offered by plaintiff. A jury question was presented on all issues raised by plaintiff. The credibility of the witnesses and the weight to be given their testimony is for the jury. Insofar as the sufficiency of the evidence is concerned, a verdict based on conflicting evidence will not be set aside unless clearly wrong. *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983). Plaintiff's first statement is without merit.

A more difficult question is presented by plaintiff's second assignment of error, which contends that the trial court erred in sustaining defendant's objections to a substantial portion of

plaintiff's cross-examination of defendant's expert witness.

On direct examination, defendant's expert witness, Mario Baccari, M.D., stated that he was certified in two specialties, general surgery and plastic surgery; that he had reviewed the depositions of the parties and other doctors who testified; and that he had examined the medical records of the surgery performed by defendant. Baccari testified on direct examination as follows:

> Q. Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, as to whether or not Dr. Gatewood deviated from the standard of care for surgeons in not prescribing prophylactic antibiotics before surgery?
>
> A. . . . [Y]ou are talking about antibiotics either given before the surgery or during the surgery? There is a question as to whether those actually do what people think they should be doing. I don't think he deviated in that regard.

Baccari also testified as follows:

> Q. In reviewing how the operation was performed by Dr. Gatewood, do you have an opinion as to whether or not he followed the standard of care for general surgeons or reconstructive surgeons in the manner and method he performed that surgery?
>
> A. In the way he performed the surgery, I have no problem at all.

Baccari concluded that he thought the right prosthesis should not have been removed by Black.

During the cross-examination of defendant's expert by plaintiff, the expert was asked: "[B]ased upon a reasonable degree of medical certainty, and based upon a review of all of the documents that you have referred to and read in this case, did Dr. Gatewood in any manner breach the standard of care?" Defendant's objection to this question was sustained, as were objections to specific questions exploring the manner in which defendant conducted plaintiff's postoperative treatment. The court sustained objections to questions concerning defendant's resuturing of the wound and the expert's opinion on the risk of infection in an open wound. In short, the trial judge confined

plaintiff's cross-examination of defendant's expert to the issues surrounding the physical acts of the surgery performed by defendant and the later removal of the right prosthesis by Black. Plaintiff now challenges this ruling.

It is true that " '[a]bsent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed.' " *Palmer v. Forney*, 230 Neb. 1, 7, 429 N.W.2d 712, 716 (1988). This court has observed that in order to find a judicial abuse of discretion, the reasons or rulings of a trial judge must be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through the judicial system. *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

Defendant contends that the trial court properly limited cross-examination strictly to the scope of the direct examination, and for this reason the ruling should not be disturbed. Plaintiff asserts that by excluding the line of questioning concerning the manner in which defendant conducted plaintiff's postoperative treatment of the left wound, plaintiff was unable to elicit testimony necessary to discredit, qualify, or render improbable the opinion expressed by defendant's expert witness on direct examination. Thus, the dispositive question here is whether the trial judge, in limiting cross-examination as he did, abused his discretion so as to prevent plaintiff from eliciting testimony that would affect the credibility of defendant's expert witness.

Cross-examination in trials in our courts is generally controlled by the provisions of Neb. Evid. R. 611 (Neb. Rev. Stat. § 27-611 (Reissue 1985)), which provides in part: "(2) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Rule 611(2) permits cross-examination on matters affecting the credibility of a witness and thus reflects the earlier holding of this court in *Scofield v. Haskell*, 180 Neb. 324, 142 N.W.2d 597 (1966).

In addition, where testimony is given by a witness on direct examination and that testimony creates an inference favorable

to the party producing the witness, anything within the knowledge of that witness tending to rebut the inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right. *Scofield v. Haskell, supra.*

The nature of the evidence sought to be elicited from defendant's expert was apparent from the context within which the questions were asked. Neb. Rev. Stat. § 27-103 (Reissue 1985). See *Schmidt v. Schmidt*, 228 Neb. 758, 424 N.W.2d 339 (1988). The ruling of the trial judge denied plaintiff the opportunity to explore whether defendant's expert in fact held any contrary opinions concerning the way in which defendant conducted plaintiff's postoperative treatment. Consequently, plaintiff was unfairly deprived of the right to test either the value of the expert's opinion or the degree of credibility to be attached to his testimony. The action of the trial court in excluding such evidence affected a substantial right of plaintiff.

Defendant's expert was qualified on direct examination as an expert in both general and plastic surgery. He stated that he reviewed the depositions of defendant and of the other doctors who served as witnesses. He testified about preoperative antibiotics, the actual surgery, and even the postoperative treatment of the right breast by another physician. As previously stated, the expert testified that in his opinion, defendant followed the standard of care in the way defendant performed the surgery.

The expert's opinion, taken together with his above testimony, created an inference that he was also of the opinion that defendant met the standard of care in the way defendant conducted plaintiff's postoperative treatment. Plaintiff was denied the opportunity to rebut the inference when plaintiff was not allowed to establish the limits of the opinion held by defendant's expert witness.

The ruling by the trial judge was an abuse of discretion. Plaintiff should have been permitted to fully cross-examine defendant's expert and should not have been confined strictly to examination concerning only the physical act of the surgery itself. The limitation of plaintiff's cross-examination was error requiring a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. BESSIE HILL, ALSO KNOWN AS BESSIE STUBBLEFIELD, APPELLANT.
444 N.W.2d 905

Filed September 1, 1989. No. 88-194.

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

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

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

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

WHITEHEAD, D.J.

Bessie Hill, also known as Bessie Stubblefield, appeals her jury convictions and resulting sentences for possession with intent to deliver a controlled substance and unlawful possession of a controlled substance. We affirm Hill's convictions and sentences.

On August 10, 1987, two Omaha police officers, Haskell and Smith, were conducting a surveillance of an area in the 2300 block of Charles Street, Omaha, Nebraska, which was known to the officers as one of the highest areas of drug traffic in the city. They had conducted this surveillance on various occasions in the prior 6 weeks.

Officer Haskell had participated in the earlier surveillance and knew who the defendant was and knew that she did not live in the immediate area. This officer, partially obscured by trees and weeds, was standing 20 to 30 feet from the area where the defendant was standing. Haskell observed the defendant and a woman approaching the defendant. The woman and the defendant spoke briefly, and then the woman handed the defendant cash and the defendant handed something to the woman. Because the defendant had her back to the officer, the officer did not see what the defendant gave the woman. A man approached the defendant and pointed to the officer, and defendant Hill headed toward her car. Haskell radioed Officer

Smith, who was in the cruiser, to assist him and then stopped the defendant before she got to her car. Haskell asked for identification, and the defendant provided it. Haskell then went to the cruiser and checked for outstanding warrants on the defendant. Smith, who had been in the cruiser, stayed with the defendant. Smith observed that the defendant appeared to be attempting to hide something she had in her hands by moving her arms into positions which kept them away from Smith's view. Smith asked the defendant to show him what she had in her hand, but she refused. When Smith tried to take hold of the defendant's arm, Hill threw a prescription bottle about 10 feet. Haskell retrieved the bottle. A laboratory check of the contents revealed the bottle contained packets of cocaine and 14 tablets of 20 milligrams each of methylphenidate. The defendant was placed under arrest and was taken to the station, where her purse was searched and revealed no further controlled substances.

Before trial, the defendant moved to suppress physical evidence seized by a search of the defendant's person and immediate surroundings on August 10. The trial court overruled the motion. During the trial of the case, the defendant's only objection was raised after the contents of the purse were introduced into evidence. A jury found the defendant guilty on both charges.

The defendant's principal assignment of error is that the district court erred in overruling the defendant's motion to suppress based upon the argument that the police officers failed to articulate facts sufficient to justify the detention and that they went beyond the permissible scope provided by law.

In reviewing the trial court's order on the motion to suppress, this court will not overrule the trial court's finding of fact unless the findings are clearly erroneous. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987). Neb. Rev. Stat. § 29-829 (Reissue 1985) provides that a police officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime, and may demand of him his name, address, and an explanation of his actions.

The police officer, in the case at hand, approached the

defendant based upon all the facts before him. It is the court's opinion that he had reason to believe that the defendant was committing, had committed, or was about to commit a crime. Officer Haskell observed the defendant walking the area of the 2300 block of Charles Street and talking with various people. Haskell was observing the defendant because the narcotics unit of the police department received information that the defendant was dealing drugs. Also, the area in which the defendant was observed was the highest drug trafficking area in the city at that time, and he knew that the defendant did not live in that area. Haskell observed the defendant talking with a woman who handed money to the defendant, and immediately after the woman handed the money to the defendant, a man ran up to the defendant and pointed toward Haskell standing nearby. The defendant looked toward the officer and then walked toward her car.

Also, in a period of 6 weeks prior to August 10, Officer Haskell had observed the defendant standing on the sidewalk in the area of the 2300 block of Charles Street, and individuals would approach and talk to her. They would then get in the defendant's car, drive around the block, and return to the same area. The defendant would park her car, and they would both get out of her car and go in separate directions. Sometimes the defendant would stay on the sidewalk until someone else would come along to talk to her, and then they would go into one of the houses there, be in the house for 5 to 20 minutes, and come back out. The defendant would then wait until the next person came along.

At the time, the officers believed that a drug transaction had taken place. It should be noted that the person of the defendant was not searched, nor were her purse or other belongings gone through. The officers were just trying to identify the defendant and see if there were any outstanding warrants for her. When Officer Smith believed the defendant was hiding something in her hand from him and he attempted to find out what it was, the defendant flung the medicine bottle in question.

In *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972), the U.S. Supreme Court stated that " 'a police officer may in appropriate circumstances and in an

appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.' " 407 U.S. at 145. In fact, the Court goes on to say that "it may be the essence of good police work to adopt an intermediate response." *Id.* A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be more than reasonable in light of the facts known to the officer at the time. *Adams, supra.* See, also, *State v. Gross*, 225 Neb. 798, 408 N.W.2d 297 (1987); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).

Even if the court agreed with the defendant that the trial court did err in overruling her motion to suppress evidence, this matter would not be before the court for consideration inasmuch as the defendant did not preserve her objection at trial. In a criminal trial, after a pretrial hearing and order which overrules the defendant's motion to suppress evidence, the defendant must object at trial to the receipt of the evidence in order to preserve the question for review on appeal. Nebraska Evid. R. 103 (Neb. Rev. Stat. § 27-103 (Reissue 1985)); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

"This court has consistently held that a defendant may not predicate error on the admission of evidence to which timely objection was not made." 224 Neb. at 894, 402 N.W.2d at 270. Uniformly, we have held that the alleged error was not presented for our review because of the lack of objection to the evidence at trial. Even if the court agreed with the defendant that the district court erred in not sustaining the defendant's motion to suppress evidence, the error was not preserved for consideration by this court, and, therefore, the judgment and sentences must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT R. VENABLE, APPELLANT.

444 N.W.2d 907

Filed September 1, 1989. No. 88-394.

1. **Constitutional Law: Juries: Discrimination: Prosecuting Attorneys.** Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race, the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.
2. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.
3. _____: _____: _____: _____. Once the defendant has made a prima facie case of discrimination in the selection of a jury, the burden shifts to the State to provide a neutral explanation for the peremptory challenges related to the particular case to be tried.
4. **Trial: Juries: Discrimination: Appeal and Error.** The trial court's findings that there was no discrimination in the selection of a jury are not to be reversed on appeal unless clearly erroneous.
5. **Rules of Evidence: Witnesses.** The credibility of a witness may be attacked by any party, including the party calling him.
6. **Criminal Law: Witnesses: Proof.** A witness may be impeached by proving his conviction of a felony.
7. **Witnesses: Evidence: Appeal and Error.** The reception of evidence affecting the credibility of a witness is within the discretion of the trial court and will not be reversed on appeal in the absence of an abuse of that discretion.

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

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

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

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

FUHRMAN, D.J.

Robert R. Venable, convicted by a jury of robbery, was sentenced to serve a term of 16 2/3 to 50 years. Venable appeals, claiming the court erred in failing to grant a mistrial because the prosecution used a peremptory challenge to strike one of the only two black prospective jurors and in allowing the prosecutor to ask his rebuttal witness if she had been convicted of a felony. We affirm.

After the voir dire of the jury, the prosecution used a peremptory challenge to dismiss Calvin Brye as a prospective juror. Defense counsel moved for a mistrial based on the prosecution's dismissal of one of two black prospective jurors. The other black juror was left on the panel. The prosecutor gave three reasons for the dismissal. First, Brye's address was in the same general area as the address to which the car in which some of the stolen merchandise was found was registered. Second, in the experience of the prosecutor, persons in Brye's type of work (social services) were generally not sympathetic to the State's position, and the prosecutor generally excluded all persons in this type of work. Third, a law clerk with the prosecutor's office, who had been watching the proceedings and who had been identified as an acquaintance of another prospective juror, told the prosecutor he knew Brye, but Brye did not mention knowing the law clerk. The defense counsel objected to the court's considering the third reason because it was based on hearsay, but the judge overruled the objection.

The judge overruled the defense's motion for mistrial, saying:

> The State did come forward with several reasons why it struck Mr. Brye from the venire persons who had been chosen as perspective [sic] jurors. Had Mr. Ashford [the prosecutor] struck the other black member of the jury I would have no hesitancy of sustaining your Motion, Mr. O'Connor [defense counsel]. . . .
>
> . . . .
>
> . . . Christina King, who is black, remains a member of the jruy [sic]; and absent of showing that Mr. Ashford's striking of Mr. Brye was racially motivated I'm going to overrule your Motion at this time.

Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In so holding, *Batson* overturned the evidentiary standard contained in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), which required a showing of systematic exclusion of black jurors over time, and established a new multistep standard of proof for showing discrimination in the jury selection process. In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race. Once the defendant has made a prima facie case, the burden shifts to the State to provide a neutral explanation for the challenges related to the particular case to be tried. The explanation need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to defendant because of their shared race. *Batson v. Kentucky, supra*; *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987); *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988); *State v. Brockman*, 231 Neb. 982, 439 N.W.2d 84 (1989).

By asking the State to articulate its reason for questioned strikes, a trial court implicitly finds a criminal defendant has met her or his burden of proving a prima facie case of discrimination in the selection of a jury. The trial court's

findings that there was no discrimination in the selection of a jury are not to be reversed on appeal unless clearly erroneous. *State v. Rowe, supra.*

In this case, upon being asked to articulate its reason for the questioned strike, the prosecutor stated three reasons for the exercised peremptory challenge of one of the two black prospective jurors. The trial court overruled defense counsel's motion for mistrial, which was based upon alleged discrimination in selection of the jury.

It is inherent in the trial court's order overruling Venable's motion for a mistrial claiming discrimination in the selection of his jury that the trial court found the prosecutor did not strike the black juror because of his race, but rather on neutral grounds. We cannot say that the trial court's ruling was clearly erroneous. Venable's assignment of error in regard to the selection of the jury that tried him is not supported by the record.

Finally, Venable contends it was improper for the prosecutor to ask his rebuttal witness if she had been convicted of a felony.

The trial record shows that after the defense had rested, the prosecutor called Teresa Rigby as a rebuttal witness. After asking Rigby to identify herself, the prosecutor then asked:

> Q [Mr. Ashford]. Ms. Rigby, have you ever been convicted of a felony?
>
> A. Yes.
>
> MR. O'CONNOR: Your Honor, I object. This is the same thing — May I approach the bench?
>
> (At this point, counsel for the parties approached the side bar and the following record was made in low tones.)
>
> THE COURT: Go ahead.
>
> MR. O'CONNOR: The last question asked, the first question on direct examination was whether the witness had ever been convicted of a felony. It was my concern in question in chambers — Mr. Ashford called her as a rebuttal witness and rebuttal witness only. He can bring her on to impeach her or for impeachment. The question, the first question out of his mouth is not an impeachment question and the answer has been given in front of the jury. He had no right to do that. I would ask that the jury

be instructed to disregard, and that she can no longer be used as a witness, and told by the Court to be dismissed, and in the alternative I'll ask for a dismissal.

THE COURT: Say it now.

MR. ASHFORD: Yes, Your Honor. At this time there is a general question that can be asked of all witnesses. It's as to whether or not they've ever been convicted of a felony. It's confined to that question, and are there any convictions that regard dishonesty. That's a general question that can be asked of any witness at any time.

MR. O'CONNOR: That's an impeachment witness, and only impeachment questions . . .

THE COURT: Well, it gives both — It certainly goes to her credibility, number one, and certainly if she's answered the question it certainly goes for impeachment.

MR. O'CONNOR: What was the intent of it being asked? Only one intent. Impeachment.

MR. ASHFORD: That's not the case, Your Honor.

THE COURT: Your motion is overruled.

The prosecutor was then allowed to ask the question again and Rigby responded, "Yes, I have."

The credibility of a witness may be attacked by any party, including the party calling him. Neb. Rev. Stat. § 27-607 (Reissue 1985); *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). A witness may be impeached by proving his conviction of a felony. *State v. Reinert*, 197 Neb. 379, 248 N.W.2d 782 (1977).

The prosecution is allowed to impeach witnesses called by it. There is no evidence Rigby was called for the purpose of impeaching the credibility of Venable with her felony conviction. The reception of evidence affecting the credibility of a witness is within the discretion of the trial court and will not be reversed on appeal in the absence of an abuse of that discretion. *Hampton v. Strove*, 160 Neb. 305, 70 N.W.2d 74 (1955).

It appears no reversible error was made in regard to Teresa Rigby's testimony. The defendant's conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY L. GRELL, APPELLANT.

444 N.W.2d 911

Filed September 1, 1989. No. 88-667.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Theft: Time.** The offense of theft by deception may take place over a period of time.
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 defendant, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
4. **Probation and Parole: Sentences: Appeal and Error.** A sentence of probation, as opposed to a sentence of imprisonment, is a matter within the discretion of the trial court and will not be set aside on appeal absent an abuse of discretion.

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

Paul M. Conley for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

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

BOSLAUGH, J.

The defendant, Stanley L. Grell, was convicted by a jury of theft by obtaining property of Iola Coatney by deception, such property having a value of $7,974. The defendant was sentenced to 5 years' probation. He has appealed and has assigned as error (1) the finding that the evidence was sufficient to sustain his conviction; (2) the failure to grant a new trial, sua sponte; (3) the failure to grant a mistrial upon the ground of ineffective assistance of trial counsel; and (4) his sentence to probation.

The record shows that in the fall of 1986, Iola Coatney, who was then approximately 64 years old, expressed an interest in

purchasing rest home insurance for herself and her husband, William E. Coatney. Mr. Coatney had been disabled by a stroke in 1980. The defendant, who was in the insurance business, telephoned Mrs. Coatney and arranged to meet with her at her home in Lincoln to discuss purchasing the insurance.

During a meeting with the defendant on October 10, 1986, Mrs. Coatney gave him two checks, one for $2,696 and one for $600, as a "down payment" on rest home insurance for both herself and her husband. On December 5, 1986, Mrs. Coatney gave the defendant another check, for $1,382, for her rest home insurance. On December 23, 1986, Mrs. Coatney gave the defendant a $3,296 check for rest home insurance for her husband. In each instance, the defendant told Mrs. Coatney to make the check payable to him. The December 23 check was issued because the defendant told Mrs. Coatney that he had held the two October checks (for $600 and $2,696) too long. In fact, the defendant cashed all of Mrs. Coatney's checks, and they were paid out of her checking account.

After Mr. Coatney was found to be uninsurable, the defendant issued a $3,296 refund check to Mrs. Coatney, drawn on his personal account. Payment of this check was refused. The defendant subsequently promised Mrs. Coatney that he would make monthly payments to her to cover the refund check, but no such payments were ever made. Mrs. Coatney testified that she believed that an insurance policy for her had been approved, but she never received an insurance policy, notwithstanding the defendant's assurances that delivery of her policy had been delayed.

The record further shows that the defendant had been instructed by his managing general agent that customers' checks should be made payable to the insurance company and submitted with a new business application to the managing general agent, who would then deposit the checks into the insurer's trust account, do underwriting on the application, and issue a commission check to the agent. The defendant was not supposed to take any money out of original premium checks. The record shows that the managing general agent did not receive an application or premium from the defendant or Iola Coatney.

The information alleged that on or between October 10, 1986, and December 23, 1986, the defendant "did obtain property of Iola Coatney, valued at more than $1,000, by deception, to-wit: did create or reinforce a false impression as to law, value, intention, or other state of mind."

Neb. Rev. Stat. § 28-512 (Reissue 1985) provides:

> A person commits theft if he obtains property of another by deception. A person deceives if he intentionally:
>
> (1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise . . .

Theft is a Class III felony when the value of the thing involved is over $1,000. Neb. Rev. Stat. § 28-518 (Reissue 1985).

In determining the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Botts*, 232 Neb. 802, 442 N.W.2d 384 (1989).

The evidence of the State was sufficient, if believed, to show that between October 10 and December 23, 1986, the defendant engaged in a continuing scheme to obtain money from Iola Coatney by creating the false impression that she was purchasing insurance from him. The record supports the jury's finding that the defendant wrongfully obtained $7,974 from Mrs. Coatney over the alleged period of time. The offense described in § 28-512(1) may take place over a period of time.

The defendant complains that he should have been charged with four separate offenses instead of one offense involving four transactions and that it was plain error for the trial court "to submit the allegation of theft by deception aggregating all four transactions as one." Brief for appellant at 12-13. There was no prejudice to the defendant in charging him with but one

offense instead of four offenses for which he could have received separate sentences. The first assignment of error is without merit.

The second and third assignments of error relate to the defendant's contention that he received ineffective assistance of counsel at trial because his trial counsel failed to file a motion for a new trial, thus limiting the issues which might be presented to this court.

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 defendant, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Wiley*, 232 Neb. 642, 441 N.W.2d 629 (1989); *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989). The defendant has failed to show how he was prejudiced in any way because of the failure to file a motion for new trial. The only alleged error of which he has complained, the insufficiency of the evidence to sustain the conviction, is without merit.

Furthermore, Neb. Rev. Stat. § 25-1912.01 (Reissue 1985) provides:

> (1) A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record.
>
> (2) When an action has been tried before a jury a motion for a new trial shall not be a prerequisite to obtaining appellate review of the sufficiency of the evidence . . . .

In light of § 25-1912.01, the defendant was not prejudiced by his counsel's failure to file a motion for new trial.

Finally, the defendant claims that the probation he received was an excessive sentence.

The defendant is 44 years of age and has a college education. He was convicted of petit larceny in 1974 and of theft by unlawful taking in 1983. In 1985, three counts of theft by deception filed in Saline County were dismissed, apparently because the complaining witnesses desired to accept restitution from the defendant and avoid a trial. On April 19, 1988, two

counts of theft by deception were filed in Lancaster County. The presentence report does not show the disposition of these counts.

The offense of which the defendant was convicted is a Class III felony with a maximum penalty of 20 years' imprisonment, a $25,000 fine, or both, and a minimum penalty of 1 year's imprisonment. The defendant was sentenced to 5 years' probation, including 90 days in jail and payment of full restitution to Mrs. Coatney.

The record shows that the sentence of probation was imposed so that the defendant could make full restitution to Mrs. Coatney. A sentence of probation, as opposed to a sentence of imprisonment, is a matter within the discretion of the trial court and will not be set aside on appeal absent an abuse of discretion. See, *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988); *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982). The sentence imposed was not excessive.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT R. NASH, APPELLANT.
444 N.W.2d 914

Filed September 1, 1989. No. 88-865.

1. **Controlled Substances: Circumstantial Evidence: Proof.** The existence of and dealing with narcotics may be proved by circumstantial evidence. There need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence is sufficient to support an inference that the material in question was narcotics.
2. **Controlled Substances: Convictions: Circumstantial Evidence: Witnesses: Proof.** Proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient to sustain a criminal conviction resulting from a drug prosecution, so long as this evidence establishes the identity of the drug beyond a reasonable doubt.
3. **Controlled Substances: Proof: Evidence.** Some of the factors to be considered in determining whether the State has met its burden of proving the identity of a controlled substance beyond a reasonable doubt include: (1) the privacy or

secretiveness of the transaction, (2) references made to the drug by the defendant and others, (3) testimony by witnesses who have a significant amount of experience with the drug in question, (4) high price paid for the substance, (5) behavior characteristic of sale and use of a particular substance, (6) prior involvement by the defendant in drug trafficking, (7) corroborating testimony by officers or other experts as to the identification of the substance or the expected effects of the substance, and (8) sensory identification of the substance if the substance is sufficiently unique.

4. **Wiretaps: Proof.** The ultimate burden of showing an unlawful interception rests upon the party against whom the fruits of the electronic surveillance are offered.
5. **Wiretaps.** It is not necessary for the State to utilize all investigative techniques before making an application for a wiretap. It is sufficient that the State show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation.
6. **Wiretaps: Affidavits.** The application for a wiretap must contain a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a wiretap is authorized.
7. _____: _____. An affidavit in support of an application for a wiretap is to be tested in a practical and commonsense fashion.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Richard J. Bruckner for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

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

BOSLAUGH, J.

The defendant, Robert R. Nash, was convicted of unlawful possession of methamphetamine and was sentenced to 8 months in jail and fined $1,000 and costs. He has appealed and contends that the evidence was insufficient to sustain the verdict and that the trial court erred in overruling his motions to suppress wiretaps.

The evidence of the State consisted largely of the testimony of Kevin Florom, who was an eyewitness to the sale of methamphetamine to the defendant. Florom is 30 years old and is a resident of North Platte, Nebraska. Florom testified that he has used drugs since he was 16 years old and sold drugs from 1974 until 1986.

With respect to methamphetamine, Florom stated that he had used the drug over 100 times and that it affected his body by raising his body temperature, decreasing his appetite, and allowing him to go without sleep for up to a week at a time. He described methamphetamine as a white powder with a crystalline or chunky appearance, occasionally with a yellow tint to it, and with a certain odor that "you can't mistake for anything else." In addition, the drug has a bitter taste and may be smoked, dissolved in water and drunk, or injected. Florom stated that he himself preferred injection because of the instant high achieved by injection. When Florom sold methamphetamine, it was referred to as crank or crystal, which are simply two names for the same substance.

Florom stated that in 1986 he was a seller of methamphetamine for Monte Allen and William Roach, Jr., and at that time was living with Roach in a trailer house behind Bud's Repair on East 5th Street in North Platte. Allen was residing in Fort Collins, Colorado, and Florom had been acquainted with him when Allen lived in North Platte. Florom had been to Allen's home in Colorado to pick up crystal for distribution in North Platte. In addition, Allen had delivered crystal to North Platte on more than one occasion.

Florom testified that he met the defendant in 1980 when Florom was working as a bartender at the Platte Bar. Their relationship at this time was not related to drug dealings, and in fact the parties did not socialize together. Florom stated that although he personally never sold crystal to Nash, he was present when Allen sold the drug to Nash on December 1, 1986. Florom claimed that he had introduced Allen to Nash. According to Florom, he placed a call to Nash to inquire whether Nash was interested in buying any crystal, as Allen had a quantity of crystal that he needed to sell. Nash told Florom to come over to his house and see him, which both Florom and Allen then did.

All three individuals sat down at a table, and Allen reached into his pocket and pulled out an "eight ball" of crystal and handed it to the defendant. Florom testified that an eight ball of crystal is 3 1/2 grams, or an eighth of an ounce, of methamphetamine. Nash then took his bowie knife and stuck it

into the bag, sampled the drug, and stated that "it's not too bad." Florom stated that earlier in the day, he, Allen, and Roach had divided the crystal into smaller quantities and had injected some of the drug at that time. Apparently, the drug injected by Florom was from the same lot of methamphetamine that later was broken down into 1/8-ounce bags and distributed to Nash.

In terms of payment for the crystal, Allen told the defendant it would cost him $285, which the defendant paid to Allen at Florom's trailer behind Bud's Repair. Florom stated that all events transpired on December 1, 1986, in North Platte, Lincoln County, Nebraska.

Florom was not working for law enforcement and had never been an undercover informant.

The first time that Florom told authorities of the December 1 incident was in February of 1987, when he was in the Hastings Regional Center for treatment of drug and alcohol problems.

On cross-examination, Florom testified that he had been charged in March of 1988 with either distribution of methamphetamine or conspiracy to do so, but as of the date of trial he had not gone to court on the charge. In addition, he has been charged with two counts of felony nonsupport dating back to December of 1987. Since leaving the regional center, Florom has smoked marijuana three or four times and was arrested on July 26, 1988, for disturbing the peace and resisting arrest.

Florom's testimony concerning the sale of methamphetamine to the defendant on December 1, 1986, was corroborated by the testimony of James Parish, Melvin Messersmith, and Gerard Ruiz, members of the Nebraska State Patrol who were involved in the drug investigation, and by the record of a telephone conversation between the defendant and Florom.

Parish testified that he was involved in the investigation of Nash, beginning with surveillance, and later was made supervisor in charge of the investigation. The investigation of Nash began when the patrol received information from informants regarding numerous persons involved in trafficking in cocaine and methamphetamine in Lincoln County,

Nebraska. As a part of the investigation, a wiretap was installed on a telephone in the defendant's residence at 77 Maplewood Circle in North Platte. Several hundred calls were monitored at the Nash residence, and on December 1, 1986, an evidence call was monitored at the defendant's residence. An evidence call is a call of criminal nature and involves suspects, a particular transaction, or the discussion of criminal activity.

The December 1, 1986, call, which occurred at about 11:30 a.m., was monitored by Investigator Messersmith. Messersmith stated that the conversation indicated that there was a desire for a transaction involving crystal (methamphetamine) to take place. At trial, Messersmith read from the transcript of the recorded telephone conversation, which, with obscenity and vulgarity deleted, was as follows:

> Nash answered the phone, "Nash." Florom: "Nashville. What are you doing?" Nash: ["]Oh, just sitting here watching T.V.["] Florom: "This is Kevin Florom." Nash: "Sure." Florom: "Well, how are ya doing." Nash: ["]Oh, pretty good, I'm trying to get to Cheyenne, but I don't think I'm going to get the job done." Florom: "Not going to get there today, hu [sic]?" Nash: "Na, it's ------ weather." Florom: "Ah, ya, ------ icy roads probably." Nash: "Ya, it's well I was gonna fly out." Florom: "Oh ya." Nash: "Ya they've got icy conditions." Florom: ["]Oh, they've got you grounded." Nash: "Ya, it's about 1500 feet going out of here ---- ------- storm front is just 60 miles west of here." Florom: "Ah really." Nash: "But ya know, getting there, I'd pick up ice sure as ----, so[.]" Florom: "Ya, you bet you would, you'll have probably enough to do the damage." Nash: "Ya, well I can't fly in that ----." Florom: "Ya." Nash: ["]What's going on." Florom: "Ya, I just was wondering if you might be interested in any crystal." [Nash:] "Um, why don't ya come over to the house and talk to me." Florom: "Okay, I was just, I was just going to ask if you was going to be home." Nash: "Ya." Florom: "But I didn't know if you'd understand ya know what I mean." Nash: "Ya, why don't ya come over and visit me for a while." Florom: "I will do that, I'll be right there." Nash: "Well okay." Florom:

"Thank ya." Nash: "Bye." Florom: "Uh-huh."
The actual tape recording was received in evidence.

Within several minutes of the call, Messersmith notified Parish that a criminal call had been intercepted. Parish immediately contacted Investigator Ted Mashek and arrangements were made for surveillance of the Nash residence. Parish then obtained a camera and accompanied Mashek to a location in the vicinity of 77 Maplewood Circle. Ruiz was also notified. Parish and Mashek drove to a location on Bare Street, which allowed them to observe 77 Maplewood Circle and any traffic leaving that area. Photographs were taken of vehicles which were observed at the Nash residence. A black Chrysler was observed, and the officers followed that vehicle to a Kwik Stop, where they saw Allen enter the Kwik Stop. After following the car for a short period, the officers terminated their surveillance.

On February 12, 1987, Investigator Robert Zeiler and Parish interviewed Florom, one of the participants in the December 1, 1986, incident, to determine whether he would cooperate with their investigation and to clarify details as to what had transpired on December 1. Florom agreed to cooperate and gave the officers a statement without being given any "deal" or promise in return. Florom made a second statement in December 1987 in which he admitted some inaccuracies in his first statement.

Roach and Allen were also contacted, but they were unwilling to cooperate with the patrol's investigative efforts.

The entire investigation ran from October 1985 until the middle of February 1987, with the focus on Nash being from November 1986 until February 1987. Nash was initially arrested in June of 1987.

Ruiz testified that he lived at 66 Maplewood Circle in North Platte. His involvement in the Nash investigation involved keeping track of Nash's home, observing vehicles and identifying people at the Nash home, and taking photographs. On December 1, 1986, Ruiz was asked to watch Nash's residence and to photograph any individuals or cars that were seen at the home. A photograph taken by Ruiz shows a black car with Utah plates, occupied by two men, which drove up to

Nash's garage and entered it. Fifteen to twenty minutes later, the men left the home and drove away.

The evidence of the State which has been summarized was sufficient, if believed, to permit the jury to find the defendant guilty beyond a reasonable doubt. Florom's credibility was a question for the jury.

The fact that none of the methamphetamine sold to the defendant by Allen in the presence of Florom on December 1, 1986, was seized and later determined by scientific analysis to be methamphetamine does not make the evidence insufficient to sustain the verdict. Florom's extensive experience in dealing with drugs was sufficient to permit him to testify that the drug sold to the defendant was methamphetamine.

> "Just as with any other component of the crime . . . the existence of and dealing with narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished ground for inferring that the material in question was narcotics."

United States v. Atkins, 473 F.2d 308 (1973). See, also, *United States v. Sweeney*, 688 F.2d 1131 (1982).

In *State v. Watson*, 231 Neb. 507, 437 N.W.2d 142 (1989), almost a companion case to this case, we held:

> Proof of the identity of a substance by circumstantial evidence, including lay testimony by a person sufficiently familiar with the drug in question, may be sufficient to sustain a criminal conviction resulting from a drug prosecution, so long as this evidence establishes the identity of the drug beyond a reasonable doubt.

(Syllabus of the court.) We also held in *Watson, supra*, that

> [s]ome of the factors to be considered in determining whether the State has met its burden of proving the identity of a controlled substance beyond a reasonable doubt include: (1) the privacy or secretiveness of the transaction, (2) references made to the drug by the defendant and others, (3) testimony by witnesses who have a significant amount of experience with the drug in question, (4) high price paid for the substance, (5) behavior characteristic of sale and use of a particular

substance, (6) prior involvement by the defendant in drug trafficking, (7) corroborating testimony by officers or other experts as to the identification of the substance or the expected effects of the substance, and (8) sensory identification of the substance if the substance is sufficiently unique.

(Syllabus of the court.)

In this case there was substantial evidence concerning the privacy of the transaction, the references to the drug by the defendant and others, the significant experience of the defendant and Florom with the drug, the high price paid, the prior involvement of the defendant in drug trafficking, and the corroborating testimony by the officers.

The defendant's other assignment of error relates to the alleged overruling of the defendant's motions to suppress evidence obtained from the defendant by means of a wiretap. The transcript contains no motion by the defendant, or an order overruling a motion, relating specifically to a wiretap. The reference in the defendant's brief is to a motion filed January 21, 1988, relating to statements obtained from the defendant by State Patrol investigators during an interview with the defendant in the presence of his counsel. The January 21, 1988, motion was sustained by the trial court, and upon appeal by the State to a single judge of this court, the order was affirmed. *State v. Nash*, 228 Neb. 69, 421 N.W.2d 41 (1988).

The record shows that on June 3, 1986, an application was made for an order authorizing the interception of wire or oral communications at the residence of Richard Watson in North Platte, Nebraska, and an order granting the application was signed on that date.

On November 4, 1986, an application for a similar order for the residence of the defendant was made, and an order granting the application was signed on that date.

The November 4, 1986, application was supported by the affidavit of Mashek. The affidavit alleged that the purpose was to obtain information concerning drug transactions involving the defendant, other named persons, and other persons whose identities were unknown. The November 4 affidavit referred to the ongoing investigation and related in detail what other means

had been utilized or considered, including informants, the possibility of infiltration, evidence obtained through the wiretap at the Watson residence, and surveillance. The affidavit further explained why other methods would not prove successful.

The affidavit satisfied the requirements of Neb. Rev. Stat. § 86-705 (Reissue 1987) and was sufficient to justify the order signed on November 4, 1986.

The defendant's principal contention, that the wiretap was illegal, is based on his argument that the showing of the use of alternative methods, particularly surveillance, was inadequate.

> The ultimate burden of showing an unlawful interception rests upon the party against whom the fruits of the electronic surveillance are offered. *United States v. Phillips*, 540 F.2d 319 (8th Cir. 1976), *cert. denied* 429 U.S. 1000, 97 S. Ct. 530, 50 L. Ed. 2d 611 (interpreting the federal wire interception and interception of oral communications provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. (1976), on which our telephonic communications act is patterned).

State v. Brennen, 214 Neb. 734, 742, 336 N.W.2d 79, 84 (1983). See *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984).

In *State v. Lozano*, 209 Neb. 772, 774-75, 311 N.W.2d 529, 531 (1981), we said:

> In *State v. Kolosseus*, 198 Neb. 404, 415, 253 N.W.2d 157, 163 (1977), we said: " 'There is no requirement that every investigative methodology be exhausted prior to application for a [wiretap] authorization. . . . It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation.' . . . We conclude that what is required under the first alternative is that the application make a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a tap is authorized." In *State v. Holmes and Beardslee*, 208 Neb. 114, 121, 302 N.W.2d 382, 386 (1981), we held that "it is not necessary for the State to

> utilize all investigative techniques before making an application for a wiretap." We further noted there that " 'wire tap "procedures were not to be routinely employed as the initial step in criminal investigation," but it is equally true "that the statute does not require the government to use a wire tap only as a last resort." United States v. Kerrigan, 514 F.2d 35 (9th Cir. 1975); United States v. Staino, 358 F.Supp. 852, 856-7 (E.D. Pa. 1973).' " *Id.* at 122, 302 N.W.2d at 386.

An affidavit in support of an application for a wiretap is similar to an affidavit in support of an application for a search warrant and is to be tested in a practical and commonsense fashion. *State v. Holmes and Beardslee*, 208 Neb. 114, 302 N.W.2d 382 (1981).

This case involved an extensive investigation into the drug traffic in North Platte, Nebraska, that was carried on over a relatively long period of time. As in *State v. Hinton*, 226 Neb. 787, 415 N.W.2d 138 (1987), *Lozano, supra*, and *Holmes and Beardslee, supra*, law enforcement officials were attempting to identify the sources of the drugs, and the defendant's activities were but a part of the overall investigation.

The showing made in this case, when tested in accordance with the rules stated above, was adequate to support the order authorizing the wiretap.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KAREN ARVIZO, APPELLANT.
444 N.W.2d 921

Filed September 1, 1989. No. 89-318.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed as modified.

Barry Waid, Hall County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Marie C. Pawol for appellee.

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

GRANT, J.

In an amended information, defendant was charged, in one count, with a violation of Neb. Rev. Stat. § 28-611(1)(b) (Reissue 1985), in that defendant had obtained value from Management Investment Industries, Inc., and issued that corporation a check for $324 on Home Federal Savings and Loan of Grand Island, Nebraska, when defendant had no funds in that institution.

On January 12, 1989, defendant pled guilty to that charge. On March 3, 1989, defendant was sentenced to 6 months in the Hall County jail, "said sentence to run consecutively with sentences from Adams and Buffalo Counties," and to pay the costs of prosecution, and the court ordered that "restitution in the sum of $3278.17 be made to the Clerk of the District Court within one (1) year . . . ."

Defendant timely appealed to this court and assigns only one error: "The sentence imposed on March 3, 1989, is excessive and an abuse of discretion." For the reasons hereafter stated, we affirm, but modify, the sentence.

The jail time set out in the sentence cannot be considered excessive. A sentence imposed within the limits prescribed by statute will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988). In the case before us, defendant was charged with violating § 28-611(1)(b), a Class IV felony. The possible punishment for such a violation is up to a maximum of 5 years' imprisonment, plus a possible fine. Defendant admitted her actions and stated her only excuse was that she was a compulsive gambler.

At the time of defendant's plea to this charge, there were in the hand of the Hall County attorney at least 20 other no-funds checks written by defendant. As shown by the consecutive nature of her sentence, defendant had been convicted of similar acts in Adams and Buffalo Counties. Defendant's sentence was

not excessive insofar as her imprisonment is concerned.

Defendant also contends, however, that the court erred in requiring her to make restitution of $3,278.17 when she had been convicted of writing a no-fund check of $324. With that contention we agree.

Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1988) provides:

> A sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. Whenever the court believes that restitution may be a proper sentence or the victim of any offense or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim.

The "victims" of defendant's actions may have lost an additional $2,954.17 beyond the loss sustained by the victim "of the offense for which the defendant has been convicted," but such losses may not be the subject of a restitution order in connection with a different offense.

The judgment and sentence of the Hall County District Court are affirmed in all respects, except the restitution required to be paid is reduced to $324, to be repaid within 1 year to the victim, Management Investment Industries, Inc.

AFFIRMED AS MODIFIED.

ALAN GATZEMEYER, APPELLANT, V. NELIGH TOWNSHIP AND ROBERT MULLER, APPELLEES.

445 N.W.2d 593

Filed September 15, 1989. No. 87-881.

1. **Motor Vehicles: Negligence.** The rule that it is generally negligence as a matter of law to operate a motor vehicle on a public street or highway in such a manner that the vehicle cannot stop or turn aside without colliding with an object or obstruction on the street or highway within the operator's range of vision is not

applicable where reasonable minds might differ as to whether the motorist was exercising due care under the circumstances.

2. **Summary Judgment.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, this court takes the view of the evidence most favorable to the party against whom the motion is directed and gives that party the benefit of all favorable inferences drawn from the evidence.
4. **Motor Vehicles: Negligence.** Neb. Rev. Stat. § 39-606 (Reissue 1988) does not absolve persons engaged in road work from obeying the fundamental premise that an operator of a vehicle is under a continuing duty to exercise reasonable care for the safety of others.

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

N. Richard Willia and Theodore E. Karpuk, of Margolin, Gildemeister, Willia, Mugan & Keane, for appellant.

C.J. Gatz, of Jewell, Gatz, Collins, Dreier, Fitzgerald & Balsiger, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

MULLEN, D.J.

The plaintiff, Alan Gatzemeyer, appeals from the trial court's granting of summary judgment in favor of the defendants, Neligh Township and Robert Muller. As a matter of law, the trial court found Gatzemeyer was negligent and the defendants were not negligent. Gatzemeyer claims the court erred in finding (1) he was negligent as a matter of law; (2) his negligence was a bar to recovery as a matter of law; and (3) the defendants were not negligent as a matter of law. We reverse and remand for further proceedings.

For the purposes of the summary judgment hearing, the trial court received 11 exhibits into evidence. The exhibits included the pleadings and the depositions of the parties.

Gatzemeyer stated in his deposition that on October 2, 1985, at approximately 5:30 p.m., he drove his motorcycle west on

the township road between his house and a pasture to feed cattle. The road was roughly 22 feet wide. Gatzemeyer was driving the motorcycle on the right-hand side tire track on the north side of the westbound lane. Upon cresting a hill, Gatzemeyer saw a road maintainer, owned by the defendant Neligh Township and operated by the defendant Robert Muller, traveling east in the westbound lane. At that time the maintainer was 40 to 50 feet in front of Gatzemeyer. Muller stated in his deposition that he first saw the motorcycle when it was 25 feet away. At that time Gatzemeyer estimated his speed at approximately 40 miles per hour; the maintainer's speed was approximately 5 miles per hour. In his deposition, the plaintiff stated he had seen the maintainer working on the road several times in the past, but he had never seen it when it was moving against traffic.

The maintainer was a "Caterpillar 140 G," approximately 13 1/2 feet high, with an attached 16-foot blade. According to Muller, the revolving yellow beacon light on the top of the maintainer was operating at the time, although Gatzemeyer stated in his deposition he did not see the light. The edge of the blade was approximately 2 feet from the north edge of the road and angled so that it extended another 12 feet into the road. There were no warning signs or devices in place to warn oncoming traffic of the maintainer's operation. According to Muller, the only notice oncoming traffic would have of his presence was the windrow in the middle of the road.

To pass to the left, Gatzemeyer would have had to swerve 8 to 10 feet to the left and jump the windrow, which was 10 inches high and 12 to 16 inches wide. In a statement attached to the plaintiff's response to defendants' request for production of documents, Muller stated, "Mr. Gatzemeyer had no choice but to drive into the ditch as he could not have avoided the maintainer blade had he attempted to swerve to the left into the other lane of travel . . . ."

Gatzemeyer passed the maintainer on the right, between the blade and the edge of the road; however, he entered the ditch shortly after passing the blade. Although he avoided hitting the maintainer, Gatzemeyer collided with a haystack in the ditch and was allegedly injured.

Gatzemeyer claimed the defendants were negligent in (1) operating the maintainer eastbound in the westbound lane of traffic; (2) failing to warn oncoming traffic of the presence of the maintainer in that lane of traffic; (3) failing to exercise ordinary, reasonable, or due care commensurate with the danger reasonably to be anticipated under the existing circumstances; (4) operating a vehicle on a highway at a greater width than allowed by Neb. Rev. Stat. § 39-6,177 (Reissue 1988); (5) operating the maintainer in a careless, reckless, or willfully reckless manner, in violation of Neb. Rev. Stat. §§ 39-669, 39-669.01, and 39-669.03 (Reissue 1988); and (6) failing to place flags or emergency reflectors in a position that would forewarn others of a dangerous situation, in violation of Neb. Rev. Stat. § 39-6,164 (Reissue 1984).

The defendants denied they were negligent and claimed Gatzemeyer's negligence was the cause of the accident. The specific claims of negligence against Gatzemeyer included failure to (1) maintain a proper lookout, (2) maintain proper control, (3) operate the motorcycle in a manner that would enable him to stop within his range of vision, (4) operate his vehicle at a proper rate of speed under the existing conditions, and (5) stop or turn aside prior to the collision. The defendants further claimed such negligence was more than slight when compared with any negligence on the part of defendants.

The defendants moved for summary judgment. The trial judge found (1) the defendants were maintaining the township road at the time of the accident; (2) it was not shown the road was being maintained in a negligent manner; and (3) Gatzemeyer was negligent as a matter of law because he was operating his motorcycle at such a rate of speed that he could not safely stop or turn aside in time to avoid an obstruction within his range of vision.

Defendants contend they were not negligent, as a matter of law, based upon Neb. Rev. Stat. § 39-606 (Reissue 1984), which stated:

> Unless specifically made applicable, the provisions of sections 39-601 to 39-6,122 [Nebraska's rules of the road], except those provisions relative to careless driving and to reckless driving, shall not apply to:

> (1) Persons, teams of draft horses, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work . . . .

The record is clear that Muller was engaged in "work upon the surface of a highway." Therefore, he was not obligated to follow the statutory rules of the road. However, such fact did not absolve him from obeying the fundamental premise that an operator of a vehicle is under a continuing duty to exercise reasonable care for the safety of others. *Chmelka v. Continental Western Ins. Co.*, 218 Neb. 186, 352 N.W.2d 613 (1984).

The defendant Muller operated the road maintainer on a steep hill against the flow of traffic without any warning to oncoming traffic. Whether he exercised reasonable care for the safety of others in doing so is a question for the trier of fact. If there were reasonable alternatives to achieve the result sought or if a warning signal would have been feasible, the defendants could be held liable for not exercising reasonable care in the performance of their duties. There remains a question of fact as to any negligence on the part of the defendants.

Defendants argue Gatzemeyer was negligent as a matter of law in driving his vehicle at such a speed that he was unable to stop or turn aside in time to avoid the maintainer, which was discernible within his range of vision.

Under Nebraska law, it is generally negligence as a matter of law to operate a motor vehicle on a public street or highway in such a manner that the vehicle cannot stop or turn aside without colliding with an object or obstruction on the street or highway within the operator's range of vision. *Converse v. Morse*, 232 Neb. 925, 442 N.W.2d 872 (1989); *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). This rule, however, is not applicable where reasonable minds might differ as to whether the motorist was exercising due care under the circumstances. *Fink v. Meister*, 188 Neb. 248, 196 N.W.2d 122 (1972).

A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt. *Sherbeck v. Schaper*, 232 Neb. 754, 442 N.W.2d 364 (1989).

In reviewing a summary judgment, this court takes the view of the evidence most favorable to the party against whom the motion is directed and gives that party the benefit of all favorable inferences drawn from the evidence. *Sherbeck v. Schaper, supra.*

In considering a motion for summary judgment, the court examines the evidence to determine if any issue of material fact exists, not to decide how a particular issue of fact should be resolved. *Allan v. Massey-Ferguson, Inc.*, 221 Neb. 528, 378 N.W.2d 664 (1985); *Roy v. Morford*, 216 Neb. 818, 346 N.W.2d 392 (1984).

We cannot say reasonable minds could draw only one conclusion from the facts of this case. The general rule is not applicable here, and the determination of any negligence on the part of Gatzemeyer is a factual question to be answered by a trier of fact.

Therefore, it was error for the court to grant summary judgment when there remain questions of fact as to the negligence of the parties involved in the matter.

Since the cause is remanded on other grounds, discussion of the plaintiff's second assignment of error is moot.

As questions of material fact exist concerning the negligence of the various parties, the trial court's grant of summary judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FIRST SECURITY SAVINGS, APPELLANT, V. AETNA CASUALTY AND SURETY COMPANY, APPELLEE.

445 N.W.2d 596

Filed September 15, 1989. No. 87-897.

1. **Insurance: Bonds: Notice: Time: Proof.** In order for an insured to recover under a discovery bankers blanket bond, the insured must establish that it (1) discovered the loss within the period of the bond's existence, (2) furnished written notice to the underwriter at the earliest practicable moment after discovery of the loss, and (3) furnished the underwriter proof of loss with full particulars within the time specified by the bond.
2. **Summary Judgment.** Summary judgment is appropriate where there exists no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and the moving party is entitled to judgment as a matter of law.

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

James B. Cavanagh, of Erickson & Sederstrom, P.C., for appellant.

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

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

CAPORALE, J.

The plaintiff-appellant, First Security Savings, a state-chartered industrial loan and investment company, challenges the district court's sustainment of defendant-appellee Aetna Casualty and Surety Company's motion for summary judgment in this suit on a discovery bankers blanket bond, pursuant to the terms of which Aetna undertook to indemnify First Security for certain losses. We affirm.

So far as is relevant to this inquiry, the bond covered any loss which resulted directly from the dishonest or fraudulent acts of the insured's employee and which was discovered during the period of the bond's existence, irrespective of when the loss occurred. The bond required, among other things, that the insured "within six months after such discovery furnish to the

Underwriter affirmative proof of loss with full particulars." The bond further provided:

> At any time prior to the termination or cancellation of this bond as an entirety, whether by the Insured or the Underwriter, the Insured may give to the Underwriter notice that it desires under this bond an additional period of twelve months within which to discover loss sustained by the Insured prior to the effective date of such termination or cancellation and shall pay an additional premium therefor.

The subject bond became effective on April 11, 1977, was renewed for an additional 3 years as of April 11, 1980, and, since First Security elected not to purchase the extended coverage available to it under the last-mentioned bond provision, was terminated "effective from and after the 11th day of April, 1983." (According to *First Sec. Sav. v. Kansas Bankers Sur. Co.*, 849 F.2d 345 (8th Cir. 1988), First Security obtained a new bond from a different insurer effective April 11, 1983, which was held not to cover the losses sought in that case because they were determined to have been discovered before the new bond took effect.)

First Security's petition in this case alleges that its president, one James Gillette, "dishonestly and fraudulently misappropriated and converted" its funds in a variety of ways. Aetna denied liability on the grounds, among others, that First Security did not discover any loss within the period of the bond's existence and, further, failed to provide a timely proof of loss.

The evidence establishes that First Security's first communication with Aetna concerning this matter was by a letter dated April 13, 1983, which advised that First Security had been informed by regulatory authorities of "possible violations" of law by Gillette related to First Security Bank and Trust Company, an affiliate of First Security, and that it was "likely that similar misconduct in connection with First Security Savings Company occurred. If so, a loss covered by your bond will undoubtedly result."

By cover letter dated October 11, 1983, First Security submitted to Aetna a proof of loss in the amount of $89,194.02

relating to First Security's discovery of Gillette's allegedly fraudulent involvement in the Gillette-Morton transaction. The proof of loss is dated October 11, 1983, at the top and October 12, 1983, at the bottom and is stamped as received by Aetna on October 17, 1983. The proof of loss states, "This particular loss was first discovered in early May, 1983 . . . ."

Thereafter, on March 29, 1984, Aetna received a second proof of loss, dated March 5, 1984, and entitled "Initial Proof of Loss," in which First Security claimed the amount of $2,176,861.60 as the result of Gillette's allegedly fraudulent involvement in the Copple transactions. This document also reasserted the loss which was the subject of the October 1983 communication.

In *First Security Bank v. New Hampshire Ins. Co.*, 232 Neb. 493, 441 N.W.2d 188 (1989), we held that in order for an insured to recover under a discovery bankers blanket bond, the insured must establish that it (1) discovered the loss within the period of the bond's existence, (2) furnished written notice to the underwriter at the earliest practicable moment after discovery of the loss, and (3) furnished the underwriter proof of loss with full particulars within the time specified by the bond.

Resolving the confusion as to the date of the October 1983 proof of loss in favor of First Security and thus assuming that that document was submitted seasonably, the fact remains that the loss described therein was, by First Security's own admission, not discovered within the period of the bond's existence. Thus, the loss which is the subject of that communication is not covered by the bond.

The March 1984 proof of loss clearly was not submitted to Aetna within 6 months of the termination of the bond as was required; consequently, the losses reported in the March letter are likewise not covered. First Security's argument that the March 1984 proof of loss merely amended and thus related back in time to its October 1983 submission is untenable. The later submission added a series of transactions which were not mentioned in the earlier submission and increased First Security's claim by more than $2 million. There can be no question but that the March 1984 letter constituted a new, and untimely, proof of loss.

The record discloses that there exists in this case no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that Aetna, as the moving party, is entitled to judgment as a matter of law. Accordingly, the district court properly granted Aetna's motion for summary judgment. *Gatzemeyer v. Neligh Township, ante* p. 329, 445 N.W.2d 593 (1989); *State Farm Fire & Cas. Co. v. Victor,* 232 Neb. 942, 442 N.W.2d 880 (1989).

AFFIRMED.

IN RE INTEREST OF J.H., H.H., L.H., M.H., AND R.H., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. V.H., APPELLANT.

445 N.W.2d 599

Filed September 15, 1989. No. 88-513.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the court to reach a conclusion independent of the findings of the trial court. Where evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof: Appeal and Error.** A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply with a rehabilitative plan ordered by the juvenile court, and it is in the best interests of the children that parental rights be terminated.
3. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child presents an independent reason justifying termination of parental rights.
4. **Parental Rights.** The juveniles' best interests are the primary considerations in considering whether parental rights should be terminated. Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require termination of the parental rights.

5. **Parental Rights: Juvenile Courts.** The juvenile court has discretionary power to prescribe a reasonable plan for parental rehabilitation to correct conditions underlying the adjudication that a child is a juvenile within the juvenile code.
6. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Dean M. Johnson for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Bridgitt Brochtrup Blankenau for appellee.

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

MCGINN, D.J.

V.H. appeals from an order of the separate juvenile court of Douglas County terminating her parental rights with regard to five of her children, J.H., H.H., L.H., M.H., and R.H. We affirm.

On April 4, 1985, a petition to terminate the parental rights of V.H. was filed in the separate juvenile court of Douglas County. The petition alleged that J.H. (age 10), H.H. (age 9), L.H. (age 7), A.B. (age 4), M.H. (age 3), and R.H. (age 1) were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), lacking proper parental care by reason of the fault or habits of V.H., the natural mother, and within the meaning of Neb. Rev. Stat. § 43-292(2) (Reissue 1988), having a natural parent, V.H., who has substantially and continuously or repeatedly neglected said children and refused to give the necessary parental care and protection.

At the hearing on the petition, V.H. admitted several of the allegations contained in the petition. The court found J.H., H.H., L.H., A.B., M.H., and R.H. to be within §§ 43-247(3)(a) and 43-292(2) and retained jurisdiction over the children, with physical custody of all the children except A.B. given to the Department of Social Services. A.B. was placed in the physical custody of D.B., the natural father. The court took

the motion to terminate V.H.'s parental rights under advisement.

Following a dispositional hearing on September 4, 1985, the court established a rehabilitation plan which required V.H. to (1) undergo a chemical dependency evaluation and psychological and psychiatric evaluations, and obtain the treatment indicated; (2) maintain her employment and provide verification of income on a monthly basis; (3) obtain suitable housing (at a minimum, a one-bedroom residence) within 60 days and maintain the same residence for 60 consecutive days before the next hearing, maintain adequate housekeeping standards and furnishings, and provide monthly rent receipts; (4) notify the court of any change in employment or residence within 48 hours; and (5) meet with the juvenile court probation officer once a month to establish goals for the month. V.H. was also granted reasonable visitation with the children, to be arranged by Child Protective Services.

The first review hearing was held January 6, 1986. After evidence was presented on V.H.'s compliance with the rehabilitation plan, the court terminated its jurisdiction over A.B. and granted permanent custody to D.B., the natural father. The court retained jurisdiction over the remaining five children and continued the rehabilitation plan with some modifications. First, V.H. was ordered to participate in a YWCA alcohol awareness program. Second, the court ordered counseling for J.H., H.H., and L.H. to deal with behavior problems the children were experiencing, with V.H. participating as required. Last, the visitation schedule was adjusted to deal with problems V.H. had controlling the children when she visited all five at one time. Visitations were split so that V.H. visited M.H. and R.H. weekly and visited J.H., H.H., or L.H. once every 3 weeks on a rotating basis.

Further review hearings were held on May 6, 1986, July 31, 1986, October 31, 1986, and May 18, 1987. At each hearing, evidence was presented showing the extent of V.H.'s compliance with the rehabilitation plan since the last hearing. After each hearing, the court retained jurisdiction over the five children and continued the rehabilitation plan in essentially an identical form. Beginning with the order after the May 6, 1986, hearing,

V.H. was ordered to attend relinquishment counseling aimed at helping her assess her capabilities to parent and determine if voluntary relinquishment was in the best interests of the children.

A motion for termination of parental rights was filed on September 18, 1987. On January 19, 1988, V.H. moved for increased visitation with the children. A hearing on the motions began on February 10, 1988, and continued on April 14, with the motions heard in the order in which they were filed. At the conclusion of the hearing, the juvenile court found there was clear and convincing evidence to support the motion for termination and ordered V.H.'s parental rights over J.H., H.H., L.H., M.H., and R.H. terminated. Having terminated V.H.'s parental rights, the court took no action on the motion for additional visitation.

V.H. filed a motion for new trial and a motion for visitation pending a determination of the motion and during the pendency of any appeal. Both motions were overruled. This appeal followed.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the court to reach a conclusion independent of the findings of the trial court. Where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of E.B.*, 232 Neb. 653, 441 N.W.2d 637 (1989); *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989).

This case began on March 21, 1985, when the Omaha Police Division received an anonymous telephone call concerning minor children left alone in a residence at 2411 Laurel Avenue in Omaha, Nebraska. Upon investigation, the police found J.H., H.H., L.H., A.B., M.H., and R.H. alone in the residence. The residence was described as being in a state of total disarray. The burners on the electric stove were turned on and were red hot. The police immediately took the children into protective custody.

V.H. admitted the children were alone, the burners were on,

and the house was in disarray. She also admitted (1) garbage, trash, dirty clothes, and animal and human waste were scattered throughout the house; (2) a putrid odor permeated the entire residence; (3) J.H. and H.H. had been observed at school on numerous occasions in very dirty clothing and in dire need of bathing; (4) school personnel bathed and gave new clothes to J.H. and H.H.; and (5) V.H. had been informed of the hygiene problems by school personnel, but had not cooperated in correcting the problem. V.H. stated she had left the children alone for about 20 minutes while she went to the store for food. She explained the condition of the house as being partially the result of the gas and water being turned off for not paying the utility bill and partially the result of plans to move at the end of the month.

Photographs were introduced to show the condition of the house on the date the children were taken into protective custody. The pictures showed clothes piled throughout the residence; the bathroom stool unflushed; dishes left unwashed in the kitchen sink; little food in the refrigerator, which needed to be cleaned; and liquor bottles, some of which appeared to contain alcohol, prevalent in the residence.

According to V.H., she was receiving $560 per month in aid to dependent children payments. She paid $250 per month rent for the Laurel Avenue residence. Also, V.H. owed $30 to the Omaha Public Power District and $400 to the Metropolitan Utilities District for unpaid utility bills and $225 to friends and relatives for various loans. By the time of the dispositional hearing, two warrants had been issued for V.H.'s arrest due to nonpayment of fines. V.H. owed $180 on a $220 fine for one count of child abuse/neglect (stemming from the March 21 incident) and another $40 fine on a ticket for improper turning.

V.H. had been previously convicted of child abuse/neglect in 1982. The charge resulted in the five oldest children being placed under the jurisdiction of the juvenile court from July 27, 1982, until November 6, 1984. The previous involvement of the juvenile court was terminated after the court found further intervention would be to no avail and would be unnecessary.

At the final hearing, extensive evidence was introduced concerning V.H.'s compliance with the court-ordered

rehabilitation plan and the effect the proceedings were having on the children. The court also took judicial notice of all reports introduced at the review hearings.

In the approximately 2 1/2 years in which the children were under the jurisdiction of the juvenile court, V.H. held roughly 10 jobs, some for only 2 weeks. Within this time, she had also been unemployed for several months. She was terminated at two jobs because of her attendance record, and she lost another job because of a complaint about alleged contact with a customer. She voluntarily left other jobs for various reasons. When she was employed, she frequently did not provide income verification as required by the court.

In the same time period, V.H. reported approximately 15 different residences. V.H. did not timely inform the probation officer of all the changes in residences. In most of these residences, she was living in the homes of friends or relatives or in shelters. Only two of the reported residences were independent, one of which she obtained in December of 1987, after the motion to terminate parental rights was filed. For about 6 months, she received room and board in exchange for caring for an elderly gentleman. The probation officer inspected the situation and classified it as inadequate. There was also a 6 1/2-month period between October 1986 and May 1987 when there was no contact with V.H., and she did not report her whereabouts. Further, in the entire 2 1/2-year period, V.H. supplied only two rent receipts, showing payment of $130 toward rent of $250.

V.H.'s visitation with her children deteriorated over the 2 1/2 years of court supervision. According to Lillie Carther, the DSS caseworker in charge of the children while they were under the court's jurisdiction, V.H. made 33 of 36 possible visits in 1985, 40 of 48 possible visits in 1986, 18 of 48 possible visits in 1987, and 8 of 15 possible visits through April of 1988. V.H. explained the decreased visitation was due to a change in DSS rules concerning the timing of arranging visits. She stated she was not always able to get to a phone before the deadline. Carther testified she tried to accommodate V.H. even if she called in late.

At the beginning, an observer described the visits as

containing "a great deal of yelling, fighting, [and] throwing things (toys)." Visits attended by V.H.'s mother were "calmer" than when V.H. was there alone. The CPS observer described the children as "wild and out of control." The worker also described V.H. as "oblivious" to the conduct of the children. Later observations indicate V.H. was unable to maintain control of the children during visits. Observers described the children as "animals" during the visits, saying, "They climb all over everyone else and hit each other, [and] run wild in the halls." J.H., H.H., and L.H. would enter offices in the building where the visitations occurred and steal items out of desks. On several occasions, M.H. returned to the foster home with bruises and scratches. These problems appear to have been corrected when the visits were split.

V.H. was occasionally late for the scheduled visits. She excused the tardiness and failure to keep appointments as due to lack of transportation, although DSS provided bus tickets and cabfare to assist in getting to appointments.

The record shows V.H. virtually vanished between December 1986 and May 1987. V.H. did not visit any of the children between December 4, 1986, and May 14, 1987. She had no contact with H.H. from October 30, 1986, until May 1987. Further, she contacted her probation officer only once and did not attend the relinquishment counseling during the October to May period. She did not maintain steady housing or employment and did not report changes in housing and employment during this time period. V.H. explained the lack of contact was due to depression over not having a job or her own housing; also, she stated she had been sick with bronchitis and a slight case of pneumonia.

The evidence overwhelmingly shows this absence caused the children to wonder if something was wrong with V.H. and even to fear she might have died. During the absence, however, the behavior of the children improved, only to deteriorate again once V.H. returned.

V.H. underwent chemical dependency testing. Although V.H. was not chemically dependent, the counselor recommended participation in an alcohol education program designed to increase awareness of the warning signs of alcohol

abuse. V.H. completed the program on October 21, 1986.

The ordered psychological and psychiatric evaluations were conducted in April 1986. Ravinder P. Mediratta, M.D., of the Creighton University department of psychiatry, determined V.H. did not suffer from any mental illness, psychotic disorder, organic brain disorder, or personality disorder which would interfere with her ability to take care of the children. Thomas A. Korn, Ph.D., from St. Joseph Center for Mental Health, conducted the psychological evaluation. According to Korn, V.H.'s "ability to model an adequate social behavior and her judgment in parenting and child care issues is [sic] highly questionable."

Further, V.H. made less than 75 percent of her monthly meetings with the probation officer. The record also indicated V.H. attended only one session of relinquishment counseling after it was ordered on May 6, 1986.

At various points during the court's supervision, J.H., H.H., L.H., and M.H. underwent evaluation and counseling, necessitated by behavior problems. These problems included fighting at school and in the foster home, running away from the foster home, stealing, and sexual conduct inappropriate for their age groups. J.H., L.H., and H.H. all received inpatient evaluations at St. Joseph Center for Mental Health. The foster placements of several of the children had to be changed as a result of their behavior problems.

Gwen Opfer, the DSS worker in charge of L.H.'s foster care between October 1986 and June 1987, testified she had no contact at all with V.H. during the time she was in charge of L.H. and could not reach V.H. to arrange visits. L.H.'s foster mother told Opfer there was some visitation in November, but, otherwise, there were no cards, letters, gifts, or phone calls from V.H. during that time. Because of V.H.'s absence, L.H. expressed the fear that V.H. was dead. In June 1987, L.H. moved to Lincoln to live with his grandmother. David Hammer became the worker in charge of L.H.'s case. Hammer testified, in the time L.H. had been in Lincoln, V.H. had never contacted Hammer to arrange visits. The grandmother told him V.H. visited on approximately four occasions and called less frequently. In Hammer's opinion, the extended periods of time

during which there was no contact between L.H. and his mother was not in the child's best interests and caused L.H. concern. Also, Hammer stated the placement with the grandmother had been good for L.H., and L.H. wished to stay with the grandmother.

Kendal Osbahr, director of the Blondo Treatment Facility, where H.H. was placed from September 5, 1986, until November 24, 1987, testified as to V.H.'s relationship with H.H. During the time H.H. was in the facility, V.H. was ordered to participate in H.H.'s therapy and in parenting classes at the facility. Visitations were scheduled either immediately before or after the therapy sessions. Of a possible 55 sessions, V.H. attended only 11. In Osbahr's opinion, V.H.'s attendance at the parenting classes was too infrequent to make progress in dealing with H.H.'s behavior problems. During his stay at the facility, H.H. expressed concern over V.H.'s not visiting, especially during her absence between October 1986 and May 1987. Osbahr stated it was her opinion that the inconsistency of V.H.'s visits was not in H.H.'s best interests.

In the opinion of Carther, the children's behavior problems during visitations were caused by instability brought about by the presence of V.H., and it would be in the best interests of all the children for V.H.'s parental rights to be terminated. From the beginning, the consensus of the social workers involved in the case recommended termination of V.H.'s parental rights.

V.H. makes five assignments of error, which will be dealt with in order.

V.H. first claims the juvenile court erred in finding there was sufficient evidence to support the termination of her parental rights. The second assignment of error claims the court did not determine it was in the best interests of the children for V.H.'s rights to be terminated. These two arguments overlap and will be discussed together.

A judgment terminating parental rights will be affirmed where the State has proved by clear and convincing evidence that the parent has willfully failed to comply with a rehabilitative plan ordered by the juvenile court, and it is in the best interests of the children that parental rights be terminated. *In re Interest of E.B.*, 232 Neb. 653, 441 N.W.2d 637 (1989); *In*

re Interest of S.C., S.J., and B.C., 232 Neb. 80, 439 N.W.2d 500 (1989).

A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child presents an independent reason justifying termination of parental rights. *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989); *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

The record supports the juvenile court's determination that V.H. failed to comply with the rehabilitation plan. She received repeated warnings from the court and the probation officer that there was a strong possibility her parental rights would be terminated if she did not at least make a reasonable attempt to comply with the plan. V.H. testified that financial problems were the cause of failure to comply, but the evidence also shows that she lost jobs because she did not show up for work and that she quit jobs because she was not being paid what she considered enough money. Also, at the hearing of May 18, 1987, V.H. stated she did not want a job that was only going to pay "three something an hour." She also acknowledged at that hearing that she had made no effort during the previous 6 months to contact the caseworker or probation officer and that if one of her children had become gravely ill during that period, no one would have known how to find her. On this record, we find there was more than sufficient evidence to find V.H. failed to comply with the court-ordered plan.

The juveniles' best interests are the primary considerations in considering whether parental rights should be terminated. *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). Where a parent is unable or unwilling to rehabilitate herself within a reasonable time, the best interests of the children require termination of the parental rights. *In re Interest of P.D., supra.*

The record is clear that the disruption in the lives of the children was enormous. Between 1982 and 1988, the children had been under the jurisdiction of the court for all but approximately 6 months. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain

parental maturity. *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989); *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 430 N.W.2d 552 (1988).

Further, the testimony of the caseworkers involved with the children shows the children fared better during the 6-month period in which they had no contact with V.H. There is sufficient evidence that termination of V.H.'s parental rights is in the best interests of the children.

The third assignment of error claims the rehabilitation plan was not reasonable in that it did not adequately provide for the correction of the problems which led to the filing of the original petition.

A juvenile court has discretionary power to prescribe a reasonable plan for parental rehabilitation to correct conditions underlying the adjudication that a child is a juvenile within the juvenile code. *In re Interest of L.H., supra.*

V.H.'s main argument claims a one-bedroom apartment, which the plan required her to obtain, was, by definition, insufficient for herself and her five children. While it is obvious six people in a one-bedroom residence would indeed be crowded, it should be noted the court established that as a *minimum*; V.H. was free to obtain more spacious living quarters. At the termination hearing, the probation officer addressed this issue, stating, "The reason for the one bedroom was to get [V.H.] on her feet so that we could start moving the children home . . . ." She further testified, "We were willing to work with the mother for her to start with a one bedroom and work into a larger residence that would accommodate all five children . . . ." The one-bedroom specification appears to have been an acknowledgment that, at the time of the first hearing, V.H. may not have had the financial resources to obtain a larger, presumably more expensive, residence. The major focus was on having V.H. maintain a steady residence that was properly furnished and kept in order.

At the time the court took jurisdiction over the children, a large part of the problem was the conditions in which the children were living. The housing requirement was intended to rectify this shortcoming. The plan never developed further

because of V.H.'s own actions.

The employment requirement was needed to assist V.H. in maintaining adequate housing. The other requirements were aimed at assisting V.H. in reaching the goal of reunification of the family. As such, the plan adopted by the court appears to have been a reasonable attempt to correct the conditions which led to the original adjudication. Therefore, the court did not abuse its discretion in the formulation of the plan.

V.H. also relies on the psychiatric and psychological evaluations, which recommend reunification of V.H. and her children with long-term supervision by DSS. According to V.H.'s brief, since these recommendations were not followed, the plan was not reasonable.

It should be noted these evaluations did not make an unqualified recommendation for reunification. Dr. Korn's evaluation stated:

> *If* in the wisdom of the court, the . . . children are reunited with their mother in the home environment, it would appear that a lengthy (one year) trial period during which continuous weekly monitoring and concurrent remediation of [V.H.'s] parenting and child care practices be carried out in order to insure the health and well-being and adequate social functioning of the children.

(Emphasis supplied.) Dr. Mediratta stated: "She *may* be given partial responsibility to take care of her children . . . under very close Welfare supervision, maybe starting with one or two children." (Emphasis supplied.)

V.H.'s argument ignores the fact that at no time during the court's involvement was there any type of residence in which to reunite the family. Reunification of the family, under the conditions which existed, would in all likelihood have led to a continuation of the problems which the family was experiencing in March 1985. The court did not err by not acting upon the recommendations found in these evaluations.

V.H. also claims there was not sufficient evidence that her noncompliance was willful. The record shows, during the 2½ years preceding the filing of the motion to terminate her parental rights, V.H. was unable or unwilling to maintain steady employment and independent housing. She did not even

maintain one residence for any length of time. She was evicted for nonpayment of rent from the only independent housing she had during this time. V.H. had the probation officer visit at least one prospective residence, but never moved into it even though it was adequate. At one point in time, V.H. had $550 in savings but did not obtain the required housing. It appears she used at least part of the money to purchase an automobile which was not in good condition. Upon this record, we cannot say the failure to comply with the plan was not willful.

Fourth, V.H. claims the court erred in not granting her visitation with her children pending the appeal to this court. "After parental rights have been terminated, visitation while an appeal is pending would not be in the best interests of children who already have been in limbo for months or years." *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 243, 430 N.W.2d 552, 556 (1988). Clearly, the court did not err in refusing to grant V.H. visitation during this appeal.

Lastly, she claims the termination hearing did not comply with the requirements of due process because (1) there was a substantial delay between the filing of the motion for termination and when the actual hearing was held, and (2) the court did not allow evidence to be presented as to V.H.'s compliance in the time between the filing of the motion and the actual hearing.

The only reference in the record to the length of time between the filing of the motion in September 1987 and the hearing in February 1988 indicates the delay was in part due to continuations requested by V.H. Appellant has not provided a record upon which we may properly evaluate this argument. Therefore, we find there was no prejudice caused by the delay.

V.H. also claims she was denied due process because certain evidence concerning compliance with the court order since the filing of the motion in September 1987 was not admitted. A review of the evidence introduced at the hearing on the motion to terminate shows, however, that evidence was admitted as to V.H.'s compliance with the rehabilitation plan since the time the motion was filed. Evidence was received concerning V.H.'s employment, housing, visitation with her children, and meeting with the probation officer.

The only evidence to which an objection was sustained because of the timeframe involved was certain testimony of the foster mother of M.H., who was also a friend of V.H. This testimony concerned V.H.'s church attendance, a matter which the court found irrelevant. The court sustained an objection to certain testimony regarding contact between the foster mother and V.H., apparently because the timeframe was not specified. No offer of proof was made, nor is the substance of the evidence apparent from the context in which it was offered. "Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." Neb. Rev. Stat. § 27-103(1) (Reissue 1985); *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985). On the record before this court, we fail to see how any substantial right was affected by the exclusion of the above evidence.

The due process assignment of error is without merit.

The judgment of the separate juvenile court of Douglas County terminating V.H.'s parental rights over J.H., H.H., L.H., M.H., and R.H. is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. IPALIBO GEORGE WOKOMA, APPELLANT.

445 N.W.2d 608

Filed September 15, 1989. No. 88-767.

Convictions: Appeal and Error. In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

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

Dennis R. Keefe, Lancaster County Public Defender, and Joseph D. Nigro for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

GRANT, J.

On May 20, 1988, in the district court for Lancaster County, defendant-appellant, Ipalibo George Wokoma, was convicted by a jury of sexual assault in the first degree under Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1985). Under that statute, any person who subjects another person to sexual penetration, and the actor is 19 years of age or older and the victim is less than 16 years of age, is guilty of a Class II felony. Defendant was sentenced to imprisonment of not less than 4 nor more than 10 years.

Defendant timely appealed to this court, assigning as error only the district court's action in finding there was sufficient evidence to support the jury's verdict. We affirm.

The record shows the following. Defendant was sexually involved with the victim's mother and lived with the victim and her mother at various locations in Lincoln, Nebraska, from July 1984 to August 1985. Defendant married another woman on March 13, 1986, but continued to visit the victim's mother at her residence on several occasions thereafter, and in particular on two occasions during April 1987, when defendant was 24 years old and the victim was 13. The victim testified that during the time when the defendant lived in the same household with the victim and her mother there were many sexual assaults on the victim by defendant but that the incidents were indistinguishable in her memory. The assaults involved both penile and digital penetration, which caused the victim pain and caused her to bleed from her vagina.

The victim testified specifically to two sexual assaults on her by defendant in April 1987. On the first occasion, the defendant

came over to visit the victim's mother at about 1 a.m. After the defendant arrived, he went with the victim's mother into the victim's mother's bedroom. The victim was sleeping on the couch in the living room, which was a short distance from the mother's bedroom. After a short time the phone rang. While her mother was talking on the phone in the bedroom, the defendant came into the living room, began touching the victim, and digitally penetrated the victim. When the defendant heard sounds from the bedroom indicating the victim's mother was getting up from the bed, the defendant ceased and ran into the bathroom. Later that morning, the mother escorted the defendant out of the house.

On the second occasion in April 1987, the defendant again came to the victim's residence at about 1 a.m. The victim's mother was expecting the defendant and had asked the victim to hide the mother's purse. The defendant appeared to be drunk and went with the victim's mother into the mother's bedroom. After a time, the defendant came into the living room, where the victim was resting, and penetrated the victim both digitally and with his penis. Afterward, the defendant returned to the mother's room.

The victim testified that she did not complain of the assaults until after this second assault in April 1987. The victim testified that she was afraid to reveal the assaults to her mother, who frequently beat and whipped her. She also stated that the defendant told her she would be beaten if she told.

The day after the second April 1987 assault, the victim was upset and told her friend at school that the defendant had assaulted her. The friend wanted to call the victim's mother, but the victim did not want her to because she was afraid she would be punished.

On approximately April 24, 1987, the victim was removed from her mother's care because of physical abuse and placed with a foster family. The victim's foster mother immediately noticed a strange odor emanating from the victim. The foster mother at first thought the odor was caused by the victim's shoes or clothes or that the victim was not washing herself well enough. Finally, on a family trip in late May 1987, the foster parents determined that the odor was so bad that they should

discuss it with the victim. The foster mother had a discussion with the victim and discovered that the odor came from the victim's vagina. At this time, the victim also revealed to her foster mother the assaults by the defendant.

Consequently, in early June 1987, the victim was taken to a physician. The victim was diagnosed as having trichomonas infection, a sexually transmitted disease. The victim first noticed the discharge associated with the disease as early as October 1984. The victim was given an antibiotic to treat the infection.

The defendant testified and denied the assaults. There is no evidence that either the defendant, his wife, or the victim's mother has ever been diagnosed as having trichomonas infection. However, the defendant indicated on a medical history taken December 30, 1986, that he had problems with a discharge from his penis and a burning sensation during urination. He also complained of a discharge from his penis during a May 1, 1987, doctor's examination. During the May 1 examination, the defendant tested negatively for chlamydia and gonorrhea, but defendant's physician testified such tests will not reveal the presence of trichomonas. As a result of his May 1987 examination, the defendant was treated with a broad-spectrum antibiotic.

The victim's physician testified that a male infected by trichomonas could experience either no symptoms, have a penis discharge, or have a burning sensation during urination. The victim's physician also testified that adult immune systems are often able to combat trichomonas infection but that children often require medication to be cured. The evidence relating to the infection, if believed by the jury, was consistent with both the defendant's and the victim's being infected with the disease.

Defendant contends that "[i]t becomes clear that the evidence is insufficient to support a verdict of guilty when inconsistencies in [the victim's] story are considered along with other facts in evidence which support the defendant's version rather than the version of [the victim]." Brief for appellant at 6.

In evaluating that contention, this court's standard of review is that a judgment of conviction will not be reversed on appeal

unless the evidence supporting the conviction is so lacking in probative force that it is insufficient as a matter of law. *State v. George*, 228 Neb. 774, 424 N.W.2d 350 (1988); *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988). The State is not required to disprove every hypothesis but that of guilt. *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988).

Applying those rules, the evidence as shown in the record, if believed by the jury, is clearly sufficient to support the verdict of guilt. As required at the time of defendant's conviction, the victim's testimony as to the crime was fully corroborated by the testimony of the victim's school friend, by the testimony of the victim's foster mother, and by the circumstances of the presence of a sexually transmitted disease in the body of the victim. The judgment of conviction is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL THOMAS MEIS, APPELLANT.
445 N.W.2d 610

Filed September 15, 1989. No. 88-808.

1. **Postconviction: Proof: Appeal and Error.** 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.
2. **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.

3. **Postconviction: Effectiveness of Counsel: Proof.** When, in a postconviction motion, a defendant alleges a violation of his or her 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 an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions.
4. **Postconviction.** An evidentiary hearing in a postconviction proceeding may be denied when the records and files in the case affirmatively establish that the defendant is not entitled to relief.
5. _____. In a proceeding under the Postconviction Act, the applicant is required to allege facts which, if proved, constitute a violation or infringement of rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing.
6. **Supreme Court: Judicial Notice.** The Supreme Court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have been previously considered and determined, in cases which are interwoven and interdependent.
7. **Expert Witnesses: Effectiveness of Counsel: Proof.** Generally, expert testimony is not admissible as proof that assistance of counsel in a criminal case was ineffective.

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

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

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

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

HASTINGS, C.J.

The defendant, Daniel Thomas Meis, has appealed from the order of the district court which denied him a hearing on and overruled his second motion for postconviction relief. The proceedings regarding his first motion are found in *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986). His direct appeal, which contains most of the facts concerning his conviction for first degree murder, may be found in *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984). We affirm the order of the trial court.

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. *State v. Patterson*, 232 Neb. 304, 440 N.W.2d 242 (1989); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

In his first motion for postconviction relief, the defendant alleged that he was denied effective assistance of counsel at trial and on appeal and that the prosecutor conducted himself in such a way as to result in prosecutorial misconduct. The district court allegedly refused to hear evidence on the defendant's numerous other claims because they could have been raised on direct appeal.

After an evidentiary hearing, the district court denied the defendant's request for postconviction relief. On appeal, this court affirmed, finding that the claims on which the district court allegedly did not permit evidence all could have been, and some were, raised on direct appeal, including the trial court's failure to make an entry on the record as to the voluntariness of the defendant's impeaching statement. Additionally, the issue of prosecutorial misconduct could also have been raised on appeal. This court further found that there was no factual support for the allegations of ineffective assistance of counsel at trial and on appeal, including the allegation relating to trial counsel's failure to object to statements made by the prosecutor in closing argument and failure to fully cross-examine witnesses.

Regarding trial counsel's alleged ineffectiveness in not objecting to statements in the prosecutor's closing argument, trial counsel testified at the postconviction hearing that he had discussed with cocounsel and the defendant whether to object and decided against objecting. In light of that testimony, this court found the failure to object to be a matter of trial strategy. As to the claim that trial counsel failed to fully cross-examine witnesses, this court held that the defendant failed to allege facts to show how he suffered prejudice and also failed to prove prejudice.

In his second motion for postconviction relief, the defendant alleged that he was denied effective assistance of counsel in that his postconviction counsel (1) failed to make a record and offer

proof that his trial counsel did not hear portions of the prosecutor's closing argument and therefore did not object that the argument was contrary to the evidence; (2) failed to adequately argue the trial court's failure to make a finding with respect to the voluntariness of certain of the defendant's statements and the admissibility of those statements for impeachment purposes after suppressing the statements; (3) failed to raise all reasonable bases for relief, including (a) trial counsel's failure to discuss with defendant all available defenses and lesser-included offenses, and (b) trial counsel's failure to properly prepare for and cross-examine one of the State's expert witnesses; and (4) failed to object to expert testimony on the issue of whether the defendant received effective assistance of counsel.

According to the defendant, with respect to the foregoing allegations of errors and omissions on the part of his postconviction counsel, he was prejudiced in that (1) the conduct of counsel was less than that which a lawyer with ordinary training and skill would have provided the defendant; (2) but for the unreasonableness of counsel's effort, there existed a reasonable probability that the outcome of the proceeding would have been different sufficient to undermine confidence in the decision; and (3) the evidence or arguments, if properly developed by counsel at the postconviction proceeding and at the original trial, would have raised a reasonable doubt and would have resulted in the acquittal of the defendant on all charges.

After hearing arguments from both sides via a telephone conference call, the district court denied the defendant an evidentiary hearing on his second motion for postconviction relief, making the following pertinent findings: (1) The trial jury was instructed to not be influenced by arguments of counsel not supported by the record, the record of the first postconviction proceeding reflects that trial counsel made a tactical and strategic decision not to object to the prosecutor's closing argument, and the argument made by the prosecutor related to evidence that was an insignificant matter in the context of all evidence presented at trial; (2) the trial court's admission of the defendant's statements for impeachment

purposes constituted an independent determination of the court that the statements were voluntary, and defendant failed to allege that his statements were not voluntary or how he was or could have been prejudiced by the admission of the statements; (3) trial counsel's argument to the jury constituted performance at least as well as would have been made by a lawyer of ordinary training and skill in criminal law in the area, was a matter of trial strategy, and adequately covered the subject of manslaughter given that the jury may have considered a request for a manslaughter conviction as inconsistent with the defendant's claim of innocence; (4) the defendant's allegation of ineffective assistance of counsel due to the manner in which trial counsel cross-examined one of the State's expert witnesses has previously been addressed and dismissed by this court; and (5) there is no reasonable probability that the result of defendant's first postconviction proceeding would have been different if counsel had objected to the expert testimony relating to the effective assistance of counsel.

Defendant assigns as error that the district court erred (1) in failing to allow the defendant an evidentiary hearing, (2) in holding that effective assistance of counsel is governed by a "locality rule," (3) in determining that the defendant was represented by competent counsel at his trial and in his earlier postconviction proceeding, and (4) in holding that expert testimony was admissible to determine whether the defendant received effective assistance of counsel.

The defendant is entitled to bring this second proceeding for postconviction relief because the grounds relied upon, ineffective assistance of postconviction counsel, did not exist at the time of the filing of the first motion for postconviction relief. See, *State v. Nance*, 227 Neb. 581, 418 N.W.2d 598 (1988); *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983). However, such a motion cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. See *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989).

STANDARD FOR DETERMINING EFFECTIVE ASSISTANCE OF COUNSEL

The defendant argues initially that the standard for

ineffective assistance of counsel established by this court is in conflict with the standard established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because of the "locality rule" added to the Nebraska standard.

As most recently articulated by this court in *State v. Patterson*, 232 Neb. 304, 308, 440 N.W.2d 242, 245 (1989), the standard to be applied is as follows:

> When, in a postconviction motion, a defendant alleges a violation of his or her 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 an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions.

According to the defendant, the Court in *Strickland, supra*, did not *suggest that the effective assistance of counsel is to be measured by the relative competence of a small group of lawyers* in a particular region of the country. However, the Court did hold that "*[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard* of reasonableness." (Emphasis supplied.) 466 U.S. at 687-88.

This court decided prior to *Strickland* that ineffective assistance of counsel would be measured by the *performance of "a lawyer with ordinary training and skill in the criminal law in his area.*" (Emphasis supplied.) See *State v. Leadinghorse*, 192 Neb. 485, 489, 222 N.W.2d 573, 577 (1974). Contrary to the defendant's contentions, the Nebraska standard is not in conflict with the *Strickland* standard. In Nebraska, the objective standard of reasonableness to be used is the performance of a lawyer with ordinary training and skill in the criminal law in the area.

In further support of his contention, the defendant cites *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981), in which the

court rejected a locality rule in sixth amendment cases. A careful reading of the opinion, however, *reveals that a locality rule is not invalid, it simply is not accepted in federal courts.* In *Hawkman* the court explained:

> Appellant state of Nebraska argues that the federal district court ordered an evidentiary hearing in this case to determine whether the performance of Hawkman's counsel was "at least as well as a lawyer with ordinary training and skill in the criminal law in his area," namely, the area of Valentine, Nebraska. In ordering the hearing, the district court stated, *inter alia*, "[s]ince in this case evidence regarding the standard of performance for an attorney was not developed at the state hearing, an evidentiary hearing is, therefore, appropriate." It appears to us that the district court convened the hearing simply to elicit opinions as to what actions a reasonably competent attorney would have taken on Hawkman's behalf. . . . It is true that all witnesses who testified at the federal hearing were from western Nebraska and specifically from Valentine or Scottsbluff. However, the federal district court: (1) correctly set forth the applicable constitutional standards of counsel competence in this circuit; (2) expressly stated in its opinion that an evidentiary hearing was held "concerning the standard of performance for an attorney with ordinary training and skill"; and (3) clearly did not apply the Nebraska standards of counsel effectiveness set forth in *State v. Leadinghorse, supra*, 222 N.W.2d at 577. If the *Leadinghorse* standards differed from the federal standards delineated in our opinions, they would, of course, not bind a federal district court.

661 F.2d at 1165-66.

The defendant's contention that the effectiveness of counsel cannot be measured by comparison with the performance of a lawyer of ordinary training and skill in the criminal law in the area is without merit.

DENIAL OF AN EVIDENTIARY HEARING

The defendant argues that he was entitled to an evidentiary hearing on his motion for postconviction relief. An evidentiary hearing may be denied on a motion for postconviction relief

when the records and files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989). In a proceeding under the Postconviction Act, the applicant is required to allege facts which, if proved, constitute a violation or infringement of rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing. *Id.*

THE PROSECUTOR'S CLOSING ARGUMENT

The defendant argues that his contention that his counsel made no objection because counsel did not hear the argument is different from the issues he raised about the prosecutor's closing argument in his first postconviction proceeding. According to the defendant, an evidentiary hearing is necessary to determine whether counsel heard the statements and decided as a matter of strategy not to object or whether counsel simply did not hear the argument.

The defendant's claim is without merit. In affirming the denial of postconviction relief the first time, this court considered the defendant's contention that he received ineffective assistance of counsel at trial and on appeal because his counsel failed to object to statements of the prosecutor in closing argument. Noting that the defendant's counsel testified at the postconviction hearing that he discussed whether to object with cocounsel and the defendant, this court found the failure to object to have been a matter of counsel's trial strategy. Implicit in trial counsel's testimony that he considered and discussed whether to object to the prosecutor's comments is the fact that trial counsel did hear the comments.

ADMISSION OF SUPPRESSED STATEMENTS FOR IMPEACHMENT

The defendant's challenge of the admissibility of suppressed statements for purposes of impeachment has already been addressed by this court. On direct appeal, this court upheld the use of the statement for impeachment purposes, noting that the defendant made no claim that the statement was involuntary. In his first motion for postconviction relief, the defendant's contention that the trial court erred in failing to make an entry on the record as to the voluntariness of the defendant's

impeaching statement was summarily dismissed because the claim had been raised on appeal. In this motion for postconviction relief, the defendant contends that postconviction counsel was ineffective in failing

> to adequately argue and/or develop an argument on the record concerning the Trial Court's failure to make a finding with respect to the voluntariness of certain of the defendant's statements, and the admissability [sic] of those statements for impeachment purposes following an Order of the Court suppressing those statements.

The defendant is, quite simply, beating a dead horse. This is the third time the issue of the voluntariness of the suppressed statement has been raised by the defendant and the third time he has failed to allege that the statement was in fact involuntary.

OTHER CLAIMS FOR RELIEF

The defendant argues that postconviction counsel failed to raise two issues which, according to the defendant, were apparent on the record and should have been raised if counsel was conscientiously representing the defendant's interests.

The first issue has to do with whether trial counsel discussed with the defendant all available defenses to the charge, including the possibility of arguing for conviction of a lesser-included offense. The defendant contends post-conviction counsel was ineffective in not arguing that trial counsel was ineffective because of the "all or nothing defense" that the defendant was not guilty by reason of accident.

During closing argument, the defendant's trial counsel stated:

> I think that the State has failed to meet its burden of proof that murder in the first degree was committed. It's failed to meet its burden of proof that murder in the second degree was committed. It's failed to meet its burden of proof that manslaughter was committed. And it's failed to meet its burden of proof that it wasn't an accident. And that burden of proof is beyond a reasonable doubt.
>
> One final thing I'd like to touch on is the unlawful act in the manslaughter. You are going to be asked to look at that. I think the Judge may instruct you on the offense of

> assault. When you look at that offense, you have to look at the offense, if any was committed, at the time of the shooting.
>
> . . . .
>
> . . . It is a tragedy when a young man loses his life. But the decision you have to make is whether the State has met its burden of proof in murder I, murder II, manslaughter, and that this was not an accident. I think when you examine the evidence that you have before you, you are going to find that the State has not met its burden of proof beyond a reasonable doubt, and it will justify a verdict of not guilty.

According to defendant's present appellate counsel, the defense of "accident" would not even be a defense under the facts of this case. He argues that having a gun unintentionally discharge "while struggling with the victim would be an unintentional killing while in the commission of an unlawful act, to-wit: assault, unlawful discharge of a firearm, etc." Brief for appellant at 27. Accordingly, counsel continues, the offense would be manslaughter pursuant to Neb. Rev. Stat. § 28-305 (Reissue 1985). He also argues that defense trial counsel should have requested an instruction on and argued self-defense.

We deal first with the matter of self-defense. In order to maintain some consistency with the defendant's own testimony and to avoid detracting from its credibility, trial counsel could hardly have argued self-defense. This was entirely inappropriate given the fact that defendant insisted throughout all of his testimony that he did not intend to kill the victim; i.e., he did not intend to and did not in fact use any force against the victim, Thomas Schuchardt. The defense of justification states that "the use of force upon or toward another person is justifiable when the actor [defendant] 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." Neb. Rev. Stat. § 28-1409 (Reissue 1985).

When asked on cross-examination whether he, the defendant, had said, "I had to blow him away," the defendant responded, "I remember us talking about the shells and that I didn't mean to blow him—shoot him, something like that, but

it wasn't that I had to do anything." Further on, defendant testified, "I don't remember exactly what I said, but it had [sic] to the effect I wouldn't do it just because I couldn't breathe."

Under the circumstances, trial counsel would not have been justified in arguing self-defense.

Defendant's present argument that having a gun unintentionally discharge while in the commission of an unlawful act such as an assault or unlawful discharge of a firearm would also find no support in the posture of the case in which trial counsel was left following his client's testimony. Defendant denied that he in any manner assaulted the victim. He denied that he intentionally fired the weapon. His statement that the gun accidentally discharged, without more, would not amount to a criminal act.

Finally, appellate counsel criticizes trial counsel for arguing accident as a defense. However, to understand the argument that was made at trial, it is necessary to examine the court's instructions.

The court correctly set forth the elements which the State must prove in order to establish first degree murder, second degree murder, or manslaughter, i.e., that defendant killed the victim purposely and with deliberate and premeditated malice; that he killed the victim intentionally, but without premeditation; or that he killed him without malice, either upon a sudden quarrel or unintentionally while the defendant was in the commission of an unlawful act. There was no evidence that this occurred upon a sudden quarrel; whatever fighting had been going on had covered a period consisting of most of the evening, and defendant denied that he had any quarrel with the victim at the time of the killing. That would leave only the second prong of manslaughter, unintentional killing while in the commission of an unlawful act. It was obvious that the only unlawful act during which the killing occurred would have to have been an assault, and the court defined the various degrees of assault. However, as previously stated, defendant's testimony completely negatived an assault on his part.

As defined in the instructions, it was necessary to prove an intentional act on the part of the defendant, whether it be the actual killing to support first or second degree murder, or an

unlawful assault to support the charge of manslaughter.

By instruction No. 10, the trial court instructed the jury:

> Regarding Count I, the defendant contends that he shot and killed Thomas A. Schuchardt accidentally, and he thus denies that the killing was done purposely and with deliberate and premeditated malice; he thus denies that he intentionally killed Thomas A. Schuchardt; and he denies that he killed Thomas A. Schuchardt either upon a sudden quarrel, or unintentionally while he was in the commission of an unlawful act.
>
> The claiming of such a defense does not shift to the defendant the burden of proving that the homicide occurred by accident.
>
> As explained in Instruction No. 4, the burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged or included therein, and that burden never shifts.

Trial counsel perhaps was incorrect, semantically speaking, in stating that the burden was on the State to prove that the killing was not accidental. However, what his argument amounted to was that in order to convict, the State had the burden of proving all of the elements of the charged crime or one of the lesser-included offenses, and in order to do so it would in effect be proving that the shooting was not an accident. Perhaps the State could have objected to his characterization of the burden of proof, but it did not, and certainly such an argument favored the defense.

In denying defendant an evidentiary hearing, the district court found that

> trial counsel's argument to the jury constituted performance at least as well as would have been made by a lawyer with ordinary training and skill in criminal law in the area, was a matter of trial strategy, and that trial counsel adequately covered the subject of a manslaughter conviction in view of the risk that asking for a manslaughter conviction could have been considered by the jury as inconsistent with the defendant's testimony claiming innocence.

This finding is not clearly erroneous and therefore cannot be

disturbed on appeal.

The second issue postconviction counsel allegedly failed to raise to establish that trial counsel was ineffective relates to trial counsel's handling of scientific evidence at trial, specifically the results of the neutron activation test done to determine the presence of gunpowder. In the earlier postconviction appeal, this court addressed the issue of whether trial counsel was ineffective in failing to properly cross-examine the State's forensic expert and found that trial counsel was not ineffective. The defendant contends that the test conducted on the defendant has previously been considered but that previous inquiry did not address the question of the test conducted on the victim.

This court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have been previously considered and determined, in cases which are interwoven and interdependent. *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982). A review of the briefs submitted in the appeal from the denial of the defendant's first motion for postconviction relief reveals that the issue under consideration at that time was the validity of the neutron activation test conducted on the hands of the victim.

EXPERT TESTIMONY REGARDING EFFECTIVE ASSISTANCE OF COUNSEL

The defendant's last argument is that postconviction counsel was ineffective in not objecting to the offer of expert testimony by the State regarding the reasonableness of trial counsel's efforts. Generally, expert testimony is not admissible as proof that assistance of counsel in a criminal case was ineffective. *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989). Nevertheless, as the district court determined, there is no basis to conclude that it is reasonably probable that the result of the first postconviction proceeding would have been different had counsel objected to such testimony from Richard Krepela, the State's expert witness. This finding of the district court not being clearly erroneous, it cannot be disturbed on appeal.

The defendant is entitled to no postconviction relief, and the order and judgment of the district court are affirmed.

AFFIRMED.

IN RE INTEREST OF M.B. AND J.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. T.B., APPELLANT.

445 N.W.2d 618

Filed September 15, 1989. No. 88-923.

1. **Trial: Evidence: Appeal and Error.** One who makes no objection to the admission of evidence at trial may not complain on appeal of its admission.
2. **Appeal and Error: Words and Phrases.** "Plain error" exists when there is plainly evident from the record error not complained of at trial which prejudicially affects a litigant's substantial right and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.

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

Virginia G. Johnson for appellant.

James Elworth, Deputy Lancaster County Attorney, for appellee.

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

CAPORALE, J.

T.B. appeals the order terminating her rights as the mother of M.B., a daughter born February 12, 1986, and J.B., a son born July 23, 1983. She assigns as "plain error" that the separate juvenile court allowed the proceedings "to continue based on testimony from a caseworker with a recognized and significant conflict of interest." We affirm.

The mother, who at the time of the adjudication hearings was herself a juvenile within the jurisdiction of the court below, did not appeal the determinations that her children were in such circumstances as to come within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), which gives the juvenile court jurisdiction over any juvenile

> who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent,

> guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . .

It would thus be inappropriate to concern ourselves with the facts under which the juvenile court asserted jurisdiction over the children. See *In re Interest of C.D.A.*, 231 Neb. 267, 435 N.W.2d 681 (1989).

Moreover, in view of the nature of the claimed error, it would not serve any useful purpose to detail the evidence which on de novo review clearly and convincingly establishes grounds for terminating the mother's parental rights in and to her two children. See, *In re Interest of J.H. et al., ante* p. 338, 445 N.W.2d 599 (1989); *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989). We need only note that while the record demonstrates that the mother has such an emotional attachment to her children that she may be said to love them and that when with the children she interacts well with them, the record also demonstrates that this now 21-year-old mother is still too immature, undisciplined, and unwilling, or perhaps unable, to make the day-to-day sacrifices which the raising of children demands. Although she made sporadic efforts to comply with the court-ordered plan for helping her to become an adequate parent and to be reunited with her children, she made no substantial long-term progress and has not acquired the commitment and skills required, and thus remains one who neglects to give her children necessary parental care and protection. Neb. Rev. Stat. § 43-292 (Reissue 1988) provides that parental rights may be terminated when such action is in the best interests of the juvenile and it appears by the evidence that, among other things, the parent has "substantially and continuously or repeatedly neglected the juvenile and refused to

give the juvenile necessary parental care and protection," or, as to a child found to be one described in § 43-247(3)(a), "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

The gravamen of the mother's complaint is that much of the evidence came from a Department of Social Services caseworker who was assigned both to her and to her children's cases. Although she made no objection to the caseworker's testimony on this basis, the mother now argues that the caseworker had such a conflict of interest that the termination of her rights in and to her children cannot stand.

In apparent recognition of the rule that one who makes no objection to the admission of evidence at trial may not complain on appeal of its admission, *In re Interest of J.H. et al., supra, Cassio v. Creighton University, ante* p. 160, 446 N.W.2d 704 (1989), and *State v. Welsh,* 232 Neb. 219, 440 N.W.2d 225 (1989), the mother characterizes her assignment of error as "plain error." Such has been said to exist when there is plainly evident from the record error not complained of at trial which prejudicially affects a litigant's substantial right and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989).

One of the major difficulties with the mother's argument is that she cites no legal authority in support of her argument that the caseworker in question should not have been permitted to testify. Neb. Evid. R. 601, Neb. Rev. Stat. § 27-601 (Reissue 1985), provides that every person "is competent to be a witness except as otherwise provided in these rules." We are cited to no legal authority which provides a basis for a caseworker-client privilege or duty of confidentiality or loyalty such as that suggested by the mother. Indeed, it seems to us that because the juvenile court's efforts are directed toward reuniting parents with their children, there is merit in having the testimony of a caseworker who has worked with all parties to the familial relationship. It must be remembered that a caseworker is not an

advocate for one party or another. A caseworker's function is to testify truthfully as to her or his observations and to express such competent opinions as may be sought. It is for the judge to evaluate the testimony and adjudicate the case in accordance with all the evidence.

There being no merit to the mother's position, the judgment of the court below is affirmed.

AFFIRMED.

IN RE INTEREST OF K.D.B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. E.O.B., APPELLANT.

445 N.W.2d 620

Filed September 15, 1989. No. 88-989.

1. **Courts: Jurisdiction: Notice: Appeal and Error.** For the Supreme Court to obtain appellate jurisdiction, it is mandatory that a party timely file a notice of appeal and deposit a docket fee in the office of the clerk of the trial court.
2. **Affidavits: Appeal and Error.** In lieu of filing a docket fee, a party may proceed to appeal in forma pauperis. Neb. Rev. Stat. § 25-2301 (Cum. Supp. 1988). To proceed without prepayment of fees and costs or security, a party must file his or her affidavit setting forth the nature of the action and that he or she is unable to pay the costs or give security involved in an appeal. In addition, the party appealing must obtain the authorization of the trial court to proceed in forma pauperis.
3. **Affidavits.** To be effective, a poverty affidavit must show on its face, by the certificate of an authorized officer before whom it is taken, evidence that it was duly sworn to by the party making the affidavit.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Appeal dismissed.

Kathleen M. Schmidt, of Emery, Penke & Blazek, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Richard E. Rothrock for appellee.

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

FAHRNBRUCH, J.

The natural father of K.D.B. has filed an appeal from an order of the separate juvenile court of Douglas County terminating his parental rights in his now 11-year-old daughter. We dismiss the appeal for lack of jurisdiction.

Except as hereinafter noted, for the Supreme Court to obtain appellate jurisdiction, it is mandatory that a party timely file a notice of appeal and deposit a docket fee in the office of the clerk of the trial court. See, Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1988); *American Legion Post No. 90 v. Nebraska Liquor Control Commission*, 199 Neb. 429, 259 N.W.2d 36 (1977).

Neb. Rev. Stat. § 25-2301 (Cum. Supp. 1988) provides that in lieu of filing a docket fee, a party may proceed to appeal in forma pauperis. To proceed without prepayment of fees and costs or security, a party must file with the clerk of the trial court his or her affidavit setting forth the nature of the action and that he or she is unable to pay the costs or give security involved in an appeal. In addition, the party appealing must obtain the authorization of the trial court to proceed in forma pauperis. An appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith.

In this instance, K.D.B.'s father did not obtain the Douglas County Separate Juvenile Court's authorization to proceed in forma pauperis, nor did he file a proper affidavit with the trial court. A document labeled "affidavit" and purportedly signed by K.D.B.'s father was filed with the trial court, but the document is defective. There is no showing that it was sworn to by K.D.B.'s father before some person who had authority to administer oaths.

To be effective, a poverty affidavit must show on its face, by the certificate of an authorized officer before whom it is taken, evidence that it was duly sworn to by the party making the affidavit. See, *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969); *Kennedy & Parsons Co. v. Schmidt*, 152 Neb. 637, 42 N.W.2d 191 (1950); *Bantley v. Finney*, 43 Neb. 794, 62 N.W. 213 (1895). See, also, Neb. Rev. Stat. § 25-1241 (Reissue 1985).

Since the docket fee was not paid nor the requirements to proceed in forma pauperis met, we must dismiss this appeal for

lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH N. RHODES, APPELLANT.
445 N.W.2d 622

Filed September 15, 1989. No. 88-1042.

1. **Pleas: Waiver.** A plea of guilty or nolo contendere coupled with a claim of innocence should not be accepted unless there is a factual basis for the plea, and until the court taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.
2. **Pleas.** In order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the right against self-incrimination, and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the court must establish that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she is charged.
3. **Sentences: Appeal and Error.** A sentence imposed within statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Sentences.** In imposing a sentence, a trial court should consider, among other things, the nature of the offense and the amount of violence involved in the commission of the crime.

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

Barry Waid, Hall County Public Defender, and Gerard A. Piccolo for appellant.

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

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

HASTINGS, C.J.

Following a plea of no contest, defendant, Kenneth N. Rhodes, was found guilty of attempted first degree sexual assault and was sentenced to imprisonment for a period of 8 to 12 years, with credit for time served. The term prescribed by statute for this offense is 1 to 20 years, and therefore the minimum term may not exceed 6 2/3 years. Apparently for that reason, defendant's sentence was later reduced to a term of 6 2/3 to 12 years. He has appealed, assigning as error that the trial court should not have accepted his plea of no contest because it was not entered voluntarily, knowingly, and intelligently and that the sentence, even as modified, was excessive. We affirm.

In the early morning hours of December 10, 1987, the victim was robbed and sexually assaulted in her home. Rhodes, a former tenant of the victim, was one of two suspects.

During the course of the investigation, a pair of shoes was seized from the defendant. The shoes were sent to the FBI crime laboratory in Washington, D.C., where they were compared with a footprint found on a chair under the window through which access into the victim's home was gained. It was determined that the footprint from the defendant's shoe matched the footprint on the cushion of the chair.

Rhodes was charged with first degree sexual assault, second offense; robbery; burglary; and use of a weapon in the commission of a felony. A habitual criminal charge was subsequently added to the information.

Initially, Rhodes pled not guilty to the charges against him. Pursuant to a plea bargain, he later pled no contest to attempted first degree sexual assault and all other charges were dropped. The trial court accepted the plea, found him guilty, and imposed the sentence, which was later reduced to conform to the limits prescribed by statute.

During defendant's original arraignment, the penalties for the various crimes charged against him were stated by the court: 1 to 50 years, 1 to 20 years, 1 to 20 years, and 1 to 20 years. At the second arraignment, where defendant was again represented by counsel and when he tendered his plea of nolo contendere, the court explained to him that an amended information had been filed charging him with "criminal

attempt, first degree sexual assault," for which the penalty was imprisonment for 1 to 20 years. Defendant replied that he understood the penalties. He also understood the right to have the information served on him and the right to have the information read to him. He waived those rights. He was advised of the other pleas which he could enter, of the right to a jury trial, of the right to call witnesses in his own behalf and the right to cross-examine the State's witnesses, and of the right to remain silent. He was told that the plea of no contest would be treated by the court the same as a guilty plea for the purposes of sentencing. The defendant stated that he had not been subjected to any threats or promises in order to induce his plea and that he was tendering his plea of his own will.

Although the court did not inform the defendant of his right to counsel, the record does reflect that he was represented by counsel at all stages of the proceedings. To hold that it was error for a court to fail to tell a defendant that by pleading nolo contendere he had waived the right to counsel when, in fact, he had been accorded that right would be "the epitome of slavish technicality." *State v. Neal*, 216 Neb. 709, 712, 346 N.W.2d 218, 220 (1984).

A factual basis in support of the plea was provided by the county attorney, which, if uncontested, left no reasonable doubt of defendant's guilt. In a dialogue with the court, the defendant maintained his innocence, but conceded that the plea of no contest was in his best interests.

Although the court made no detailed finding resolving the conflict between a claim of innocence and a plea of no contest, the fact that defendant was eliminating the possibility of apparent certain convictions for four crimes providing for a maximum cumulative term of imprisonment of 110 years, to say nothing of an enhanced term for being a habitual criminal, makes it apparent that the plea met the test of *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). As paraphrased by defendant's appellate counsel in his brief, *Alford* requires that "[p]leas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the

claim of innocence." Counsel continues his argument by stating that "[t]he reasoning in Alford emphasized the importance of evaluating the evidence the state would offer against the defendant as a test of whether the plea was intelligently entered . . . ." Brief for appellant at 8-9.

This court, in *State v. Irish*, 223 Neb. 814, 820, 394 N.W.2d 879, 883 (1986), established the following rule:

> [I]n order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly,
>
> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.

The court concluded that

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

State v. Irish, supra at 820, 394 N.W.2d at 883.

Furthermore, defendant later appeared before the trial court asking to withdraw his plea, at which time his counsel stated to the court that such motion to withdraw the plea was against his (counsel's) advice. After further questioning by counsel in open court, defendant then stated that he did *not* wish to withdraw his plea. When asked what might have led him to request permission to withdraw his plea, defendant stated, "It's just

that I'm not guilty of the crime but I'm just tired of everything; as long as it's taken I just want to get it over with."

In light of the factual basis supplied by the State, the severity of the potential punishment defendant faced if he went to trial and was found guilty of all charges, and defendant's acknowledgment that the plea was in his best interests, it was reasonable for the trial court to accept his plea despite his protestations of innocence.

Regarding defendant's claim that his sentence was excessive, we have said that a sentence imposed within statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989).

In imposing a sentence, a trial court should consider, among other things, the nature of the offense and the amount of violence involved in the commission of the crime. *State v. Jones*, 232 Neb. 576, 441 N.W.2d 605 (1989). 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. *Id.*

Attempted first degree sexual assault is a serious offense. In this case, violence was involved when defendant threatened the victim with a knife held to her throat and when defendant sexually assaulted the victim. As to defendant's previous conduct, he has a lengthy record of criminal activity which has resulted in five periods of probation, three of which were concurrent, and two periods of incarceration in the penitentiary. In his second incarceration in the penitentiary, defendant served 5 years on concurrent 7- to 10-year sentences for first degree sexual assault and sodomy.

It is clear that there was no abuse of discretion on the part of the trial court in imposing sentence and that under the circumstances of this case the modified sentence is not excessive.

The judgment of the district court is affirmed.

AFFIRMED.

NORWEST BANK NEBRASKA, NATIONAL ASSOCIATION, A NATIONAL BANKING ASSOCIATION, APPELLEE, V. RICHARD G. KIZZIER AND YVONNE A. KIZZIER, HUSBAND AND WIFE, ET AL., APPELLEES, KIZZIER REALTY & INVESTMENT CO., INC., A NEBRASKA CORPORATION, APPELLANT.

446 N.W.2d 204

Filed September 22, 1989. No. 87-252.

1. **Equity: Appeal and Error.** In an action in equity, it is the duty of the Supreme Court to retry the issues of fact involved upon the evidence in the record and, upon such trial de novo, to reach an independent conclusion.
2. **Mortgages: Presumptions: Liens: Loans.** Nothing but payment or a formal release will discharge a mortgage. The existence of a lien securing an original loan furnishes a presumption that any renewal was not a discharge of the original, where the renewal is not secured.
3. **Promissory Notes: Debtors and Creditors.** The taking of a new note for an existing note is a renewal of the old indebtedness and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.

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

Robert G. Simmons, Jr., of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellant.

Patrick J. Nelson, of Jacobsen, Orr, Nelson & Wright, P.C., for appellee Norwest.

HASTINGS, C.J., CAPORALE, and GRANT, JJ., and BURKHARD and HANNON, D. JJ.

BURKHARD, D.J.

On January 6, 1986, Norwest Bank Nebraska, National Association (Norwest), plaintiff-appellee, brought an action to foreclose two trust deeds signed by defendants-appellees Richard G. and Yvonne A. Kizzier. The trust deeds secured promissory notes signed by Richard and Yvonne and defendant-appellee Roy Kizzier. Appellant, Kizzier Realty & Investment Co., Inc. (Kizzier Realty), joined as a defendant, held a mortgage covering the same property, which secured a note from Richard and Yvonne Kizzier, as personal guarantors, and Kizzier Chevrolet Company of Kearney. Several other

defendants who might claim an interest in the property by virtue of leases, mortgages, and judgments were also named in the foreclosure action.

The property covered by the trust deeds and mortgages is described as "[t]he East 192.0 feet of the West 337.0 feet of the South 391.2 feet of the Southwest 1/4 of the Southeast 1/4 of Section 34, Township 9 North, Range 16, West of the 6th P.M., Buffalo County, Nebraska, except the South 33.0 feet thereof." Richard and Yvonne Kizzier were record owners of the property.

A bench trial was held on December 10, 1986, after which the court determined the priority of the various liens and the amounts due and owing on each lien. In its order, the court found Norwest had a valid first lien by virtue of a note dated May 21, 1984, and a trust deed dated March 18, 1982, in the principal sum of $132,491.51, plus accrued interest of $30,420.53, for a total sum of $162,912.04, with interest in the principal sum at the rate of 14.5 percent per year from and after December 10, 1986, or $52.63 per day. The court found Kizzier Realty had a valid second lien upon the property by virtue of its note and mortgage dated December 23, 1982, in the principal sum of $500,000, plus accrued interest of $278,193.40, for a total sum of $778,193.40, with interest on the principal sum at the rate of 14 percent per year from and after December 10, 1986, or $191.78 per day. The court found Dwayne L. Kizzier held a valid third lien upon the property in the amount of $73,577.65, with interest at the rate of 18 percent per year, or $28.36 per day, and Kizzier Chevrolet Company, Inc., of Scottsbluff, Nebraska, held a valid fourth lien upon the property in the amount of $481,352.97, with interest at the rate of 9.5 percent per year, or $104.11 per day.

Kizzier Realty filed a motion for new trial, which was denied. Kizzier Realty perfected its appeal to this court. We affirm.

The history herein goes back to September 14, 1981, when Richard Kizzier, hereinafter called Richard, individually and as partner, and Yvonne Kizzier, hereinafter called Yvonne, individually, signed a note to First Savings Company of Kearney (First Savings) in the principal amount of $149,940, payable in five monthly payments of $3,678.99 beginning

October 14, 1981, and a final balloon payment of $151,969.22 due March 13, 1982. To secure the note Richard and Yvonne executed a trust deed on September 14, 1981, on the subject premises, with First Savings as beneficiary and Jeffrey H. Orr, attorney at law, as the trustee. A deed of reconveyance signed by the trustee on March 22, 1982, showed that the note had been paid and reconveyed the subject premises.

On March 18, 1982, Richard, individually and as a partner; Yvonne, individually; and Roy Kizzier, hereinafter called Roy, as partner, signed a note (No. 10080) to First Savings in the principal amount of $148,558.01, payable in five monthly payments of $3,542.78 beginning April 17, 1982, and a final balloon payment of $147,957.92 due September 14, 1982. To secure the note, Richard and Yvonne executed a trust deed on March 18, 1982, on the subject premises, with First Savings as beneficiary and Orr as trustee. The March 18 note was not paid when due.

On August 27, 1982, Richard, individually and as partner; Roy, individually and as partner; and Yvonne, individually, signed a note (No. 10137) to First Savings in the principal amount of $144,702.07, payable in five monthly payments of $3,557.43 beginning September 26, 1982, and a final balloon payment of $138,523.50 due February 23, 1983. The March 18, 1982, note was marked "RENEWED New Loan No. 10137 Date 8-27-82." The August 27 note shows that there is a lien on the subject premises evidenced by a trust deed "bearing even date herewith," although the note, in reference to the trust deed, refers to its being "[f]iled in Buffalo Co. 3-18-82 microfilm roll 82 page 1223," which is the correct recording information for the aforementioned trust deed executed by Richard and Yvonne on March 18. The August 27 note was also not paid when due.

On March 23, 1983, Richard, individually and as general partner; Yvonne, individually; and Roy, individually and as general partner, signed a note (No. 10207) to First Savings in the principal amount of $137,152.93, payable in five monthly payments of $3,713.60 beginning April 22, 1983, and a final balloon payment of $127,470.91 due September 22, 1983. The August 27 note was marked "RENEWED New Loan No.

10207 Date 3-23-83." The March 23 note also shows that there is a lien on the subject premises evidenced by a trust deed "bearing even date herewith," although the note, in reference to the trust deed, also refers to its being "[f]iled in Buffalo Co. 3-18-82 microfilm roll 82 page 1223." The March 23 note was also not paid when due, and further states on its face as follows: "The purpose of this loan is: rewrite loan #10137."

On May 26, 1983, Richard, Yvonne, and Roy, each individually, signed a note (No. 10222) to First Savings in the principal amount of $139,895.99, this note being payable in 11 monthly payments of $1,975 beginning June 24, 1983, and a final balloon payment of $138,219.56 due May 24, 1984. The March 23, 1983, note was marked "RENEWED New Loan No. 10222 Date 5-26-83." As on the August 27 and March 23 notes, the May 26, 1983, note also shows that there is a lien on the subject premises evidenced by a trust deed "bearing even date herewith," although the note, in reference to the trust deed, also refers to its being "[f]iled in Buffalo County 3-18-82 microfilm roll 82 page 1223." This note of May 26 was also not paid when due, and states on its face as follows: "The purpose of this loan is: rewrite #10207."

Finally, in the chronology of events, on May 21, 1984, Richard, Yvonne, and Roy, each individually, signed a note to First National Bank of Grand Island (No. 10316) in the principal amount of $137,777.55, payable in 11 monthly payments of $2,200 beginning July 5, 1984, and a final balloon payment of $134,721.84 due June 5, 1985. The May 26, 1983, note was marked "RENEWED New Loan No. 10316 Date 5-21-84." The May 21, 1984, note shows a mortgage on the subject premises "bearing even date herewith," and, in fact, on May 21, 1984, Richard and Yvonne did execute a trust deed on the subject premises, with "First Savings Company of Kearney n/k/a First National Bank of Grand Island" as beneficiary and Pat Nelson, attorney at law, as trustee. This note was also not paid when due, and states on its face as follows: "The purpose of this loan is: Rewrite 10222."

On May 1, 1984, the First National Bank of Grand Island merged with First Savings Company of Kearney, with the bank being the surviving corporation. On June 1, 1984, the title of the

First National Bank of Grand Island was changed to Norwest Bank Grand Island, National Association. On October 1, 1985, the said Norwest Bank Grand Island, National Association, merged into Norwest Bank Omaha, National Association, under the charter of Norwest Bank Omaha, National Association, and title of "Norwest Bank Nebraska, National Association," the plaintiff herein.

Appellant, Kizzier Realty, holds a mortgage to the same property signed by Richard and Yvonne. The mortgage was dated December 23, 1982, and filed January 4, 1983, in the Buffalo County register of deeds' office. The mortgage secures a note signed by Richard, as president of Kizzier Chevrolet Co. of Kearney, Inc., and Richard and Yvonne, as personal guarantors. The note, payable on demand, is in the principal sum of $500,000, with interest at 14 percent per annum, payable monthly. At the time of trial this note remained unpaid.

Plaintiff's petition generally asked for an order granting it possession of the subject premises and an accounting of the amounts due from defendants Richard, Yvonne, and Roy Kizzier on the note of May 21, 1984, and the trust deeds of March 18, 1982, and May 21, 1984. Kizzier Realty asked that the plaintiff's petition be dismissed and, on its cross-petition, that its lien be decreed to be a first lien upon the subject premises.

This is an action in equity. It is therefore the duty of the Supreme Court to retry the issues of fact involved upon the evidence in the record and, upon such trial de novo, to reach an independent conclusion. *O'Neill Production Credit Assn. v. Mitchell*, 209 Neb. 206, 307 N.W.2d 115 (1981).

In its first assignment of error, Kizzier Realty claims that the trial court erred in not determining that the plaintiff's installment loan was illegal in exceeding the statutory lending limit to one borrower. The second assignment of error states that the court erred in permitting the use of the judicial process and courts to collect (as against an individual party) the fruits of an illegal act. These two assignments of error shall be considered together.

Kizzier Realty claims that the notes of March 18, 1982, August 27, 1982, March 23, 1983, and May 26, 1983, exceeded

the loan authority of First Savings; that the charging and collecting of a prepaid finance charge on the note of May 26, 1983, was illegal; that there were illegal prepaid finance charges on the notes of March 18, 1982, and August 27, 1983; and that there were excessive finance charges on the note of March 18, 1982.

Assuming, but only for the sake of argument, that Kizzier Realty's claims of illegality have merit, the following facts are clear. Kizzier Realty was not a party to any of the allegedly illegal notes; Richard and Yvonne, in their answer to plaintiff's petition, made no defense that any of the notes were illegal; Roy, who also signed the notes in question, did not file an answer or other responsive pleading to plaintiff's petition and therefore raised no defense of illegality; none of the alleged illegal notes were sued upon by the plaintiff in this action, since they all have zero balances; and the only note sued upon by the plaintiff is the note of May 21, 1984, to First National Bank of Grand Island, and it is not claimed to be illegal in any way. There is therefore no merit to Kizzier Realty's first two assignments of error.

In its third assignment of error, Kizzier Realty states that the trial court erred in not finding the March 18, 1982, note paid and the security extinguished. The fourth assignment of error states that the court erred in not finding that the 1984 transaction was a new transaction and that the 1982 obligation had been extinguished (as a new transaction or novation) and therefore offered no security for the 1984 transaction. The sixth assignment of error alleges that the trial court erred in not finding that the security of Kizzier Realty was prior to that of the plaintiff. These assignments of error are interrelated and therefore are considered together.

The evidence is clear that the four notes (March 18, 1982, August 27, 1982, March 23, 1983, and May 26, 1983) were all renewed, and were not, as Kizzier Realty contends, paid.

Patricia A. Cook was the manager at First Savings from January 1, 1981, to October 18, 1983. Her testimony by way of deposition certainly indicates that the parties intended that the notes would be renewed. For example, credit life insurance on the March 18, 1982, note was for a term of 72 months. At about

the time the balloon payment was due on the March 18 note, Cook talked to Richard about restructuring said note, and those discussions culminated in the note of August 27, 1982. The balloon payment on the August 27 note was renegotiated with the Kizziers, and the restructuring was reflected in the note of March 23, 1983. One of the Kizziers (presumably Richard) came to Cook and said he was unable to make the monthly payments of $3,713.60 called for in the March 23 note, but felt he could make payments of $1,975. The note of May 26, 1983, calling for monthly payments of $1,975 was then executed.

James R. Clark, vice president and manager of Norwest in Kearney, testified in his deposition that he talked to Richard about the balloon payment that was due on May 24, 1984, in connection with the May 26, 1983, note. This discussion took place before the balloon payment was due. Clark testified that Richard agreed to renewing the May 26 note "at the terms that we had," and, based upon the conversations with Richard, the note of May 21, 1984, was prepared and executed.

A case very much in point is *Kehr v. Blomenkamp*, 171 Neb. 304, 106 N.W.2d 179 (1960), in which the plaintiff sued to foreclose a mortgage on certain real estate given on February 16, 1955, by defendants Blomenkamp to the plaintiff to secure a promissory note of even date therewith in the amount of $15,000. A promissory note in the amount of $8,000 was given by defendants Blomenkamp to the plaintiff as of June 1, 1956. The $8,000 was the balance due on the $15,000 note as of June 1, 1956. J.H. Melville Lumber Company was made a party defendant by reason of the fact that the Blomenkamps had given it a mortgage on the same real estate on November 14, 1956. This mortgage was assigned to Melville Investment Company, which became a substitute defendant. Universal Surety Company was a party defendant because the Blomenkamps had given it a mortgage on the same real estate on December 3, 1956. Defendant Universal Surety denied the validity of the mortgage which the plaintiff sought to foreclose, alleging that the note for $8,000 was a new obligation and transaction which was not secured by the mortgage. Universal Surety also denied the validity of the mortgage of Melville Investment and sought a foreclosure of its own mortgage as a

first lien on the real estate. Melville Investment contended that the lien of its mortgage had priority over the mortgage of Universal Surety. In finding the mortgage of the plaintiff to be a first lien, the mortgage of Melville Investment to be a second lien, and the mortgage of Universal Surety to be a third lien, the trial court found that the mortgage given to the plaintiff on February 16, 1955, to secure the $15,000 note remained as security for the $8,000 note given as of June 1, 1956, and as such was a first lien on the real estate. The effect of the trial court's finding was that the $8,000 note was a renewal note for the balance due on the $15,000 note "in consequence of which the obligation and security of the mortgage remained in full force and effect." *Id.* at 307, 106 N.W.2d at 181.

In affirming the trial court, this court, in *Kehr*, stated as follows:

> The principles of law on which this question must be determined were stated early in the decisions of this state. There has been no departure from the early statements. In Davis v. Thomas, 66 Neb. 26, 92 N.W. 187, it was said: "Nothing but payment or a formal release will discharge a mortgage. The existence of a lien securing the original loan, furnishes a presumption that any renewal was not a discharge of the original, where the renewal is not secured."
>
> This principle was approved in Auld v. Walker, 107 Neb. 676, 186 N.W. 1008. The following was also said in this case: "The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt."
>
> In Berwyn State Bank v. Swanson, 111 Neb. 141, 196 N.W. 125, these principles were approved in the following words: "But, whatever the rule may be in other jurisdictions, it is well settled in this state that—'The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.' " [Citations

> omitted.]
>
> By what was said in these cases it is clear that the specific agreement that a new note will extinguish the original debt must be one between the parties to the transaction.
>
> In the record before this court there is no evidence either direct or circumstantial in proof of a specific agreement between the plaintiff and the defendants Blomenkamp that the note for $8,000 should or would extinguish the original debt.
>
> This lack of evidence renders applicable and controlling in this case the unvaried rule that the existence of a lien securing an original loan furnishes a presumption that any renewal was not a discharge of the original where the renewal is not secured, the effect of which is to say that the contention of the appellant that the mortgage was released is presumptively without merit.

Kehr v. Blomenkamp, 171 Neb. 304, 307-08, 106 N.W.2d 179, 181 (1960). See, also, *First West Side Bank v. Herzog*, 204 Neb. 356, 361, 282 N.W.2d 38, 41 (1979), which not only fortifies *Kehr*, but further holds: "In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place."

In the instant case, there is no evidence to indicate an intent on the part of the plaintiff and Richard, Yvonne, and Roy to extinguish the debts evidenced by the four notes (March 18, 1982, August 27, 1982, March 23, 1983, and May 26, 1983) and substitute a new agreement in each case in place of the old. The intent was clearly to renew the notes, not extinguish them, and the trust deed of March 18, 1982, was therefore not released by the subsequent notes. As regards the trust deed of May 21, 1984, it is mere surplusage. It follows that there is no merit to Kizzier Realty's third, fourth, and sixth assignments of error.

Kizzier Realty's fifth assignment of error is that the trial court erred in giving priority for more than was loaned. This assignment is somewhat unclear. In any event, there was unrefuted evidence from Gary L. Ott, vice president of special loan administration for the plaintiff, that the principal balance owing on the May 21, 1984, note as of December 10, 1986, was

$132,491.51 and total accrued interest as of that date was $30,420.53, or a total of $162,912.04, with interest at $52.63 per day. These are the same figures that are in the district court's judgment. The fifth assignment of error is also without merit.

The judgment of the district court is affirmed.

AFFIRMED.

KENNETH B. KNOX AND MARILYN M. KNOX, APPELLANTS, V. WILLIAM W. COOK, JR., ET AL., APPELLEES.

446 N.W.2d 1

Filed September 22, 1989. No. 87-868.

1. **Contracts.** Whether a document is ambiguous is a question of law initially determined by a trial court.
2. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. **Contracts: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
4. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
5. **Contracts: Intent.** If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and the intention of the parties to the document must be determined from the contents of the document.
6. **Contracts: Guaranty.** A guaranty, as any other contract, must be interpreted by reference to the entire document with meaning and effect given to every part of the guaranty whenever possible.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded with directions.

John S. Pierce, of Rembolt Ludtke Parker & Berger, for appellants.

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

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

SHANAHAN, J.

Kenneth B. and Marilyn M. Knox brought an action in the district court for Gage County to recover on a personal guaranty signed by the defendants, David O. Carlson, William W. Cook, Jr., and Walter G. Nickel. The district court, after finding that the provisions of the guaranty were ambiguous, received extrinsic evidence regarding the parties' intent for the guaranty and subsequently determined that the defendants were not liable to Knoxes on the guaranty.

Knoxes appeal and contend that (1) the district court erred in its conclusion that the guaranty was ambiguous, (2) the district court erred in quashing a subpoena served on Carlson and Cook, and (3) the judgment that the defendants were not liable under their guaranty is unsupported by the evidence.

In April 1981, Knoxes entered a written lease with N Double C, Inc. Carlson, Cook, and Nickel were the sole shareholders of N Double C. Pursuant to the lease, Knoxes were required to construct on their real estate a restaurant which N Double C would then lease for a 15-year term. Knoxes wanted Carlson, Cook, and Nickel to give their personal guaranty for the payments required by the lease to N Double C. The lease called for a monthly payment of $5,437.50 as rent due on the first day of each month during the lease and, among its several provisions, contained the following:

> 16. In case of default by lessee [N Double C], David O. Carlson, Walter Nickel, and William W. Cook, Jr., the sole shareholders of N Double C, Inc., will guarantee the monthly payments as heretofore set out until the property herein described is re-leased or up to a term of thirty-six (36) months, whichever is sooner.

Notwithstanding the lease provision for a guaranty, the defendants signed a "Personal Guarantee," which was appended to the Knox-N Double C lease and provides:

> David O. Carlson, Walter Nickel and William W. Cook, Jr. represent that they are the sole owners of all the issued and outstanding stock of the lessee corporation, and that

they personally, jointly, and severally guarantee the faithful and full performance by the lessee of its obligations under this lease, to the following extent.

In the event that the corporation should default under this lease agreement at any time during its term, the guarantors will guarantee the monthly payments set out in the original lease until the property is re-leased or up to a term of thirty-six (36) months, whichever is sooner.

/s/ David O. Carlson
David O. Carlson
/s/ Walter Nickel
Walter Nickel
/s/ William W. Cook, Jr.
William W. Cook, Jr.

Knoxes constructed the restaurant, which N Double C occupied in November 1981. N Double C paid its monthly installments of rent through November of 1985, but failed to pay the rent installment due on December 1, 1985. On January 24, 1986, Knoxes' lawyer sent a letter to the defendants' lawyer, requesting that the defendants pay the then delinquent rent (December 1985 and January 1986). On January 29, 1986, defendants' lawyer responded to Knoxes' demand: "I feel that a fair construction of the guaranty portion of the lease agreement is that it is only in effect for the first thirty-six (36) months from the signing of the lease agreement. That time has expired." N Double C vacated the premises and removed all its equipment sometime between January and May of 1986.

Knoxes attempted to relet the property by listing it with a real estate agency and initially asked $35,000 annual rent, which was reduced to rent of $24,000 per year in June 1986, and again reduced, this time to $22,000 per year in December 1986.

In response to Knoxes' action based on N Double C's default regarding the lease and the defendants' guaranty, Carlson and Cook stated in their answer: "The term of the guarantee under said lease expired three years from the inception of said lease and, therefore, no liability is due from these Defendants to Plaintiffs." Additionally, Carlson and Cook alleged: "Plaintiffs have not made good faith efforts to mitigate the damages of the Defendants and to make reasonable efforts to

lease the property for a commercially reasonable amount and, therefore, are barred from any recovery under the terms of said lease." In his separate pleading, Nickel not only denied liability in a verbatim restatement of the defensive allegations made by Carlson and Cook, but also cross-claimed against Carlson and Cook on account of an alleged indemnity agreement among the defendants to the effect that Carlson and Cook indemnified Nickel "against any claims and demands arising as a result of the" guaranty for the Knox-N Double C lease.

Knoxes obtained service of a subpoena duces tecum on Carlson and Cook, who moved to quash the subpoena. The court sustained the motion by Carlson and Cook and quashed a portion of the subpoena.

Kenneth Knox testified that N Double C had defaulted in the payment of all rent due for the period from December 1, 1985, to April 14, 1987, the date of trial. The defendants offered no evidence to contradict Kenneth Knox's testimony concerning N Double C's default in the payment of rent.

At the conclusion of evidence, the district court found: "Said premises have not been re-leased since [N Double C's] default notwithstanding plaintiffs' efforts so to do; plaintiffs' efforts in such regard have been reasonable and proper in the circumstances." Further, the district court concluded that the guaranty's language "or up to a term of thirty-six (36) months" was ambiguous. In view of such ambiguity, the court allowed the defendants to testify concerning their intention for the guaranty. In substance, the defendants testified that the phrase "or up to a term of thirty-six (36) months" meant that the defendants' guaranty existed only for the first 36 months of the Knox-N Double C lease. Thus, according to the defendants, their guaranty expired in 1984, that is, 3 years after the lease was signed by Knoxes and N Double C. In view of the defendants' testimony, the district court concluded that the guaranty's language "up to a term of thirty-six months" was a reference to the duration of the guaranty's existence for 36 months from commencement of the Knox-N Double C lease and was not a reference to the period or temporal extent of the defendants' liability after N Double C's default on the lease. Consequently, in the judgment entered, the district court stated that "more

than three years having elapsed from the beginning of the lease period before default occurred thereon, defendants are not now obligated to pay plaintiffs any sums under their guarantees." The court then dismissed Knoxes' action.

In their appeal, Knoxes contend that the defendants' guaranty is not ambiguous and request that the district court's judgment be reversed with direction to enter judgment for Knoxes, that is, judgment for $92,437.50 (delinquent rent from December 1985 to and including April 1987, or 17 months) with prejudgment interest. The defendants maintain that their guaranty is ambiguous, and, therefore, the district court's judgment, determining the intent for the guaranty, is correct. The defendants have not cross-appealed to challenge the district court's finding that the Knoxes have exerted reasonable efforts to relet the leased premises previously occupied by N Double C.

Whether a document is ambiguous is a question of law initially determined by a trial court. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). "Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). See, also, *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987). See, also, *National Farmers Union Serv. Corp. v. Edwards*, 220 Neb. 231, 369 N.W.2d 76 (1985) (a document is ambiguous if, after application of the pertinent rules for construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties). The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988). If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and

the intention of the parties to the document must be determined from the contents of the document. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

"Nebraska adheres to the rule of strict construction of guaranty contracts. . . . '. . . When the meaning of the contract [guaranty] is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.' " *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 293, 417 N.W.2d 162, 163 (1987) (quoting *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922)).

A guaranty, as any other contract, must be interpreted by reference to the entire document with meaning and effect given to every part of the guaranty whenever possible. *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb. 292, 237 N.W.2d 645 (1976).

Applying the foregoing rules of construction or interpretation for a document, we conclude that the guaranty in the present case is unambiguous. The guaranty provides that the defendants will "guarantee" rental payments "[i]n the event that the corporation should default under this lease agreement *at any time during its term*" (emphasis supplied), which term the defendants knew was 15 years. The guaranty's provision limiting the defendants' liability to "a term of thirty-six (36) months" clearly refers to the period of the defendants' liability after N Double C's default on the lease from Knoxes. As the result of the guaranty and on N Double C's default on the Knox lease, the defendants obligated themselves to pay the rent, which accrued but was unpaid, for each of the ensuing 36 months throughout the term of the lease remaining after the default by nonpayment of rent or to pay the rent until the premises were relet, whichever occurred first. The defendants suggest that the guaranty's language "up to a term of thirty-six (36) months" means that the guaranty was effective only for the first 36 months of the Knox-N Double C lease. The construction suggested by the defendants is completely inconsistent with the guaranty's provision for the defendants' liability if N Double C "should default under this lease agreement at any time during its term," that is, default any time

during the 15-year term of the lease from Knoxes. While the defendants point out that the lease provision regarding a guaranty does not include the language "at any time during its term," we cannot ignore that the terms of the defendants' guaranty for performance of the lease, not the terms of the lease, identify and determine the scope of the defendants' personal liability under their guaranty. See *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 170, 266 N.W.2d 736, 740 (1978):

> The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral.

Therefore, as a matter of law, we conclude that the district court erred in finding that the guaranty was ambiguous. The guaranty obligates the defendants to pay the installments of the monthly rent which N Double C has failed to pay and which Knoxes seek to recover. The district court found that Knoxes have made reasonable efforts to mitigate damages which they have incurred to the date of trial, a finding from which no appeal has been taken. The undisputed evidence establishes that at the date of trial, N Double C had defaulted in the payment of rent for 17 months. With each monthly installment of $5,437.50, the delinquent rent amounted to $92,437.50 at the date of trial. Under the circumstances and as a matter of law, Knoxes are entitled to a judgment against the defendants for the unpaid rent of $92,437.50 prescribed by the Knox-N Double C lease.

As they did at trial and now on appeal, Knoxes ask for prejudgment interest. Neb. Rev. Stat. § 45-103.02 (Reissue 1988) prescribes the conditions for allowance of prejudgment interest on all causes of action accruing on or after January 1, 1987, subject to the exclusions in Neb. Rev. Stat. § 45-103.04 (Reissue 1988), and states:

> [J]udgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the

> judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer . . . .

Section 45-103.04 provides:

> Judgment interest shall not accrue prior to the date of rendition of judgment for:
>
> (1) Any action arising under Chapter 42; or
>
> (2) Any action involving the state, a political subdivision of the state, or any employee of the state or any of its political subdivisions for any negligent or wrongful act or omission accruing within the scope of such employee's office or employment.

Nothing indicates that Knoxes made a written offer for settlement of their claim against the defendants. However, a cause of action accrued for Knoxes on December 1, 1985, and on the first day of each month thereafter, when N Double C defaulted in the payment of rent due at the specified time. In view of N Double C's default on installment payments of rent due on the first day of each month, a separate cause of action accrued in favor of Knoxes for each month's rent which was not paid by N Double C. Therefore, at the date of January 1, 1987, N Double C was in default for 13 months' rent.

> Prejudgment interest is allowed where the amount of the claim is liquidated. When reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed. *Graff v. Burnett*, 226 Neb. 710, 414 N.W.2d 271 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986).

Lutheran Medical Center v. City of Omaha, 229 Neb. 802, 810, 429 N.W.2d 347, 352 (1988).

We have decided, as a matter of law, that the defendants' guaranty in issue is unambiguous. Consequently, no reasonable controversy existed concerning the provisions of the guaranty inasmuch as the defendants make no challenge to the guaranty beyond the alleged ambiguity. The amount recoverable under

the guaranty is not disputed, that is, 17 months' delinquent rent at $5,437.50 per month. The amount of Knoxes' claim is, therefore, liquidated. The Knox-N Double C lease contains no provision for interest assessable on a delinquent payment of rent. Neb. Rev. Stat. § 45-104 (Reissue 1988) specifies the legal rate of interest as 12 percent per annum. For that reason, Knoxes are entitled to prejudgment interest at the rate of 12 percent per annum in accordance with § 45-104, assessable from the date of delinquency for each unpaid installment of rent due under the Knox-N Double C lease. However, in accordance with § 45-103.02, Knoxes are not entitled to prejudgment interest on rent which accrued on or after January 1, 1987.

On account of our decision regarding the issue of the guaranty involved in this appeal, it is unnecessary to consider Knoxes' other assignments of error.

Therefore, we reverse the judgment of the district court and remand this matter to the district court with direction to enter judgment in the principal amount of $92,437.50 in favor of Knoxes and against the defendants. Further, as a part of the judgment entered on remand, the district court shall allow prejudgment interest to Knoxes in accordance with this opinion. Because the record does not disclose that the cross-claim of Nickel against Carlson and Cook has been disposed of, we remand this matter to the district court for disposition of Nickel's cross-claim against Carlson and Cook.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

I dissent from that part of the majority opinion that seems to hold that compliance with Neb. Rev. Stat. § 45-103.02 (Reissue 1988) is a prerequisite to the recovery of prejudgment interest in all situations. Rather, I would hold that the section is an addition to those cases where prejudgment interest is allowed pursuant to Neb. Rev. Stat. § 45-104 (Reissue 1988).

The application of the conditions in § 45-103.02, specifically that of a greater recovery than demanded, will result in denial of justified prejudgment interest. If one demands a delinquent payment and subsequently sues and recovers a judgment for the delinquent payment, prejudgment interest must be denied,

since plaintiff's first offer of settlement is "[not] exceeded by the judgment."

The result, I submit, is contrary to the plain intent of the statute, i.e., to encourage settlements, not to offer a boon to deadbeats.

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

BANK OF BURWELL, A NEBRASKA BANKING CORPORATION, APPELLANT, V. ROGER KELLEY ET AL., APPELLEES.

445 N.W.2d 871

Filed September 22, 1989. No. 87-880.

1. **Uniform Commercial Code: Guaranty: Notice: Words and Phrases.** One who guarantees payment of another's debt is a "debtor" entitled to notice pursuant to the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
2. **Uniform Commercial Code: Security Interests: Notice.** Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.
3. **Uniform Commercial Code: Guaranty: Security Interests: Notice.** Whether a creditor's notice under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980) sufficiently informs a guarantor of his or her status as such, of the default of the principal debtor, and of the guarantor's obligations, rights, and stake in the collateral, and is therefore reasonable, must be determined in light of the entire conduct of the parties.
4. **Summary Judgment.** Summary judgment is appropriate where there exists no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

T. Randall Wright, of Dixon & Dixon, P.C., for appellant.

Richard P. Garden, Jr., of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

CAPORALE, J.

Plaintiff, Bank of Burwell, appeals from the summary judgment entered in favor of defendants-appellees, Rex Kelley, Roger Kelley, and Florence Kelley White, sometimes hereinafter collectively referred to as the "defendant Kelleys," asserting two assignments of error which merge to challenge the district court's conclusion that plaintiff's notices of sale sent pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980) were unreasonable as a matter of law and thus would not support a claim for deficiency judgments. We reverse and remand for further proceedings.

Prior to 1976, one Max Kelley, who was a defendant in the trial court but is not a party to this appeal, operated a well-drilling business with Ronald Jensen under the name of Jensen Kelley. In 1976, Max Kelley decided to purchase Jensen's interest in the business. In order to raise capital for this purchase, Max Kelley formed Kelley Irrigation, Inc., and sold stock in the corporation to his mother, the aforenamed Florence Kelley White, and to his brothers, the aforenamed Rex and Roger Kelley. Max Kelley became president and Roger Kelley a vice president of the corporation. While the record is not entirely clear with respect to the official titles of Rex Kelley and Florence Kelley White at given times, it appears that Florence Kelley White served as secretary at the inception of the corporation and later became treasurer. Rex Kelley apparently initially served as treasurer and later became second vice president.

On June 17, 1976, plaintiff loaned the corporation $170,000. At that time each of the Kelley brothers and their mother executed a guaranty agreement, under the language of which each of the four personally guaranteed any future indebtedness the corporation might incur.

Plaintiff's records indicate that the original loan was stamped paid on August 26, 1976. While the record does not provide a means of ascertaining with certainty a complete and detailed record of the corporation's borrowings from June 17, 1976, to March 20, 1985, the date on which the last note was executed, it does show that the corporation had once repaid its entire indebtedness to the plaintiff and that such repayment

occurred sometime prior to 1978.

On April 3, 1978, plaintiff made the corporation another loan of $50,000. Through various renewals and advances taking place from April 3, 1978, to March 20, 1985, the debt grew to $290,000. It appears that all of the notes were signed only by Max Kelley as president of the corporation, including the final $290,000 note dated March 20, 1985, and due on September 16, 1985. The March 20 note references the June 17, 1976, guaranty as part of plaintiff's security on the loan.

Plaintiff's officers had become concerned about the corporation's debt, and on September 28, 1984, plaintiff's then president, Robert McEvoy, sent a letter to Max Kelley and each of the defendant Kelleys informing them that the corporation's line of credit was nearly 90 days past due and reminding them of their status as guarantors. Later in the fall of 1984, McEvoy again wrote to each of the guarantors. Those letters read as follows:

> This is to advise you as an officer as well as a personal guarantor on the above captioned line of credit, that the severely past due note of your corporation must be brought current no later that [sic] December 3, 1984.
>
> If this second letter is also ignored we will take legal action in this matter. Further, be advised that if the total liquidation of this corporation does not pay the entire principle [sic] plus interst [sic] on this loan, we will then move for a deficiency judgement against your personal assets to the extent necessary to pay the total remaining balance due.

On March 20, 1985, McEvoy sent a second letter to each of the four guarantors, prepared on bank letterhead but signed by Max Kelley, revealing the March 20, 1985, renewal of the corporation's loan. This letter also indicated that the guaranties served as part of the security on the loan.

The March 20, 1985, letters were immediately followed by March 22, 1985, letters which were signed by McEvoy. These referenced the letter over Max Kelley's signature, referenced an enclosed copy of the June 17, 1976, guaranty, confirmed the acquisition of additional collateral from the corporation, and advised the guarantors that plaintiff was "still relying heavily

on your personal guarantee as a very important part of this new arrangement with the corporation."

Subsequently, on September 10, 1985, McEvoy again sent letters to each of the guarantors, informing them that the March 20, 1985, note was due on September 16, 1985, and asking them to "[p]leas [sic] make arrangements to meet this company and personal obligation . . . ."

On March 31, 1986, plaintiff's attorney signed and sent a letter to each of the guarantors, which read:

> You will recall that on June 17, 1976 you executed a Guaranty to the Bank of Burwell to induce the Bank of Burwell to lend money to Kelley Irrigation, Inc., Burwell, Nebraska. Pursuant to that Guaranty, and in reliance thereon, the Bank did lend monies to Kelley Irrigation, Inc. Presently, the corporation owes to the Bank the amount of $290,000.00 plus interest, and that amount has been past due since September 16, 1985. From that time the Bank has worked with the corporation in an attempt to effect an orderly liquidation of the assets. However, to date the corporation has been unable to achieve that goal. We have notified the corporation that if the notes are not paid by April 15, 1986, the Bank will seek legal recourse for the recovery of the amount of the Note and interest. If the amount is not paid by that time, we will be looking for payment from you under the terms of the Guaranty agreement. We would like your cooperation in helping to achieve a workout of this matter so that we can maximize the proceeds of the liquidation and thereby reduce the amount of your liability under the Guaranty. Please contact this office within ten (10) days from the date of this letter so that we can arrange a meeting of the corporation officials and the Guarantors so that the matter can be amicably worked out in the best interests of all parties.

On May 1, 1986, plaintiff's attorney signed and sent another letter to each of the guarantors. This letter indicated that because he had received no response with respect to his earlier letter, plaintiff had filed suit against the "corporation and its Guarantors." The letter also declares:

> In principle, the bank would rather work these things out amicably than to proceed through litigation. As a practical matter, if the bank can solicit your help in liquidating the assets of the corporation, such a voluntary liquidation almost always will bring a greater price than would a forced sale. When one considers that each of you are [sic] personally liable for the indebtedness of the corporation, it would seem to be an advantage to you that the corporation obtain liquidation at the highest possible prices. The bank intends to proceed in each of the matters of litigation to judgment and collection, unless an earlier amicable resolution can be reached.

The defendant Kelleys acknowledge that they received correspondence from plaintiff and its attorney and that they ignored such correspondence based on the belief, notwithstanding the language of the June 17, 1976, guaranty agreement, that the guaranty covered only the initial $170,000 loan and that they thus no longer guaranteed the corporation's debt.

While the defendant Kelleys testified that they ignored the correspondence sent by plaintiff, it appears they did contact an attorney at least as early as June of 1986 in response to this lawsuit.

In any event, on June 18, 1986, plaintiff obtained a judgment allowing it to repossess the corporation's personalty on or after August 25, 1986. Plaintiff then took possession of and began the process of liquidating that collateral.

Prior to selling any of the collateral, plaintiff sent separate notices of such sale to the corporation and to each of the guarantors as "Mr. Max Kelley, President of Kelley Irrigation, Inc.," "Max Kelley," "Florence Kelley White," "Rex Kelley," and "Roger Kelley." The first mailing of such notices apparently took place on August 30, 1986. In most instances, plaintiff also sent copies of the notices to the defendant Kelleys' attorney.

One set of notices with respect to the sale of some of the repossessed property of the corporation was apparently prepared by plaintiff's senior vice president. This set relates to an auction of some of the repossessed property of the

corporation and differs slightly from other notices which plaintiff sent with respect to the sale of other collateral. Other sets of notices were prepared on what appears to be a "standard" form used by plaintiff to notify debtors of an upcoming sale of collateral. A review of these two forms of notice makes it apparent that if the standard form provided reasonable notice to the guarantors, then the other form also provided adequate notice.

The following is a typical example of the standard form notice:

NOTICE OF PRIVATE SALE OF COLLATERAL
ON DEFAULT

To: [Name and address of notice recipient] Date: November 25, 1986

Please take Notice that pursuant to a security agreement, dated March 20, 1986, between Kelley Irrigation, Inc. and the Bank of Burwell, Burwell, NE, County of Garfield, which was filed in the office of the Clerk of the County of Garfield, State of Nebraska, the undersigned shall sell at private sale your 1972 Ford F-750 Truck with 10 T. Smeal

which was the collateral pledged pursuant to the security agreement described above, due to the default of the note. The collateral shall be offered for sale at Kelley Irrigation Inc. Building in Burwell, County of Garfield, State of Nebraska, on Dec. 2, , 1986, after 12:00 p.m. The above collateral items are listed with the offered price from the following individual. You will be liable for any deficiency resulting from the sale of the collateral. You may redeem the collateral by paying the amount due on the obligation secured by the security agreement at any time prior to the date of the sale. This notice is given pursuant to UCC 9-504(3).

Offer to Purchase From: Tom Mosier
22946 Fox Street
Cassopolis, Michigan 49031

Respectfully submitted by:
/s/ Paul E. Rainbolt, S.V.P.
THE BANK OF BURWELL
P.O. Box 610
Burwell, NE 68823

Neb. U.C.C. § 9-504(1) (Reissue 1980) provides that after default, a secured party may sell the collateral. Insofar as is relevant to our inquiry, § 9-504(3) requires that "reasonable" notice be sent the debtor of the intended disposition of the collateral. One who guarantees payment of another's debt is a "debtor" entitled to notice pursuant to the foregoing statute. *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989); *General Electric Credit Corp. v. Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *Allis-Chalmers Corp. v. Haumont*, 220 Neb. 509, 371 N.W.2d 97 (1985); *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983).

We have said that "compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency." *First Nat. Bank & Trust Co. v. Hermann*, 205 Neb. 169, 172, 286 N.W.2d 750, 751-52 (1980), citing *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974). This rule has also been applied and followed in *American Honda Finance Corp. v. Bennett, supra*; *General Electric Credit Corp. v. Lewis, supra*; *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*; and *First Nat. Bank & Trust Co. v. Hughes, supra*. " '[T]he burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. . . . Failure to give notice is an absolute bar to the recovery of a deficiency.' " *Citizens State Bank v. Sparks*, 202 Neb. 661, 664, 276 N.W.2d 661, 663 (1979), citing *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976).

In *Hughes*, *Hi-Bo Farms*, *Lewis*, and *Bennett*, the central issue was whether the creditors had provided guarantors with reasonable notice as required by § 9-504(3). Because of the resolution we reach, it becomes necessary to make a detailed

review of each of the four cases last mentioned.

In *Hughes*, Vernor and Diana Hughes personally guaranteed a loan from First National Bank of Fremont to Central Auto & Truck Supply, Inc. Central Auto assets secured the loan. Vernor Hughes was president of Central Auto, and Diana Hughes was secretary of the corporation. On April 1, 1981, after Central Auto defaulted on the loan and the bank had obtained possession of the securing assets, it sent the following letter to the Hughes residence:

> "Mr. Venor [sic] Hughes, President
> Central Auto & Truck Supply
> 1558 East 5th
> Fremont, NE. 68025
>
> RE: Loan #869930
> Collateral: Financing Statement 5-9-74
>
> Dear Mr. Hughes:
>
> "This is to notify you that, in connection with the repossession of the above collateral involved in the abovee [sic] account, you may redeem said collateral and terminate the contract relating thereto by payment of $51,417.90 plus interest and expenses any time prior to the sale of said collateral on the date designated below. It is possible for this sum to increase should further expenses of any nature be incurred by our bank.
>
> "In the event you are not able to fully redeem the collateral or make suitable arrangements for redemption, the collateral will be sold at private sale on or after April 10, 1981 at the present place of storage which is 245 East 5th St., and First National Bank & Trust Company of Fremont.
>
> "Local, State and Federal laws permitting, you will be held liable for any deficiency declared owing after disposal of this collateral."

Id. at 44-45, 332 N.W.2d at 676.

The bank then sold a portion of the securing assets. In determining that the notice was unreasonable and that the bank was thus precluded from obtaining a deficiency judgment against the Hugheses as guarantors of the Central Auto debt,

the court said:

> The April 1 notice in this case makes no reference to the guaranty; indeed, it makes reference only to the "Financing Statement 5-9-74," in fact a security agreement dated May 24, 1974, a document which was signed individually by neither Mr. Hughes nor Mrs. [Diana] Hughes. In that regard the notice fails to apprise either Mr. or Mrs. Hughes that a personal deficiency judgment might be sought against any one of them in his or her capacity as guarantor of the corporation's debt. Secondly, as between Mr. Hughes and Central Auto, the matter as to whom the notice was sent is ambiguous. The interest of Mr. Hughes in this context conflicts with that of the corporation. It cannot be said that the notice, as addressed, unmistakably advises Mr. Hughes personally that he is the "you" who may be held "liable for any deficiency declared owing after disposal of this collateral." To assume that Mr. Hughes would know that a deficiency could not be obtained against the bankrupt Central Auto is to assume something not supported by the record before us. Although the statement that ambiguous language is to be construed against the drafter of the language is generally applied in the case of insurance policies, *Niemeyer v. Estate of Tichota*, 191 Neb. 484, 215 N.W.2d 885 (1974), the reasoning behind that rule is equally applicable to notices of the nature involved here.

First Nat. Bank & Trust Co. v. Hughes, 214 Neb. 42, 46-47, 332 N.W.2d 674, 677 (1983).

In *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987), Hi-Bo purchased farm machinery on a retail installment contract. Four of its corporate officers, namely Dale Hinz, president; Carol Hinz, secretary; Allen Bors, vice president; and Janice Bors, treasurer, each personally guaranteed the installment debt. After Hi-Bo had defaulted on the obligation and had surrendered possession of the machinery to the creditor, Deutsche Credit Corporation, Deutsche mailed a separate notice of private sale of the collateral to Hi-Bo, as well as to each of the guarantors. Each notice read as follows:

"RE: HI-BO FARMS INC.

"You are hereby notified by and on behalf of the undersigned secured party that by virtue of the default under the terms and provisions of a security agreement executed by the captioned Debtor dated 06-28-81, the undersigned secured party, holder of the aforesaid agreement and the indebtedness represented therby [sic] will, on or after 08-18-84 make one or more private sales or other dispositions of our right, title and interest in and to the goods described in said agreement, which goods may be described as follows:

ONE WHITE 9700 COMBINE S/N 97-20218 W/CORNHEAD S/N A90065, AND KWICK CUT HEAD S/N 912118

The net proceeds of sale (less expenses incurred) shall be, in accordance with said agreement, applied to the reduction of total obligation due and owing by Debtor to the undersigned secured party.

"Dated this 7TH day of AUGUST, 1984.

Deutsche Credit Corporation"

Id. at 465, 398 N.W.2d at 695.

Deutsche sold the equipment on October 3, 1984, and subsequently sought a deficiency judgment against the corporate officers who had personally guaranteed the Hi-Bo debt. In upholding the summary judgment dismissing Deutsche's petition, the court wrote:

> The guarantors contend that the notices in the present case are indistinguishable from the notice in *Hughes*. Plaintiff argues that, on the contrary, its notices are different from the notice in *Hughes* in several important respects. First of all, while in *Hughes* there was but a single notice, in the present case each of the guarantors was sent a separate notice. While the notice in *Hughes* was addressed to the president of the corporate debtor, each of the notices to the guarantors in this case was addressed to a guarantor individually, and no reference was made to the guarantor's capacity as an officer of the corporate debtor. While the notice in *Hughes* directed specific attention to

"Collateral: Financing Statement 5-9-74," which the guarantor had not signed, the notices in this case directed attention to the entire "HI-BO FARMS INC." transaction. Plaintiff concludes that these distinctions are such that the guarantors had no reasonable basis to conclude that the notices were sent to them in their capacity as corporate officers rather than to them in their own individual capacities.

The guarantors, on the other hand, point to the facts that, as did the notice in *Hughes*, the notices in this case refer only to Hi-Bo Farms as the debtor. Moreover, as the notice in *Hughes* failed to make any reference to the guaranties executed by the Hugheses, so in this case did the notices limit themselves to the "default under the terms and provisions of a security agreement executed by the captioned Debtor . . . ." Thus, the guarantors argue that the notices are, at best, ambiguous and, as such, constitute no notice at all insofar as they individually are concerned.

We conclude that the notices are ambiguous as a matter of law with respect to the guarantors. They refer to but a single debtor, Hi-Bo Farms, and refer only to the security agreement executed by that debtor solely. That ambiguity is to be resolved against plaintiff as the drafter of the notices.

Hi-Bo Farms, supra at 468, 398 N.W.2d at 696-97.

In *General Electric Credit Corp. v Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988), Gerald Lewis executed a guaranty in favor of General Electric Credit Corporation and covering the present and future debts of William Thompson III and Donna Ahrens. General Electric then extended a loan to Thompson and Ahrens; the loan was secured by a Mack truck tractor.

After Thompson and Ahrens had defaulted on the loan and General Electric had repossessed the Mack tractor, General Electric sent the following " 'NOTICE OF SALE OF COLLATERAL' " to Lewis:

"TO: Gerald B. Lewis
C/O Lewis Service Center
4101 West "O" Street

> Lincoln, NB 68528
>
> "PLEASE TAKE NOTICE that the following described collateral of which we have taken possession pursuant to Chattel Mortgage dated August 10, 1983 in which William Thompson III and Donna Ahrens is the Debtor and we are the Secured Party, will be sold by: . . . Private Sale on or after November 30, 1983 at 2333 Waukegan Road, Bannockburn, Illinois 60015
>
> "DESCRIPTION OF COLLATERAL: One (1) 1981 Mack Truck Tractor . . . ."

Id. at 430-31, 432 N.W.2d at 28.

In holding the notice unreasonable, this court declared:

> Apparently implicit in [*Hughes* and *Hi-Bo Farms*] is Neb. U.C.C. § 9-504 comment 5 (Reissue 1980), namely, one of the purposes of the Uniform Commercial Code notice provisions is assurance that "persons entitled to receive [notice] will have sufficient time to take appropriate steps to protect their interests." Consequently, this court has concluded that, because reasonable notice of sale is designed to give a guarantor an opportunity to protect the guarantor's interest, a notice which fails to inform the guarantor concerning an interest to protect, namely, potential liability for a deficiency after sale, is not reasonable. Therefore, to satisfy the requirement of reasonable notice, as a prerequisite concerning a guarantor's liability for a deficiency, § 9-504(3) requires that the secured party-creditor inform the guarantor of a debt concerning the guarantor's potential liability for a deficiency on sale of collateral after the principal debtor's default. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra*; *First Nat. Bank & Trust Co. v. Hughes, supra*.
>
> The notice sent to Lewis, as guarantor, is deficient in view of [*Hi-Bo Farms*] and *Hughes*, because [General Electric's] notice failed to refer to Lewis' guaranty and did not inform Lewis that he, as a guarantor of the Thompson-Ahrens debt, would be liable for any deficiency after sale of the collateral. Instead, the notice referred only to Thompson and Ahrens as debtors, and to the "chattel mortgage" signed by those debtors. Since

> [General Electric's] notice to Lewis failed to inform him that [General Electric] would seek a personal deficiency judgment against Lewis in his capacity as a guarantor, the notice was unreasonable under § 9-504(3).

Lewis, supra at 433-34, 432 N.W.2d at 30.

The reasonableness of the notice to a guarantor was most recently considered in *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989). Therein, Ronald and Shirley Bennett served as corporate officers of Bennett's Gun & Cycle, Inc., and personally guaranteed that corporation's obligations to American Honda Finance Corporation. The credit which American Honda had extended to Bennett's Gun & Cycle was secured by a portion of the corporation's inventory.

After Bennett's Gun & Cycle had defaulted and American Honda had recovered its collateral, American Honda mailed identical notices of private sale to the Bennetts and to Bennett's Gun & Cycle. The only difference between the notices was the first line of the inside address. The notices stated:

> "RE: Repossessed Motorcycles and Power Equipment
> Dear Ronald and Shirley Bennett:
>
> "Pleae [sic] be advised that on or after 8:00 AM, on October 24, 1986, American Honda Finance Corporation will sell at private sale the collateral heretofore repossessed from you by American Honda Finance Corporation pursuant to the Security Agreement between you and American Honda Finance Corporation. Such collateral consist of Motorcycles and Power Equipment."

Id. at 22, 439 N.W.2d at 461.

The court concluded that the notice of private sale was sufficiently ambiguous as to be unreasonable and thus foreclose a deficiency judgment. In so ruling, it stated:

> To be reasonable, the notice must inform the guarantor of his potential liability for a deficiency on the sale of collateral after the principal debtor's default [citing *Lewis*, *Hi-Bo Farms*, and *Hughes*].
>
> Separate notices were sent to the primary debtor and the guarantors; however, the notice to the Bennetts states it was sent "pursuant to the Security Agreement between

> you and American Honda Finance Corporation." The notice made no reference to the guaranty agreement signed by the Bennetts. The notice received by the Bennetts referred only to collateral in the form of motorcycles and power equipment repossessed from "you." From the notice, it is clear the "you" referred to is Bennett's Gun & Cycle, not Ronald and Shirley Bennett. Nor does the notice give any indication that the Bennetts may be held liable for any deficiency which results from the sale. Therefore, this notice was deficient as a matter of law.

Bennett, supra at 24-25, 439 N.W.2d at 462.

The standard form notices in this case were sent to the defendant Kelleys as "Roger Kelley," "Rex Kelley," and "Florence Kelley White," without indicating whether they were being given notice in their corporate or individual capacities. This confusion is compounded by the fact the notices declare that plaintiff would "sell at private sale *your* [description of items to be sold] which was the collateral pledged pursuant to the security agreement described above . . . ." (Emphasis supplied.) The use of the term "your" before the description of the collateral to be sold exacerbates the doubt as to whether the notices were sent to the defendant Kelleys as individuals or as corporate officers. Moreover, while the standard form notices state that "[y]ou will be liable for any deficiency," the use of the term "your" before the description of the collateral makes it unclear whether plaintiff was giving notice it would seek to hold the defendant Kelleys as individuals or the corporation liable for any deficiency. Finally, the notices omit any reference to the guaranty the defendant Kelleys signed. It is these ambiguities which the defendant Kelleys argue entitle them to summary judgment under the *Hughes* line of cases.

It is to be noted, however, that in that line of cases, the notices represented the creditors' only efforts to inform the guarantors of their stake in the collateral. Consequently, the ambiguities were necessarily resolved against the creditors as the drafters of the notices, rendering the notices unreasonable.

Conversely, the plaintiff in this case made a concerted effort to ensure that the defendant Kelleys were fully informed of

their stake in collateral which was to be sold. On numerous occasions plaintiff reminded the defendant Kelleys of the guaranty which they had signed, at one point going so far as to mail each of them a copy of the document. And via correspondence, plaintiff made it clear that each of them, as guarantor, would be personally liable for any deficiency remaining after the corporation's assets were liquidated.

Plaintiff therefore urges that parol evidence should be considered in determining whether its notices contained sufficient information to apprise the defendant Kelleys that they needed to protect their interests as guarantors, and were thus reasonable; that is, the determination should be made in light of the entire conduct of the parties.

In support of this position plaintiff cites us to *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976), a case involving a lease. Therein, this court said:

> Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. [Citation omitted.] In any event, this court has ordinarily applied the parol evidence rule only in the absence of fraud, mistake, or ambiguity. [Citation omitted].
>
> A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.

Id. at 391-92, 238 N.W.2d at 462. This rule is restated and followed in *Mahoney v. May*, 207 Neb. 187, 297 N.W.2d 157 (1980), and *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980), both cases involving the construction of contracts for the sale of real estate. Like *Olds*, *Mahoney* also notes that "[p]arol evidence is generally admissible where it is offered for the purpose of explaining and showing the true nature of the transaction between the parties." *Mahoney* at 191, 297 N.W.2d at 160. And, more recently, in *Washington Heights Co. v Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987), this court noted that parol evidence is admissible to explain vague language in a written contract.

We therefore hold that whether a creditor's notice under the

provisions of § 9-504(3) sufficiently informs a guarantor of his or her status as such, of the default of the principal debtor, and of the guarantor's obligations, rights, and stake in the collateral, and is therefore reasonable, must be determined in light of the entire conduct of the parties.

Such holding compels the conclusion that there indeed exist in this case genuine issues as to material facts. Summary judgment is appropriate where there exists no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts and the moving party is entitled to judgment as a matter of law. *First Security Sav. v. Aetna Cas. & Surety Co., ante* p. 335, 445 N.W.2d 596 (1989); *Gatzemeyer v. Neligh Township, ante* p. 329, 445 N.W.2d 593 (1989); *State Farm Fire & Cas. Co. v. Victor,* 232 Neb. 942, 442 N.W.2d 880 (1989). Consequently, the summary judgment in favor of the defendant Kelleys must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., not participating.

WHITE, J., dissenting.

The majority, by allowing parol evidence to determine whether the notices sent the guarantors pursuant to the provisions of Neb. Rev. Stat. § 9-504(3) (Reissue 1980) were reasonable under the circumstances, departs from the bright line approach to notice requirements adopted by this court in *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *General Electric Credit Corp. v. Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988); and *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989).

I would adhere to precedent and affirm the granting of summary judgment in favor of the defendant Kelleys.

FAHRNBRUCH, J., dissenting

I join in Judge White's dissent. Abolition of the bright line approach to notice requirements under Neb. Rev. Stat. § 9-504(3) (Reissue 1980) will create uncertainty where

certainty has existed, and it will encourage prolific litigation in an already overburdened judicial system.

FIRST NATIONAL BANK & TRUST OF SYRACUSE, NEBRASKA, APPELLANT, V. OTOE COUNTY, NEBRASKA, ET AL., APPELLEES.

445 N.W.2d 880

Filed September 22, 1989. No. 87-949.

1. **Taxation: Valuation: Equity: Appeal and Error.** An appeal from action by a county board of equalization is an equity action tried de novo in the district court.
2. _____: _____: _____: _____. On appeal to the Supreme Court, an equity case involving action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the Supreme Court may give weight to the fact that the trial judge observed the witnesses and accepted one version of the facts over another.
3. **Taxation: Valuation: Proof: Appeal and Error.** In a taxpayer's appeal from action of a county board of equalization, the taxpayer has the burden to prove by clear and convincing evidence that the action of the county board of equalization, in fixing or determining the value of real estate, is unauthorized by or contrary to constitutional or statutory provisions governing taxation.
4. **Taxation: Valuation: Evidence: Appeal and Error.** When a county board of equalization has determined the value of property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action a taxpayer must show more than a difference of opinion concerning the assessed value of the taxpayer's real estate.
5. **Taxation: Valuation.** Neb. Rev. Stat. § 77-112 (Reissue 1986), which specifies factors for determining actual value of real estate for tax purposes, does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine the actual value of real estate for tax purposes.

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

Otto H. Wellensiek for appellant.

John F. Steinheider, of Hoch & Steinheider, for appellee Otoe County.

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

SHANAHAN, J.

First National Bank & Trust of Syracuse, Nebraska (Bank), appeals from the district court's judgment affirming the Otoe County Board of Equalization's decision concerning the actual value of the Bank's real estate for 1986 taxation. The Bank claims that the court erred in upholding the board's valuation and excluding certain evidence.

THE NEW BANK

In September 1984, the Bank completed construction of its new banking facility in Syracuse at a cost of $1,610,873, which included land acquisition, $202,500; demolition, $23,579; general contractor, $866,550; mechanical contractor, $171,974; electrical contractor, $79,550; architectural fees, $179,550; bank fixtures, $59,970; and carpet, $27,200.

The Bank's main building has two floors above ground, with 6,588 square feet on each floor, and a basement with 6,140 square feet. The building structurally consists of a steel frame with block backup walls, brick facing, and numerous windows, and has a steel bar joist and steel deck roof with insulation and a 7.5- by 52-foot skylight. The building's interior has quarry tile floor and carpeting, wallpapered walls, a suspended acoustical tile ceiling, glass partitioned walls, an open atrium, and lighting, both recessed and spot. Offices and teller windows occupy the first and second floors. The basement contains storage areas and a large meeting room. The building is heated and cooled by a heat pump system, and has good plumbing, lighting, and electrical facilities.

Behind the Bank's main building is a separate 560-square-foot facility with a drive-up window and a remote pneumatic teller box. The facility includes a 473-square-foot canopy, and a walk-in foyer with an automatic teller machine and a walkup teller window.

The bank property also includes a heated, two-stall 576-square-foot garage, a one-stall 312-square-foot garage, and 14,468 square feet of paved parking.

APPRAISALS AND ASSESSMENT

In 1985, Otoe County hired John Charles Fritz, a licensed Nebraska real estate appraiser, to reappraise all real property in the county as of January 1, 1986. Fritz appraised the bank property at $839,790. The assessor and the equalization board reviewed Fritz' appraisal, compared Fritz' appraisal of the bank property with appraisals of similar properties, and adopted the appraisal as the county's assessment of actual value for the Bank's property.

Robert M. Ogden, a licensed Nebraska real estate appraiser hired by the Bank to determine the value of the Bank's property as of January 1, 1986, noted three accepted methods of determining the actual value of real property: the cost approach, the market approach, and the income approach.

Under the cost approach, Ogden determined the replacement cost of improvements, subtracted depreciation of the improvements, and added the value of the land. Ogden identified three types of depreciation: physical, functional, and economic depreciation. Physical depreciation results from deterioration of the improvements over time. Functional depreciation or obsolescence results from lack of market acceptance due to the obsolete nature of improvements, inability to recover the cost of unique features of a building suited to one business but unusable if the building is sold to another type of business, and decreased value caused by an improvement that is "overbuilt" in relation to the locale or community where the structure is situated. Economic depreciation results from external economic forces which depress the value of the property.

Using the Marshall Valuation Service and Residential Cost Handbook (Marshall-Swift manual) published by Marshall and Swift Publication Company, Ogden estimated the replacement cost of structures on the bank property at $1,200,000. Ogden found no physical depreciation had occurred during the 16 months between completion of the structures in September 1984 and the valuation date, January 1, 1986. However, Ogden estimated functional obsolescence to be 40 percent and stated:

> The layout of the subject property is functionally below typical due to the specialized nature of the building as a

> main bank facility. The construction of the subject property exceeds the typical steel building used for a small-town office building and is overadequate due to the bank utilizing the facility as a monument-type structure.

Ogden also relied on market research in arriving at 40 percent as the functional depreciation for the bank property:

> That figure was based on research of the market of financial institutions that was [sic] sold, and I found one particular property that I abstracted out a functional depreciation from that sale that showed a 52 percent functional depreciation. And I estimated the subject was a similar financial institution and estimated it to be 40 percent.

Ogden estimated economic depreciation at 30 percent. Economic data provided by Ogden showed retail sales in Syracuse had declined by 19 percent over the 6-year period from 1980 through 1985, and unemployment in Otoe County had increased from 5.5 percent in December 1984 to 6.7 percent in December 1985. No evidence in the record showed a relationship between retail sales or unemployment and prices in real estate sales or the decline of real estate prices in Syracuse.

Using sales of unimproved property, Ogden estimated the value of the bank site at $47,000 and, using the Marshall-Swift manual, found the value of the Bank's parking lot was $14,500. Ogden determined the value of the bank property under the cost approach was $422,000.

Under the market approach, Ogden examined 12 sales of commercial property in Nebraska and attempted to extrapolate a sale price for the bank property. Ogden's "comparable" sales ranged from the sale of an old grocery store in Syracuse, an 8,096-square-foot building which sold for $6.64 per square foot, to the sale of a bank in Lincoln, a 4,830-square-foot building which sold for $89.03 per square foot. Although several of the sales involved structures designed to house financial institutions, only 1 of the 12 properties Ogden studied was larger than the Syracuse bank facilities. In his market analysis, Ogden relied heavily on the sale of a 29,288-square-foot bank in Grand Island which sold for $28.57 per square foot, and admitted that the other properties used for

comparison would need substantial upward or downward adjustments in the sales price to compare with a hypothetical sale price for the Bank in Syracuse.

Ogden believed that the sale price of the Bank's main building would be $29 per square foot, which was multiplied by the amount of the Bank's office space above ground in the main building and produced a value of $390,000 for the Bank's property. Ogden did not consider the basement or separate structures in determining the value of the bank property under the market approach.

Ogden rejected the income approach as an accurate indicator of the bank property's value because financial institutions usually own their own building, resulting in few if any comparable rentals from which to extrapolate an income figure for capitalization.

Considering all three methods of valuation, Ogden gave most weight to the market approach for his opinion that the actual value of the Bank's property was $390,000 as of January 1, 1986.

Glen Davidson, a licensed Nebraska real estate appraiser and witness for the Bank, testified that based on his knowledge of sales in and around Syracuse over a 25-year period, the market value of the Bank's property was between $200,000 and $250,000.

Fritz testified for the county. In valuing the Bank's property, Fritz rejected the market and income approaches, since there was insufficient data from which to extrapolate a sale price or rent for the property. Thus, Fritz relied on the cost approach and determined the reproduction cost of the Bank's improvements by using a 1981 Marshall-Swift manual formerly prescribed by the Nebraska Department of Revenue. From the reproduction cost, Fritz subtracted depreciation and then added the value of the Bank's land.

The Marshall-Swift manual provides different square foot costs for reproduction, which are based on the quality of construction: excellent, good, average, and low cost. In the manual, the terms *average* and *good* refer to the quality of construction. The cost of reproduction for average construction is 24 percent less than the cost for good

construction. Although the Bank's improvements were classified as good rather than average according to the 1981 manual, Fritz used average construction cost for the Bank's improvements, since the Bank was located in a small town and had overbuilt its facilities. Regarding his use of "average" reproductive construction costs in arriving at a value for the Bank's property, Fritz stated:

> [I]t's the judgment of the appraiser which direction he cares to go when it's a fine line. And in this case, and the reason we went to the lower value is because of the opinion of Number 2, relative location and 3 desirability of functional use and the market value.

However, Fritz used prices for good construction in determining the value of similarly constructed financial institutions in Nebraska City, a larger community in Otoe County.

To determine depreciation, including physical, functional, and economic depreciation, Fritz studied sales prices of 45 to 50 commercial properties in Otoe County from 1981 to 1984, compared reconstruction costs for improvements on those properties, and, using this data, determined the depreciation rate applicable to commercial property of various ages throughout the county. Fritz applied a 5-percent depreciation rate to improvements on the Bank's property and concluded that the Bank's property had an actual value of $917,560 as of January 1, 1986.

The county granted a 10-percent "roll back" to all improvements in the county, resulting in an assessed value of $825,805 for the Bank's improvements. According to Fritz, the Bank's land had a value of $13,985. Therefore, the total assessed actual value for the Bank's property was $839,790 as of January 1, 1986.

Fritz testified that he valued all properties in the county through a uniform process and that the value of the bank property in Syracuse was equalized with the value of other property in Otoe County.

During cross-examination of Fritz, the Bank offered a copy of the 1984 Marshall-Swift manual to show that Fritz misused the manual's classifications of "good" and "average"

construction as factors affecting the value of the Bank's property. Nothing shows that the 1981 manual, used by Fritz, and the 1984 manual are substantially similar. Pursuant to the county's objection, the court excluded the 1984 manual because the document was "not the manual in force at the time" Fritz conducted his appraisal. However, on cross-examination Fritz acknowledged that his use of "good" and "average" construction for reproduction costs was based on location of the improvements, while the 1984 Marshall-Swift manual used a classification based on the quality of construction, not the site of the structure.

STANDARD OF REVIEW

"An appeal from action by a county board of equalization is an equity action tried de novo in the district court." *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 177, 403 N.W.2d 366, 372 (1987). "On appeal to the Supreme Court, an equity case involving action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court." *Id.* However, when credible evidence conflicts, the Supreme Court may give weight to the fact that the trial judge observed the witnesses and accepted one version of the facts over another. *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989); *Affiliated Foods Co-op v. County of Madison*, 229 Neb. 605, 428 N.W.2d 201 (1988). See *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988).

In a taxpayer's appeal from action of a county board of equalization, the taxpayer has the burden to prove by clear and convincing evidence that the action of the county board of equalization, in fixing or determining the value of real estate, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Co. v. Board of Equal., supra*; *Greenwood Ranch v. Morrill Cty. Bd. of Equal., supra*; *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987); *Airport Inn v. County Bd. of Equalization*, 215 Neb. 659, 340 N.W.2d 378 (1983); *Richman Gordman v. Board of Equalization*, 215 Neb.

379, 338 N.W.2d 761 (1983). See, *Spencer Holiday House v. County Bd. of Equal.*, 215 Neb. 194, 337 N.W.2d 759 (1983); Neb. Rev. Stat. § 77-1511 (Reissue 1986).

When a county board of equalization has determined the value of property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action a taxpayer must show more than a difference of opinion concerning the assessed value of the taxpayer's real estate. *Greenwood Ranch v. Morrill Cty. Bd. of Equal., supra.*

ACTUAL VALUE

Regarding assessment of property for taxation, Neb. Rev. Stat. § 77-201 (Reissue 1986) provides in part: "[R]eal property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made." Neb. Rev. Stat. § 77-112 (Reissue 1986) provides in part:

> [A]ctual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (a) Earning capacity of the property; (b) relative location; (c) desirability and functional use; (d) reproduction cost less depreciation; (e) comparison with other properties of known or recognized value; (f) market value in the ordinary course of trade; and (g) existing zoning of the property.

Section 77-112, which specifies factors for determining actual value of real estate for tax purposes, does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine the actual value of real estate for tax purposes. *Affiliated Foods Co-op v. County of Madison, supra*; *Spencer Holiday House v. County Bd. of Equal.*, 220 Neb. 607, 371 N.W.2d 286 (1985).

"In tax valuation cases actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy." *Id.* at 611, 371 N.W.2d at 288. See, also, *Richards v. Board of Equalization*, 178 Neb. 537, 134 N.W.2d

56 (1965).

We find the Bank has not shown that the equalization board improperly determined actual value for the Bank's property.

Ogden, who testified for the Bank, relied on two methods to determine the value of the Bank's property. In reference to the market approach, Ogden admitted that all but one of his "comparable" sales would require substantial adjustment to provide an accurate index for the value of the bank property in Syracuse. We believe that Ogden relied on insufficient or incomplete data in his determining the value of the Bank's property under the market approach. For that reason, Ogden's opinion on value under the market approach has little weight, if any.

Applying the cost approach, Ogden valued the Bank's land at $47,000 and used $1,200,000 for the reproduction cost of the Bank's improvements. However, Ogden used 70 percent depreciation for the Bank's improvements, which were 16 months old on January 1, 1986, in determining value under the cost method, namely, $422,000.

We accept Ogden's premises: A structure in a small community is worth less than the same structure would be in a larger community; a bank building will not retain the value of its unique features if the building is sold for use in another type of business; and economic conditions can depress the value of real estate. However, we find nothing in the record to support Ogden's applied depreciation rates of 40 percent for functional obsolescence and 30 percent for economic depreciation.

Davidson's appraisal is also unpersuasive. Although Davidson claimed that his appraisal was based on comparable (similar) sales, there is no evidence that Davidson relied on sales of property similar to the bank property.

Regarding Fritz' opinion on value, Fritz used average construction rather than good construction concerning reproduction costs in view of the Bank's location and functional obsolescence, which, according to Fritz, decreased valuation of the Bank's property by 24 percent. However, Fritz testified that the 24-percent decrease was accurate and was corroborated by valuations for improvements of similar financial institutions in Nebraska City, improvements for which values had been

determined by using the classifications of "good" and "average" construction based on the quality of construction, as reflected in the 1981 Marshall-Swift manual.

For a depreciation rate, Fritz considered the difference and relationship between construction costs and sales prices for commercial property in Otoe County and arrived at a depreciation rate of 5 percent. Fritz used this same method to determine depreciation rates for commercial property throughout Otoe County. We find that Fritz' appraisal and his opinion on value, which was adopted by the county board of equalization, is a credible expression of value for the Bank's property. Further, the district court, having heard the witnesses, chose to believe the county's witnesses and not believe the Bank's witnesses. In view of the record, we conclude that the Otoe County Board of Equalization acted properly in determining the actual value of the Bank's property.

EXCLUSION OF EXHIBIT

The Bank argues that "documents on which an expert witness relies or on which he bases his opinion should be admitted into evidence," and, therefore, the court erred in excluding the 1984 Marshall-Swift manual, which was offered to impeach Fritz' testimony by showing he misused the 1981 manual.

Nothing indicates that the 1984 manual was substantially similar to the 1981 manual used by Fritz. Without similarity to the 1981 manual, the 1984 manual supplied no basis for impeachment of Fritz. See Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)) (relevant evidence). Moreover, on cross-examination of Fritz, the Bank elicited that the manual used by Fritz did not state or recognize locality as a basis for classifying a structure as "good" or "average" construction in reference to the cost of reproduction. Whatever impeachment may have been achieved through introduction of the 1984 manual as an exhibit was accomplished by Fritz himself, when he acknowledged his misuse of the qualitative classifications of construction in reference to reproduction costs. Under the circumstances, there is no reversible error in the district court's exclusion of the 1984 Marshall-Swift manual. See Neb. Evid.

R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)) (no reversible error unless evidential ruling adversely affects a litigant's substantial right).

CONCLUSION

After a de novo review, we find that the Otoe County Board of Equalization properly determined actual value of the Bank's property. Therefore, we affirm the district court's judgment, which affirmed the decision of the Otoe County Board of Equalization.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

BOSLAUGH, J., dissenting.

The sole issue in this case is the fair market value of the appellant bank's property. Neb. Rev. Stat. § 77-201 (Reissue 1986) requires that real estate be valued at its actual value. For the purposes of taxation, the terms "actual value," "market value," and "fair market value" mean exactly the same thing. *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984).

A taxpayer may question the assessed value (actual value) of its real estate, the lack of proportionate and uniform valuation of the property, or both issues, in a proceeding before a board of equalization. *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988). In this case, the appellant questioned only the assessed value of its property. The evidence of the appellees, however, related primarily to the matter of equalization, which is not an issue in this case.

There is no substantial dispute concerning the value of the land itself. The primary controversy is over the valuation of the improvements, namely, the bank building.

The record shows that the county assessor had never been in the building, did not personally inspect or measure the property, and relied entirely upon the determination that had been made by the appraisal company. Where the assessor does not act upon his own information, or does not make a personal inspection of the property, there is no presumption that the official assessment is valid. *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966).

On cross-examination, the assessor testified as follows:

Q- I'll rephrase my question. We'll assume we have an identical building in Syracuse and Nebraska City. Both cost $600,000.00. The one in Nebraska City will sell for $500,000.00 and the one in Syracuse will sell for $200,000.00. How would you assess those two buildings for tax purposes?

A- I would say they would be assessed at $600,000.00, both areas.

Q- In both places?

A- In both places.

Q- And is that the theory you used in the taxation of the bank building in 1985 — '86 rather?

A- That is correct.

The witness John Fritz, who testified for the county and whose company performed the reappraisal for Otoe County, testified that the value of the bank property was determined by use of a cost of reconstruction less depreciation method. The critical factor in that method is the determination of the proper amount of depreciation to be allowed so that the result will be the fair market value of the property. Depreciation in this process includes not only physical deterioration, but also functional and economic obsolescence. If an inadequate depreciation allowance is made, the resulting figure will be far in excess of the fair market value of the property. Fritz allowed only 5 percent depreciation.

In this case, it seems to be generally conceded that the property was "overimproved" in the sense that it is doubtful that any commercial building in Syracuse, Nebraska, a community of approximately 1,600 persons, could ever be sold to a willing buyer in an arm's-length transaction for an amount approaching $1 million. In an effort to arrive at some further reduction in the value of the building, it appears that Fritz used "average" construction costs rather than "good," despite the fact that there seems to be no justification for using average rather than good for a modern, newly constructed building.

In *First Fed S & L Ass'n v Flint*, 415 Mich. 702, 329 N.W.2d 755 (1982), the Supreme Court of Michigan discussed the difficulty inherent in attempting to determine market value by cost of reproduction. In that case the court said:

The constitution requires that property tax assessments reflect "true cash value". The General Property Tax Act defines that term to mean "the usual selling price" of the property.

While actual and reproduction cost are some evidence of value, the constitutional and statutory standard is market-based.

The Tax Tribunal erred in adopting the hearing officer's reasoning that the value should include amounts expended for physical improvements that the hearing officer found were made to enhance the bank's "image" or "business", without regard to whether the expenditures added to the "cash" or "usual selling price" of the property. The law does not tax expenditures that merely enhance the image or business of the owner, only expenditures that add to the cash value or selling price of the property.

It can be anticipated that, if a bank puts fine hardwood and marble throughout a building, those expenditures may not enhance the selling price of the building in an amount equal to their cost. While the expenditures may add to the selling price of the building, they may not add dollar-for-dollar.

A building is sometimes worth less the day after completion of construction than its cost of construction. Ordinarily overimprovements are built by government, not by private entrepreneurs who, in theory at least, would not construct an improvement unless they thought it was worth at least what it cost to build.

The constitution and statute do not authorize a tax on the value of lumber or marble incorporated into a building, but on the market value of the completed structure and land.

We do not hold that the income approach advocated by First Federal's appraiser should govern, nor do we fault the city's appraiser or the Tax Tribunal for *considering* historical cost. Rather, we reject the notion that it is proper to include, in determining value, expenditures made, as the Tax Tribunal found, to enhance plaintiff's image and business without regard to whether they add to the selling

price of the building.

Absent more persuasive evidence, such as comparable sales, historical cost or reproduction cost can be considered in arriving at the usual selling price, but historical or reproduction cost that merely enhances image or business but not selling price is not subject to taxation.

415 Mich. at 704-07, 329 N.W.2d at 757-58.

In notes to the opinion, the court made the following statements:

If the government were to sell an overimprovement to a private person, market price rather than the cost of construction would govern for ad valorem tax purposes. If the government subsidizes a private enterprise in constructing such structures, the market value rather than cost would govern.

This issue can also arise where a private landowner, for personal reasons or simple improvidence, overbuilds for the neighborhood. He constructs a house that costs $150,000 in a neighborhood where all the other houses are worth about $75,000. In the relevant market, the house costing $150,000 may be worth $125,000 or $100,000, but not $150,000. Because it is an overimprovement for the neighborhood, the house, although brand new, should be valued at the market value, not at what it cost.

Merely because the owner may have constructed an improvement that cost more than the improvement is worth on the market should not subject the owner to a higher ad valorem tax.

Even if the structure is not an overimprovement, expenditures on it do not necessarily enhance its value dollar-for-dollar. A greenhouse, a gazebo, a tennis court, or a hot tub, while of value to the owner, do not necessarily add dollar-for-dollar to the usual selling price.

415 Mich. at 706 nn.5-6, 329 N.W.2d at 757 nn.5-6.

The appellant's evidence consisted principally of the testimony of Robert Ogden and Glen Davidson.

Davidson, a resident of Syracuse, Nebraska, and a licensed appraiser with 25 years' experience in the insurance and real estate businesses, estimated that he had sold 200 properties in

the Syracuse area during the last 10 years. He had been a tenant in the bank building, but had moved his office across the street because the upper floor of the bank was not convenient for his customers.

In Davidson's opinion, the property could not be sold for an amount in excess of $200,000 to $250,000.

Ogden is a professional real estate appraiser, whose experience included 4 years in the Lancaster County assessor's office. Ogden's opinion was that functional depreciation should be 40 percent and that the property had a value of approximately $390,000.

In the final analysis, the test is not what factors the assessor considered or failed to consider, but whether the property in question was valued for tax purposes at its actual value. *Airport Inn v. County Bd. of Equalization*, 215 Neb. 659, 340 N.W.2d 378 (1983).

My review of the record convinces me that the appellant in this case satisfied its burden of proof and established that under the Constitution and statutes of this state, and the prior decisions of this court, the board of equalization acted arbitrarily and the appellant was entitled to relief. Upon de novo review, I conclude that the assessed value of the appellant's property should have been reduced to $390,000.

CAPORALE, J., and COLWELL, D.J., Retired, join in this dissent.

MONA J. HURST, APPELLANT, V. ROBERT H. HURST, APPELLEE.

445 N.W.2d 889

Filed September 22, 1989. No. 87-1064.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified, and cause remanded with directions.

Patrick Kelly, Sarpy County Attorney, and Anthony C. Nanfito for appellant.

No appearance for appellee.

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

BOSLAUGH, J.

This case presents the same question as *Wilson v. Ransom, post* p. 427, 446 N.W.2d 6 (1989), which was decided today. For the reasons stated in *Wilson v. Ransom, supra,* the cause is remanded to the district court with directions to delete all provisions in the order of November 13, 1987, reciting that the order confirming registration of the Washington support order is a judgment in rem. In all other respects, the order confirming registration is affirmed.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

RHONDA L. WILSON, APPELLANT, V. PAUL E. RANSOM, APPELLEE.
446 N.W.2d 6

Filed September 22, 1989. No. 87-1065.

1. **Foreign Judgments: Child Support.** Under Neb. Rev. Stat. § 42-7,100 (Reissue 1988), the filing of the documents in the office of the clerk, as specified in the Revised Uniform Reciprocal Enforcement of Support Act, constitutes the registration of a foreign support order.
2. _____:_____. Under Neb. Rev. Stat. § 42-7,101(a) (Reissue 1988), a foreign support order that has been registered in this state generally has the same effect as a support order of this state.
3. _____: _____. At a hearing to enforce a registered foreign support order, the obligor may present matters that would be available to the obligor as defenses in an action to enforce a foreign money judgment.
4. **Foreign Judgments: Child Support: Jurisdiction.** Jurisdiction over the person or property of an obligor is not necessary to validly register a foreign support order.
5. **Foreign Judgments: Child Support: Courts.** At a confirmation hearing under Neb. Rev. Stat. § 42-7,101(b) (Reissue 1988), a district court has no authority to designate the confirmation of the registration of the foreign support order as a judgment in rem.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified, and cause remanded with directions.

Patrick Kelly, Sarpy County Attorney, and Anthony C. Nanfito for appellant.

Roger R. Holthaus for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding under Neb. Rev. Stat. § 42-7,100 (Reissue 1988) to register a foreign support order under the Revised Uniform Reciprocal Enforcement of Support Act (URESA). The order sought to be registered was entered in Montana on November 1, 1979, and required the appellee, Paul E. Ransom, to pay $75 per month per child to the appellant, Rhonda L. Wilson, for the support of their three minor children.

Pursuant to the act, copies of the foreign support order were filed in the office of the clerk of the district court for Sarpy County, Nebraska, on September 8, 1987, together with the other documents required by the act. § 42-7,100(a). The act provides:

> Upon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It shall have the same effect and shall be subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

Neb. Rev. Stat. § 42-7,101(a) (Reissue 1988).

The act further provides, in § 42-7,101(c):

> At the hearing to enforce the registered support order, the obligor may present only matters that would be available to the obligor as defenses in an action to enforce a foreign money judgment. If the obligor shows to the court that an appeal from the order is pending, or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated, upon satisfactory proof that the obligor has furnished security

> for payment of the support ordered as required by the rendering state. If the obligor shows to the court any ground upon which enforcement of a support order of this state may be stayed, the court shall stay enforcement of the order for an appropriate period if the obligor furnishes the same security for payment of the support ordered that is required for a support order of this state.

The appellee, although notified as provided in the act, did not petition the trial court to vacate the registration or for other relief, so on November 10, 1987, the trial court entered an order confirming the registration. The order, however, was entitled "Judgment In Rem," and recited:

> This Order confirming the registration is a judgment in rem, and not a judgment in personam.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED the Decree of Dissolution is hereby confirmed as a registered judgment of this Court pursuant to Neb. Rev. Stat. § 42-796 [et] seq.
>
> IT IS FURTHER ORDERED this is a judgment in rem and not a judgment in personam.

The trial court overruled the appellant's motion for a new trial "for the reason that the pleadings indicate that there are no contacts between [Paul Ransom] and the State of Nebraska, that [Paul Ransom] has never been personally served, and that any statutary [sic] provision indicating the registration should be in personum [sic] is constitutionally defective."

Rhonda Wilson, the obligee and respondent in the Montana proceeding, has appealed to this court and contends that the trial court erred in designating the registration of the Montana support order as a judgment in rem.

The act provides, in § 42-7,101(c), that at the hearing to enforce a registered support order, the obligor may present matters that would be available to the obligor as defenses in an action to enforce a foreign money judgment.

In *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977), the court considered whether jurisdiction over the person or property of a defendant-obligor is necessary in order to register a foreign support order under URESA. The Pinners had been divorced in Florida in 1969, and the defendant

husband was ordered to pay $450 per month alimony. In May 1976, the wife registered the Florida judgment in North Carolina. Her affidavit stated that she resided in North Carolina, that she believed defendant resided in Pennsylvania, and that defendant was $31,050 in arrears in alimony payments. Notice of registration was sent to the defendant. He petitioned that the registration be vacated on the grounds that the court lacked jurisdiction over the subject matter or over the person or property of the defendant, that service of process was defective, and that the Florida judgment was void because that court lacked jurisdiction over the parties and the subject matter. After a hearing, the trial court concluded that the Florida judgment had been properly registered as a foreign judgment.

The statutes involved were substantially similar to Nebraska's § 42-7,101. The North Carolina court held first that the URESA registration provisions establish a two-step procedure: "(1) registration of the order, and if required, a hearing on whether to vacate the registration or grant the 'obligor' other relief; and (2) enforcement of the order." *Pinner v. Pinner, supra* at 206, 234 S.E.2d at 635. The court concluded that the obligee had the option to merely register the order or to register and enforce it simultaneously.

The court then considered whether jurisdiction over the person or property of the obligor was necessary for a valid registration.

> Jurisdiction is the power of the court to decide a matter in controversy, and presupposes the existence of a duly constituted court with control over the subject matter and the parties. . . . A judgment or order against a defendant who is not in court in some way sanctioned by law is void for want of jurisdiction. . . . In the present case we are not concerned with the limited judicial *power* of the Clerk of Court to render judgments or issue orders. . . . Rather we are here concerned with the *duty* of the clerk to register a foreign judgment properly presented under [URESA].

(Citations omitted.) *Pinner v. Pinner, supra* at 206-07, 234 S.E.2d at 636. The court held that jurisdiction over the person or property of the obligor was unnecessary for registration of a foreign support order. See, also, *Fleming v. Fleming,* 49

N.C. App. 345, 271 S.E.2d 584 (1980).

> The mere registration of a foreign support order presented by the obligee under [URESA] is a ministerial duty of the clerk. By that act no court or agency of the state is purporting to exercise power over the obligor or his property. Registration does not prejudice any rights of the obligor; it merely changes the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina. Once the order is so treated the obligee or the obligor may request modifications in the order, and when the obligee attempts to enforce the order, the court must determine whether jurisdiction exists over the person or property of the obligor and what amount, if any, is in arrears.

Pinner v. Pinner, supra at 207, 234 S.E.2d at 636. Finally, the court determined that language in the confirmation order purporting to find personal jurisdiction was superfluous and would not bind the defendant in subsequent enforcement proceedings.

The *Pinner* court's analysis has been adopted in other jurisdictions. In *Lagerwey v. Lagerwey*, 681 P.2d 309 (Alaska 1984), the parties were divorced in Washington in 1978, and the husband was ordered to pay $250 per month for the support of two minor children. The husband continued to reside in Washington. The wife moved to Alaska and, in August 1982, filed a motion to obtain an Alaska judgment for arrears on the Washington divorce decree. The motion was denied on the ground that the Alaska court lacked personal jurisdiction over the husband.

The court held, first, that to the extent that the relief sought by the wife was for an adjudication to determine the amount of arrears owed in Washington, lack of personal jurisdiction was no bar to the action. Second, under URESA, "an obligee can *register* a judgment in Alaska, regardless of the obligor's presence in this state and regardless of whether the obligor has sufficient minimum contacts with this state to satisfy due process." *Lagerwey v. Lagerwey, supra* at 311 (citing *Fleming v. Fleming, supra*, and *Pinner v. Pinner, supra*).

Third, the court distinguished between registration and

enforcement of a support order. The court determined that the judgment should have been registered, but that to the extent that the wife initiated the proceeding to invoke the assistance of the Washington courts in collecting the arrears, her complaint should have been forwarded to Washington under another URESA provision.

In considering whether the lower court properly declined to issue a judgment for arrears, the court stated:

> In this case, the question is whether an Alaska court is authorized to issue a judgment for arrears on a properly registered foreign support order, without personal jurisdiction. If the foreign support order were retrospectively modifiable as to the amount due in the state of its issuance, then it would be improper for a court of this state to issue a judgment for arrears without first obtaining personal jurisdiction over the obligor and affording him an opportunity to litigate the propriety of such a modification. However, when the foreign support order is a final judgment entitled to full faith and credit in this state and the obligor has been properly notified so as to satisfy the due process clause, personal jurisdiction over the obligor is not a prerequisite to the issuance of a judgment for arrears. *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). Given a final and presumptively non-modifiable support order, issuance of a judgment for arrears is an exercise in arithmetic, nothing more. It is when the obligee attempts to execute on property, attach wages, or otherwise *enforce* the judgment that the obligor's interests are affected. At that stage, a registering state can exercise *in rem* jurisdiction over the obligor's property in the state without any personal jurisdiction, so long as the obligor/judgment debtor is given an opportunity to respond by showing the judgment has been satisfied. [Citations omitted.]

Lagerwey v. Lagerwey, supra at 312-13.

In *Gingold v. Gingold*, 161 Cal. App. 3d 1177, 208 Cal. Rptr. 123 (1984), the court of appeal held that lack of jurisdiction over the obligor was not a proper basis upon which to vacate the registration of a foreign support order. The parties in *Gingold*

were divorced in New York in 1968. The husband was ordered to pay $800 per month alimony and $300 per month for the support of the parties' minor child. In 1981, the wife sought to register the New York decree in California, alleging that support of $88,000 was due as of July 1981. The husband petitioned the court to vacate the registration, alleging, in part, that he was not subject to the jurisdiction of the court because there existed no basis for California to exercise personal, in rem, or quasi in rem jurisdiction with respect to him or his property. The trial court vacated the registration on these grounds.

In reversing, the court of appeal held that "it is not necessary for a California court to have jurisdiction over the person or property of an obligor in order to validly register a foreign support order pursuant to RURESA." *Gingold v. Gingold, supra* at 1185, 208 Cal. Rptr. at 127.

Finally, in *In re Davanis v. Davanis*, 132 Wis. 2d 318, 392 N.W.2d 108 (1986), the parties were married in Wisconsin in 1970 and moved to California in 1971. They were divorced in California in 1979; the wife and child moved back to Wisconsin while the divorce was pending. In 1983, the wife registered the California divorce judgment in Wisconsin pursuant to URESA. The husband filed no response to the registration procedure and made no appearance.

In 1984, however, the Wisconsin court signed an order requiring the husband to show cause why an order increasing the monthly child support payments should not be entered. The trial court later issued a written decision holding that it was without the personal jurisdiction over the husband necessary to proceed in the matter. On appeal, the wife claimed that the husband waived any defense based on lack of personal jurisdiction because he failed to object to jurisdiction in the registration proceeding.

The Wisconsin Court of Appeals adopted the reasoning of *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977), holding that jurisdiction over the person is not necessary for registration of a foreign support order pursuant to URESA when no affirmative relief is requested.

Mere registration without further action does not subject

> the obligor to any peril which would motivate a reasonable person to come forward and object to the court's jurisdiction. We therefore hold that an obligor may raise a challenge to the court's exercise of personal jurisdiction at a subsequent enforcement proceeding.

In re Davanis v. Davanis, supra at 327, 392 N.W.2d at 112.

The trial court was in error in designating the registration of the Montana support order a judgment in rem. Under the act, the filing of the documents specified in § 42-7,100 constitutes the registration of the foreign support order. The confirmation order merely establishes that the registration procedure was proper and that the obligor has not petitioned the court to vacate the registration or for other relief.

At a hearing to enforce the order, the obligor may present any defense that would be available in an action to enforce a foreign money judgment.

The cause is remanded to the district court with directions to delete all provisions in the order of November 10, 1987, reciting that the order confirming registration of the Montana support order is a judgment in rem. In all other respects, the order confirming registration is affirmed.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

FIRST NATIONAL BANK AND TRUST COMPANY OF FREMONT, NEBRASKA, APPELLEE V. ROBERT D. MILLER, APPELLANT.

446 N.W.2d 11

Filed September 22, 1989. Nos. 87-1075, 87-1076.

Appeals from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge, and from the District Court for Dodge County, MARK J. FUHRMAN, Judge. Judgments of District Court affirmed.

Richard L. Kuhlman for appellant.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf & Boggy, for appellee.

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

HASTINGS, C.J.

The defendant has appealed an adverse judgment in a forcible entry and detainer action arising out of an oral lease of premises and an action for declaratory judgment for rescission of a contract to purchase the same real estate. The cases, although briefed separately, have been consolidated on the court's own motion for the purpose of this opinion. We affirm.

The defendant signed an agreement to purchase certain premises in Dodge County from the plaintiff. He made a downpayment of $1,500 and was to pay the balance of the purchase price of $40,000 in cash or certified check on closing day. The parties orally agreed that the defendant could lease the property for $350 per month until the purchase closed.

The defendant was consistently late with the rental payments. Finally, the plaintiff gave defendant a 3-day notice to quit the premises and on June 19, 1987, filed a complaint in forcible entry and detainer in the county court. On the same day, plaintiff filed an action in the district court for declaratory judgment, seeking rescission of the purchase contract because of a breach by the defendant in failing to pay the balance of the purchase price. The county court granted plaintiff a writ of restitution and a money judgment for back rental. Defendant appealed to the district court.

The district court considered the appeal from the county court and the petition for declaratory judgment at the same time. It affirmed the action of the county court and entered judgment for the plaintiff on its petition for restitution. The basis upon which rescission was granted was that at the time of closing, rather than tendering cash, defendant tendered a sight draft in the sum then due of $40,700 drawn against Common Title Bond and Trust. This was presented for payment, and Common Title returned a bill of exchange for $40,700, which

has not been paid. The Federal Reserve bank has informed the plaintiff that it has had inquiries from several banks attempting to collect on Common Title bills of exchange and that it will not pay those documents. In other words, the instruments tendered by defendant seem to be worthless, and defendant has never complied with the terms of the purchase agreement to pay the balance of the purchase price. It requires no citation of authority to justify the rescission of a purchase contract where the purchaser utterly fails and refuses to pay the purchase price when due.

Defendant's theory as to why the judgment for restitution in the forcible detainer action should be reversed is equally novel and frivolous. He contends that because he posted a supersedeas bond to cover the rental payment during the term of appeal, it constitutes acceptance of rental payments and amounts to a waiver by the plaintiff of the June breach of the oral lease. However, a supersedeas bond " 'does not reverse, annul, or undo what has already been done, or impair the force, or pass on the merits, of the judgment, order, or decision of the trial court . . . .' " *Kleeb v. Kleeb*, 213 Neb. 537, 540, 330 N.W.2d 484, 486 (1983). The bond simply preserves the status of the parties as of the time of judgment.

The judgments of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SYLVESTER FRANK PETTIT, APPELLANT.

445 N.W.2d 890

Filed September 22, 1989. No. 88-492.

1. **Homicide: Words and Phrases.** A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305(1) (Reissue 1985).
2. **Criminal Law.** There are no common-law crimes in Nebraska.
3. **Criminal Law: Legislature: Statutes.** Within constitutional boundaries, the

Legislature is empowered to define a crime and punish a person's conduct expressly declared to be criminal.

4. **Criminal Law: Statutes: Intent: Words and Phrases.** The meaning of words or phrases used in reference to common-law crimes may be helpful in determining the meaning, intent, or effect of a statute which does not contain an express definition of terms in the statute.
5. **Homicide: Words and Phrases.** Neb. Rev. Stat. § 28-305(1) (Reissue 1985) establishes and distinguishes the two categories of manslaughter: an unlawful killing, without malice, "upon a sudden quarrel," which may be characterized as voluntary manslaughter, and an unlawful but unintentional killing, without malice, as the result of the defendant's commission of an unlawful act, which may be characterized as involuntary manslaughter.
6. _____: _____. As used in Neb. Rev. Stat. § 28-305(1) (Reissue 1985), the phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
7. _____: _____. In relation to manslaughter, a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
8. **Convictions: Homicide: Proof: Intent.** To sustain a conviction for voluntary manslaughter under Neb. Rev. Stat. § 28-305(1) (Reissue 1985), that is, a conviction for killing another, without malice, "upon a sudden quarrel," the State, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another.
9. **Homicide: Intent: Words and Phrases.** "Accident" is not a defense to the crime of voluntary manslaughter under Neb. Rev. Stat. § 28-305(1) (Reissue 1985), but does relate to intent to kill, which is an element of the crime of manslaughter committed "upon a sudden quarrel."
10. **Homicide: Intent: Jury Instructions.** If a court instructs the jury that intent to kill is an element of voluntary manslaughter committed "upon a sudden quarrel," and otherwise sufficiently defines *intent* or *intentional* relative to the defendant's conduct, the trial court is not required to give a separate instruction on the theory of accident pertaining to the homicide which is the subject of the manslaughter charge against the defendant.

Appeal from the District Court for Blaine County: RONALD D. OLBERDING, Judge. Reversed and remanded for a new trial.

John O. Sennett and Brad Roth, of Sennett & Roth, for appellant.

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

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

SHANAHAN, J.

A jury found Sylvester "Frank" Pettit guilty of manslaughter in the death of his wife, Pandora Pettit. Neb. Rev. Stat. § 28-305(1) (Reissue 1985) provides: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." The court sentenced Pettit to imprisonment for 4 to 12 years.

Frank Pettit claims that the district court erred by overruling Pettit's motion for directed verdict at the conclusion of evidence and in refusing to instruct on "accident" regarding Pandora Pettit's death. Frank Pettit also contends that the district court committed reversible error by allowing amendment of the information initially filed, admitting evidence over Pettit's relevance objections (photographs taken in conjunction with the autopsy on Pandora Pettit, rifle ammunition found at the scene of the fatality, Pettit's .44-caliber pistol, and testimony concerning Pettit's physical appearance), and imposing an excessive sentence.

BACKGROUND FOR THE FATALITY

Frank and Pandora Pettit were married in July 1982. Frank Pettit drank alcohol to excess and frequently changed jobs. On New Year's Eve for 1986, Frank Pettit and his cousin, with whom Pettit had grown up, attended a dance. During the course of that evening, Frank's cousin committed suicide, apparently by gunshot. Later, Frank tried to take his own life, but his suicide weapon, a gun, misfired. In August 1986, Frank and Pandora Pettit began working for the Shinn Turkey Ranch, where Frank mixed feed for turkeys and loaded live turkeys for shipment on trucks. Pandora took care of brooder turkeys and helped Frank load turkeys for shipment. The couple lived with Pandora's children from a previous marriage, namely, Scott, age 13, and Shelly, age 12, in a house provided by and located on the Shinn ranch. The Pettit home did not have a telephone. According to Doug Shinn, Pettits' employer, Frank Pettit did not exhibit a drinking problem during employment by Shinn.

Although Shinn never saw Frank Pettit with a firearm, Frank owned two guns, a .22-250 caliber Remington Model

788, a high velocity bolt-action rifle; and a .44-caliber, black powder, cap-and-ball pistol. Donald Roberts, who was Pettits' neighbor for 5 months before Pandora's death, never observed Frank Pettit intoxicated or saw Frank Pettit act belligerently toward, or otherwise threaten, Pandora. Although Pettits had difficulty in paying their debts and sometimes argued about their financial condition, Frank Pettit never struck Pandora during their arguments.

On January 15, 1987, an extremely cold day, Frank and Pandora were working on the Shinn ranch. Around 3 p.m., Pettits and other Shinn employees began loading turkeys for shipment, work which continued until 9:30 p.m., when Pettits received their paychecks. Pandora, who received the checks for Pettits, lost the checks, which irritated Frank because the cold and dark hindered finding the checks among the turkey feathers at the loading site. After a 10-minute search, Pettits found their checks and, after dismantling the loading equipment, returned to their home around 10 p.m. Pandora took a warm bath. Frank, who was "pretty well wound up," began drinking cherry vodka and scotch while listening to music. Later, Pettits argued about Frank's drinking. After four or five drinks, Frank decided to drive to town for more liquor. Pandora accompanied Frank, who took his .44-caliber pistol on the trip to town. En route, Pettits' car ran out of gas, and the couple started to walk across a field on the return to their home. Pettit gave his insulated nylon jacket to Pandora and attempted to carry her across a rough field, but kept falling down. When Pettits finally reached their home, Frank passed out in the front yard. Pandora went into the house and returned outside with Scott and Shelly to assist in taking Frank into the house. While Pandora and the children were helping Frank enter the house, he awoke and pointed the .44 pistol at "something" in nearby bushes, only to discover that the "something" was Hubert, the family's dog. Pettits and the children entered the house. Scott and Shelly went to bed, Pandora went somewhere within the house, and Frank entered Pettits' 9- by 11-foot bedroom through its only access, a door at the room's southwest corner. A bed was located in the northwest corner of the room opposite the doorway. A dresser stood against the bedroom's east wall.

THE SHOOTING

According to Frank Pettit, he entered the bedroom with the intention to commit suicide, put the pistol in a dresser drawer, started his tape player for music, and took his rifle from behind the bedroom door. Then Frank Pettit sat on the edge of the bed and "jacked a shell in the rifle," that is, Pettit operated the bolt-action to deliver a live round from the cartridge clip or magazine to the breech and cock the rifle's hammer for firing. The cartridge clip or magazine fits into a magazine floor plate, which is located immediately ahead of the rifle's trigger guard. After he had armed the rifle, Pettit placed the butt of the rifle on the floor between his legs with the rifle's muzzle near his head. At that point, Pandora entered the bedroom and started arguing with Frank about his obvious and present effort to commit suicide. Frank pushed Pandora from the bedroom and again sat on the side of the bed, placing the butt of the rifle on the floor with the rifle's muzzle under his chin. Pandora reentered the room, grabbed the rifle from Frank, and threw it over Frank's right shoulder as she exclaimed: "Frank, don't. Frank, don't. Frank, stop. Stop, Frank. Stop, Frank." The hurled rifle landed behind Frank on the bed. Still seated on the edge of the bed, Frank retrieved the rifle and, with his knees bent and his feet on the floor, lay back on the bed. The rifle's barrel pointed generally to the left of Frank Pettit as the rifle lay across Frank's legs at his knees. The couple continued to argue about Frank's prospective suicide. Pandora finally convinced Frank to forgo suicide and began to take off the nylon jacket she was wearing. According to Frank Pettit:

> [Pandora] told me finally that if, tomorrow, I still wanted to commit suicide, that she wouldn't want to stand in my way, and convinced me to wait until tomorrow, and at that point, she started to take off her coat and stuff, and I went ahead and started to sit up and pick up the rifle, and at the same time I went to pull the clip out of the rifle, and that's when it went off.

Frank caught Pandora as she fell, placed her on the floor with her head toward the bedroom's west wall, and tried to comfort her.

Ten to 15 seconds after Scott had heard Pandora exclaim,

"Stop, Frank," or "Don't, Frank," he heard a shot and thought that Frank Pettit had committed suicide. Shelly and Scott went to the Pettit bedroom and found Pandora lying on the floor with Frank Pettit at her side. Frank told the children to go next door to the Roberts residence and call an ambulance. After doing so, Scott returned to the Pettit bedroom, where Pandora, shortly before she died, said to Scott: "Don't worry. I'm not going to die. It was an accident. I love you."

Roberts, the neighbor, came to the Pettit house and found Pandora lying on the bedroom floor with Frank's jacket wrapped around her left arm. Roberts picked up the rifle from the floor at Pandora's left side, leaned the rifle against the bedroom wall, and observed Frank Pettit, kneeling at Pandora's right side and trying to stanch the flow of Pandora's blood by inserting a piece of plastic into the bullet wound in Pandora's chest. Pandora was conscious but was experiencing "pretty bad pain." Although Pandora stopped breathing, Frank tried, without avail, to administer mouth-to-mouth resuscitation to Pandora, who was dead when the ambulance appeared.

When police arrived, they found the rifle leaning against the bedroom wall. There was an expended cartridge in the rifle's chamber, a live round in the rifle's clip, and an unspent rifle cartridge on the floor near the corner of the dresser where Frank Pettit had placed his pistol. Police found rifle ammunition in the dresser drawer. Nothing indicated a scuffle or struggle in the Pettit bedroom. The police believed that Frank Pettit was sober. Pandora Pettit's body lay adjacent to the bed with her arms extended westward over her head.

FRANK PETTIT'S TRIAL

The Information.

In the information on which the case was tried, the State, basically in the language of § 28-305(1), charged that Frank Pettit did "unlawfully and feloneously [sic], kill another, to-wit: one Pandora Pettit, without malice, either upon a sudden quarrel, or cause the death of another, to-wit: one Pandora Pettit, unintentionally while in the commission of an unlawful act . . . ."

The "unlawful act" alleged in the information was criminal assault in the third degree, a violation of Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1985), which states: "A person commits the offense of assault in the third degree if he [or she] . . . [t]hreatens another in a menacing manner."

Evidence.

During his testimony, Frank Pettit acknowledged that he and Pandora had been quarreling about his suicidal effort just before the shooting and that during the argument or quarrel, Pandora had convinced Frank not to commit suicide. Frank Pettit did not recall whether he had released the safety on the rifle that evening as a step toward suicide and could not recollect how many live rounds were in the rifle's clip or magazine when the weapon discharged. However, Frank Pettit was adamant that he never aimed the rifle at Pandora Pettit, pointed the weapon at Pandora "with the intention to hurt her," had his finger on the rifle's trigger when the weapon discharged, or intended to shoot Pandora. Pettit asserted that the shooting was "unintentional" and "accidental" because "I was raising the gun with one hand at the same time that I was sitting up, and that I was also pulling the clip out or attempting to" when the rifle discharged.

A forensic firearms specialist negated malfunction of Frank Pettit's rifle. The rifle had a properly functioning safety located on the stock behind the bolt. If the safety is engaged to prevent discharge of the rifle, the safety could be released by motion in the direction of the muzzle, such as thumb pressure exerted on the safety. When pressure of $3\frac{1}{2}$ to $3\frac{3}{4}$ pounds was applied to the rifle's trigger, the cocked hammer was released and drove the firing pin against the cartridge in the weapon's breech. Such trigger action was in accordance with the manufacturer's standards and was otherwise acceptable for Frank Pettit's rifle, which showed no susceptibility for accidental discharge through "shocks" or "jolts" to the rifle. Examinations disclosed no gunpowder residue on Pandora's body and indicated that the rifle's muzzle was at least 15 inches from the nylon jacket when the rifle fired. The bullet hole in the jacket did not align with the wound in Pandora's chest unless the jacket were elevated somewhat on Pandora's torso, indicating that when the bullet struck Pandora, she had raised her arms

above her head or had elevated her arms while she was removing the jacket.

An autopsy established that Pandora's death was caused by a bullet's destruction of the upper lobe of her right lung and that there were no bruises or contusions on Pandora's body except for the bullet wound. According to the pathologist, "The bullet entered the body in a perpendicular plane. If one assumes a body as being upright and the bullet goes almost straight in in this fashion." On entry into Pandora's body, the bullet struck her third and fourth ribs, which may have deflected the bullet from a straight path and caused the bullet to fragmentate. Bone fragments from her shattered ribs punctured Pandora's lung. However, the pathologist acknowledged that the bullet's perpendicular path to Pandora's torso could mean that the bullet was fired at a slightly upward angle if Pandora happened to be bending at the waist when the bullet entered her body. The pathologist concluded:

> There is no way that — from the autopsy, that we can tell what position Mrs. Pettit was in when this bullet struck her, so whether she was vertical or horizontal, I can't tell, but I can tell that from that plane of her body, the bullet entered in a perpendicular fashion to whatever plane her body was in.

As a witness for Pettit, a psychiatrist testified without objection that, on the night Pandora Pettit was shot, Frank Pettit was suicidal and "suffered the disease of alcoholism to a severe degree" and further testified that Frank Pettit "would not willfully . . . or intentionally harm or kill Pandora."

At the close of all the evidence, the court overruled Pettit's motion for a directed verdict or dismissal of the charges against Pettit.

Instructions.

The court denied Pettit's requested instruction:

> If the shot which caused the death of Pandora Pettit was wholly accidental so far as the Defendant was concerned and not while the Defendant was in the commission of an unlawful act, your verdict should be not guilty. To warrant a verdict of guilty the State must satisfy you beyond a reasonable doubt that the weapon, at the time and place in question was not accidentally discharged

> or if accidentally discharged that the Defendant was then engaged in an unlawful act directly connected therewith.

The court instructed the jury that to convict Frank Pettit of manslaughter, the State was required to prove beyond a reasonable doubt that Frank Pettit "killed Pandora Pettit [and that] he did so without malice, either upon a sudden quarrel, or unintentionally, while he was in the commission of some unlawful act." Regarding the "unlawful act" mentioned in the foregoing instruction, the court informed the jury: "An assault in the third degree is, under the Nebraska Criminal Code, an unlawful act within the meaning of the manslaughter statute. 'Assault in the Third Degree' is committed by threatening another person in a menacing manner." The court gave an additional instruction in the language of § 28-305(1): "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Concerning the manslaughter charge against Frank Pettit for Pandora Pettit's death "upon a sudden quarrel," the court gave no instruction relative to "accident" or intent to kill as an element of manslaughter based "upon a sudden quarrel."

In his summation, the prosecutor noted the absence of an instruction on "accident" and argued:

> What is — what's the defense that has been offered to you? Isn't the defense based on the evidence and argument from counsel that this was an accident? The statute doesn't say it's not the crime of manslaughter if it is an accident, does it? If you accept as truth everything that the defendant told you on the witness stand, he is guilty of manslaughter because this took place under or upon — upon is the language of the statute — that this took place upon a sudden quarrel. You don't find accident as a defense in the statute . . . .

The jury returned a verdict that Frank Pettit was guilty of manslaughter as charged.

NEBRASKA'S MANSLAUGHTER STATUTE AND DUE PROCESS CONSIDERATIONS

Readily apparent in the Nebraska manslaughter statute,

§ 28-305(1), is the definition of a criminal homicide, expressed in an inclusive disjunction, namely: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, *or* causes the death of another unintentionally while in the commission of an unlawful act." (Emphasis supplied.)

Clearly, the second of the statutory alternatives in § 28-305(1) prohibits a person's killing another "unintentionally while in the commission of an unlawful act," but the first of the manslaughter statute's alternatives is silent concerning intent to kill as an element of manslaughter "upon a sudden quarrel." One construction of § 28-305(1) might be that since the situations for manslaughter are expressed in the alternative or inclusive disjunction, the explicit statement of "unintentionally" killing another, expressed in the second of the alternative situations for manslaughter, means that the first of the statutory alternatives requires the element of an intentional killing as opposed to the unintentional killing in the second of the alternative situations for manslaughter. However, if the first of the alternative situations expressed in § 28-305(1) does not require an intentional killing as an element of manslaughter, absence of criminal intent results in strict responsibility for a killing "upon a sudden quarrel."

Although Pettit concedes that intent to kill is not required for violation of the second of the alternatives stated in § 28-305(1), he contends that intent to kill is a requisite element for manslaughter "upon a sudden quarrel." On the other hand, the State argues, in essence, that intent to kill is not an element of manslaughter "upon a sudden quarrel," that is, anyone causing another's death "upon a sudden quarrel" is strictly liable for the offense of manslaughter. Therefore, we must determine whether manslaughter "upon a sudden quarrel" requires the element of intent to kill or whether strict accountability for another's death "upon a sudden quarrel" eliminates intent to kill as an element of the felony designated as "manslaughter."

In determining whether criminal intent is an element of manslaughter "upon a sudden quarrel," we bear in mind the general rule that "criminal statutes are interpreted as requiring criminal intent, and this is particularly true in situations in

which the offense involved is a felony." *United States v. O'Brien*, 686 F.2d 850, 853 (10th Cir. 1982). As the U.S. Supreme Court has observed:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Morissette v. United States, 342 U.S. 246, 250-51, 72 S. Ct. 240, 96 L. Ed. 288 (1952). See, also, *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978): "Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality, [citation omitted], intent generally remains an indispensable element of a criminal offense."

The fact that a statutory definition of a crime may not include reference to the accused's mental state does not necessarily negate intent ("mens rea") as an element for a crime.

> [T]he holding in *Morissette* can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretive presumption that *mens rea* is required. "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them." [Citation omitted.]

> While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements [citation omitted], the limited circumstances in which Congress has created and this Court has recognized such offenses [citations omitted] attest to their generally disfavored status.

United States v. United States Gypsum Co., supra at 438 U.S. at 437-38 (quoting *Morissette v. United States, supra*). See, also, *United States v. Anton*, 683 F.2d 1011, 1017 (7th Cir. 1982): mere omission of intent as an element of a felony does not justify dispensing with intent as an element of the crime because " ' "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." ' " (Quoting *United States v. United States Gypsum Co., supra*); *State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986): "Strict liability offenses are the exception rather than the rule and will only be found where there is a clear legislative intent not to require any degree of mens rea"; *State v. Jones*, 242 Kan. 385, 391-92, 748 P.2d 839, 845 (1988):

> When an act is prohibited and made punishable by statute, the statute is to be construed in the light of the common law. The existence of a criminal intent is regarded as essential even though the terms of the statute do not require it, unless it clearly appears that the legislature intended to make the act criminal without regard to the intent with which it was done.

Violation of some criminal statutes may occur without a defendant's criminal intent, if such type of statutes

> omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where the conviction does not gravely besmirch, where the statutory crime is not taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960). We note that the penalty for manslaughter is a maximum sentence of 20 years' imprisonment, a $25,000 fine, or both such imprisonment and fine and that the minimum penalty for manslaughter is 1 year's imprisonment. See § 28-305(2) and Neb. Rev. Stat. § 28-105(1) (Reissue 1985). Thus, when the penalty for violation of a statute is severe or conviction for violation of the statute may irreparably damage the defendant's reputation, elimination of criminal intent as an element necessary for violation of a statute may violate due process. See *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985).

With that backdrop, we proceed to analyze the crime of manslaughter in Nebraska.

MANSLAUGHTER AT COMMON LAW

As this court observed in *State v. Hutter*, 145 Neb. 798, 801-02, 18 N.W.2d 203, 206-07 (1945):

> An historical approach seems necessary to secure an adequate discussion of the subject. There were no degrees of murder or manslaughter at common law. All criminal homicide was either murder or manslaughter, but the latter was included in the former as a constituent element thereof, or it might exist as a distinct offense where there was no malice aforethought. At common law, murder is the unlawful killing of a person with malice aforethought, either express or implied, and manslaughter is the unlawful killing of another without malice express or implied. Manslaughter differs from murder in the want of malice, a condition of the blood or mind at the time of the act. This distinction is the only one that the accumulated wisdom of the common law deemed it advisable to make.

Hence, at common law, two types of criminal homicide existed: murder and manslaughter. Under common law, murder was the unlawful killing of another human being with malice aforethought and was punishable by death, while manslaughter was the unlawful killing of another without malice and carried a penalty less than death. Consequently, the element of malice, the intention to do a wrongful act without just cause or excuse, distinguished murder from manslaughter

at common law. 2 W. LaFave & A. Scott, Substantive Criminal Law §§ 7.1(a), 7.9, and 7.10(h) (1986). Accordingly, under common law, malice was necessary for murder, and the absence of malice was necessary for manslaughter.

Although the common-law crime of murder was accompanied by an intent to kill and was, therefore, characterized as a voluntary homicide, courts began to recognize an intentional homicide committed under extenuating circumstances which mitigate, but do not justify or excuse, the killing, that is, adequate legal provocation which causes a reasonable individual to lose his or her normal self-control, thereby reducing the homicide from murder to "voluntary" manslaughter. 2 W. LaFave & A. Scott, *supra*, § 7.10.

> The usual type of voluntary manslaughter involves the intentional killing of another while under the influence of a reasonably-induced emotional disturbance (in earlier terminology, while in a "heat of passion") causing a temporary loss of normal self-control. Except for this reasonable emotional condition, the intentional killing would be murder.

2 W. LaFave & A. Scott, *supra*, § 7.10(a) at 254.

> Voluntary manslaughter is an intentional killing in the heat of passion as a result of severe provocation. As a concession to human frailty, a killing, which would otherwise constitute murder, is mitigated to voluntary manslaughter.
>
> Although, given severe provocation, the impairment of a defendant's capacity for self-control may be substantial, the offense is only mitigated, not excused; if there were no punishment at all, there would be no incentive for an enraged person to make an effort to control his emotions. It must be remembered that this is not a killing in self-defense; it is not "necessary" for the provoker to be killed. The provoker is not completely innocent of wrongdoing, but the law cannot tolerate the taking of his life.

2 C. Torcia, Wharton's Criminal Law § 153 at 236-38 (14th ed. 1979).

In the Model Penal Code § 210.3(b) at 43 (1962), criminal homicide constitutes manslaughter when "a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."

As noted in the Model Penal Code, murder and manslaughter were distinguished at common law because "homicide, even if intentional, was said to be without malice and hence manslaughter if committed in the heat of passion upon adequate provocation." Model Penal Code, § 210.3, comment 1 at 44 (1962).

Concerning provocation which reduced the criminal homicide from murder to manslaughter,

> [p]rovocation nevertheless survived as a rule of mitigation for intentional homicides committed in certain extenuating circumstances . . . . A sudden rage, however engendered, does not necessarily or even probably negate an intent to kill. More likely it reinforces the firmness of the actor's resolve to take the life of another. At most, therefore, provocation affects the quality of the actor's state of mind as an indicator of moral blameworthiness. Provocation is thus properly regarded as a recognition by the law that inquiry into the reasons for the actor's formulation of an intent to kill will sometimes reveal factors that should have significance in grading. It is a concession to human weakness and perhaps to non-deterability, a recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence.

Model Penal Code § 210.3, comment 5(a) at 54-55 (1962).

Thus, under common-law principles, adequate legal provocation eliminated malice from murder and reduced an unlawful homicide from murder to manslaughter. See *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305 (1968). See, also, *Barrett v. Commonwealth*, 231 Va. 102, 341 S.E.2d 190 (1986) (malice and heat of passion are mutually exclusive). For that reason, the phrase "without malice," in reference to voluntary manslaughter, does not mean "without intention," but means a

"willful act, characterized by the presence of an intent to kill . . . ." *People v. Brubaker*, 53 Cal. 2d 37, 44, 346 P.2d 8, 12 (1959). In *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909), this court mentioned a definition for common-law manslaughter: " 'The unlawful killing of another, without malice . . . upon a sudden heat; or inadvertently, but in the commission of some unlawful act.' "

Another type of criminal homicide which occurred without malice, but which courts sought to punish at common law, was involuntary manslaughter—the defendant's unintentionally killing another during the commission of an unlawful act. Malice was absent from the homicide characterized as "involuntary manslaughter" because the defendant did not intend to kill the victim. However, the defendant's intention to commit the underlying unlawful act supplied the mens rea in a crime for the misdemeanor manslaughter analog to the felony murder rule. 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.13 (1986).

MANSLAUGHTER IN NEBRASKA

There are no common-law crimes in Nebraska. *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986); *Kinnan v. State*, 86 Neb. 234, 125 N.W. 594 (1910).

Within constitutional boundaries, the Legislature is empowered to define a crime and punish a person's conduct expressly declared to be criminal. See, *State v. Douglas, supra*; *State v. Ewert*, 194 Neb. 203, 230 N.W.2d 609 (1975); *State v. Tucker*, 183 Neb. 577, 162 N.W.2d 774 (1968). However, the meaning of words or phrases used in reference to common-law crimes may be helpful in determining the meaning, intent, or effect of a statute which does not contain an express definition of terms in the statute. *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981); *State v. Eynon*, 197 Neb. 734, 250 N.W.2d 658 (1977); *State v. De Wolfe*, 67 Neb. 321, 93 N.W. 746 (1903).

For Nebraska statutes, the Legislature has drawn from the common law to define the crime of manslaughter. Nebraska's initial statute on manslaughter, Rev. Stat. §§ 21 to 24 (1866), provided:

> Manslaughter is the unlawful killing of a human being,

without malice, express or implied, and without any deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

§ 21.

In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

§ 22.

The killing must be the result of that sudden, violent impulse of passion, supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as a murder.

§ 23.

Involuntary manslaughter shall consist in the killing of a human being without any intent so to do, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: *Provided, always*, That where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.

(Emphasis in original.) § 24.

In 1873, however, by Gen. Stat. § 5 (1873), the Legislature amended the manslaughter statute and defined the crime as follows: "If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter . . . ." Noteworthy is the fact that in enacting the 1873 manslaughter

statute, the Nebraska Legislature drew extensively from the criminal code of Ohio. See *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897). Construing the Ohio statutory progenitor of the 1873 Nebraska manslaughter statute, the Supreme Court of Ohio stated in *John Sutcliffe v. The State*, 18 Ohio 469, 476 (1849):

> [T]he entire description of the offence is embraced in these words, to wit: that if any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act; every such person shall be deemed guilty of manslaughter; Swan's Stat. 229. It is evident that the Legislature had in their view, while framing the enactment above quoted, the crime of manslaughter, as well understood at the common law. They have adopted it in substance, and almost in form.

The statutory definition of manslaughter, contained in the General Statutes of 1873, was substantially carried into Comp. Stat. § 28-403 (1929): "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter . . . ."

As a part of the Nebraska Criminal Code, enacted in 1977, § 28-305(1) contained the current definition of manslaughter: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." As noted in *State v. Hutter*, 145 Neb. 798, 802-03, 18 N.W.2d 203, 207 (1945):

> The different degrees of homicide as defined by our statute are all carved out of murder and manslaughter as known to the common law. No new offense has been created, and no homicide which was not criminal at common law is made so by statute, but it is divided into degrees and the punishment graded to meet the circumstances of the particular case. The decisions of this court clearly hold to this view.

In light of the foregoing, § 28-305(1) establishes and distinguishes the two categories of manslaughter: an unlawful

killing, without malice "upon a sudden quarrel," which may be characterized as voluntary manslaughter, and an unlawful but unintentional killing, without malice, as the result of the defendant's commission of an unlawful act, which may be characterized as involuntary manslaughter.

As used in § 28-305(1), the phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. See *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984). Rather, in relation to manslaughter, a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control, or, as expressed in *Savary v. State*, 62 Neb. 166, 175, 87 N.W. 34, 37-38 (1901),

> whether the defendant acted under the impulse of passion suddenly aroused which clouded the reason and prevented rational action . . . whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment . . . .

See, also, *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988), wherein Rincker, carrying a hunting knife, entered a house, discovered his wife on a bed between two naked men, and stabbed to death the victim, one of the men who was on the bed with Rincker's wife. The State charged Rincker with first degree murder on account of the victim's death, that is, premeditated criminal homicide in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985). Notwithstanding that Neb. Rev. Stat. § 29-2027 (Reissue 1985) provides in part, "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter," Rincker contended that the trial court, without request, should not have instructed on manslaughter. This court responded to Rincker's contention: "The jury could well have concluded from the evidence that Rincker's wife was lying on the bed

between the victim and Siegrist and that Rincker reacted to that scene *without any prior intention* to kill the victim. That alone required the trial court to instruct the jury concerning manslaughter." (Emphasis supplied.) 228 Neb. at 534, 423 N.W.2d at 442. In view of the first degree murder charge in *Rincker*, this court's expression "*without any prior intention* to kill the victim," when placed in proper context, clearly refers to Rincker's reaction without premeditation in slaying the victim.

In reference to manslaughter, defined by the General Statutes of 1873 of the State of Nebraska, this court stated in *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909):

> [T]o convict a defendant of manslaughter, it must be proved either that the killing was done in a sudden quarrel, or while the slayer was in the commission of some unlawful act . . . . In the first class of cases referred to in the statute the homicide must have been intentional, but in sudden passion or heat of blood caused by a reasonable provocation, and without malice; in the latter clause the killing must have been unintentional, but caused while the slayer was committing some act prohibited by law . . . .

(Emphasis omitted.)

In *Egbert v. State*, 113 Neb. 790, 799, 205 N.W. 252, 256 (1925), this court approved an instruction which informed the jury in a manslaughter case that

> "to warrant a verdict of guilty [for the crime of manslaughter] the state must satisfy you beyond a reasonable doubt that the revolver at the time and place in question was not accidentally discharged, or, if accidentally discharged, that the defendant was then in the commission of an unlawful act directly connected therewith . . . ."

The instruction approved in *Egbert* must be read in relation to our decisions in which we have considered a criminal assault with a weapon, that is, a defendant's commission of an unlawful act, in reference to an unlawful killing characterized as involuntary manslaughter; for example, see, *State v. Bachkora*, 229 Neb. 421, 427 N.W.2d 71 (1988): defendant claimed that the gun he was holding discharged accidentally, killing the victim; held, an instruction on "accidental" killing

was not required because the defendant admitted pointing the gun at the victim, an act which was a criminal assault and, therefore, an unlawful act which resulted in the homicide; *State v. Drew*, 216 Neb. 685, 687-88, 344 N.W.2d 923, 925 (1984):

> [T]he focus of the inquiry is not whether the gun discharged *accidentally* but, rather, whether the defendant was acting lawfully at the time the gun discharged. The defendant must establish that the use of the gun was privileged at the time it discharged. The threatening use of a firearm is an unlawful assault sufficient to convict one of manslaughter, when defined as causing the death of another unintentionally while in the commission of an unlawful act. § 28-305(1). Similarly, the accidental discharge of a gun, the use of which was not justified under the circumstances, is not a defense to manslaughter when the killing occurred upon a sudden quarrel.

(Emphasis in original); *Ford v. State*, 71 Neb. 246, 98 N.W. 807 (1904): although the defendant believed that the gun was unloaded, the defendant's pointing the gun at the victim constituted a criminal assault as the basis for a manslaughter conviction.

State v. Worley, 178 Neb. 232, 132 N.W.2d 764 (1965), illustrates that in an appropriate factual setting, a jury must decide whether a homicide constitutes murder in the second degree, that is, a person causes another's death intentionally without premeditation (Neb. Rev. Stat. § 28-304 (Reissue 1985)), or whether the homicide is voluntary or involuntary manslaughter. In *Worley*, the defendant, alone in his girlfriend's house, where he awaited her return, fired a pistol at some figurines in the bedroom. As Worley was reloading the weapon, the doorbell rang. On answering the door, Worley found his girlfriend, Lucy, in the company of Ralph Gomez. Worley expressed his concern about what he believed to be the couple's inordinately long absence from the house. After seating himself on a divan, Worley began manipulating the pistol, which appeared to be jammed, when he was approached by Gomez with raised hands. As Worley was handling the apparently jammed pistol, the weapon discharged. When Worley started to get up from the divan, the pistol fired again. Gomez fell to the

floor and died of multiple gunshot wounds in his chest. Although Worley was charged with second degree murder, the jury found him guilty of manslaughter, that is, "killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act." 178 Neb. at 235, 132 N.W.2d at 767. In reviewing the factual background for the discharge of the pistol in Worley's hand, the court stated: "We believe this evidence alone was sufficient for the jury to reach a conclusion that the killing occurred upon a sudden quarrel and in the heat of passion. The lack of intent, as well as intent itself, is a matter peculiarly within the jury's province." 178 Neb. at 236, 132 N.W.2d at 767.

After examining the evidence of "intent" in relation to the charge of manslaughter "upon a sudden quarrel," the *Worley* court then directed its attention to manslaughter in the commission of an unlawful act and expressed the following:

> The court also instructed the jury that the defendant could be found guilty of manslaughter if he shot and killed Gomez while in the commission of an unlawful act of assault and battery. From the same circumstances set out above, the jury possibly could have found that the defendant assaulted Gomez with the weapon in his hand without necessarily rendering the commission of the homicide intentional. Malice, intent, or purpose may be inferred from the shooting of another person with a deadly weapon. But not every assault with a deadly weapon in hand is necessarily conclusive proof of intent or a design to effect death. To come within the provisions of the manslaughter statute, the killing must not have been intentional or with a design to effect death. [Citation omitted.] . . . The question of whether he [Worley] was engaged in an assault on the deceased, and whether it was done with the intent to kill, is peculiarly within the province of the jury.

Id. However, because the State, over Worley's valid objection, introduced prejudicial hearsay regarding Worley's firing the fatal shots into Gomez, the court set aside Worley's conviction and remanded the cause for a new trial.

Courts of other jurisdictions have considered manslaughter

statutes which contain language quite similar to the "sudden quarrel" provision in § 28-305(1). In *People v. Brubaker*, 53 Cal. 2d 37, 346 P.2d 8 (1959), the Supreme Court of California examined Cal. Penal Code § 192 (West 1970), which provided:

> Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:
>
> 1. Voluntary—upon a sudden quarrel or heat of passion.
>
> 2. Involuntary—in the commission of an unlawful act, not amounting to a felony . . . .
>
> 3. In the driving of a vehicle—
>
> (a) In the commission of an unlawful act, not amounting to a felony, with gross negligence . . . .
>
> (b) In the commission of an unlawful act, not amounting to a felony, without gross negligence . . . .

The California court concluded:

> Voluntary manslaughter is a willful act, characterized by the presence of an intent to kill, *engendered by sufficient provocation* and by the absence of premeditation, deliberation and . . . malice aforethought. Section 192, subdivision 1, of the Penal Code defines voluntary manslaughter as the unlawful killing of a human being, without malice, "upon a sudden quarrel or heat of passion."
>
> To be sufficient to reduce a homicide to manslaughter, the heat of passion must be such as would *naturally be aroused* in the mind of an *ordinary, reasonable person* under the given facts and circumstances, or in the mind of a person of *ordinary self-control*. [Citation omitted.]

(Emphasis in original.) 53 Cal. 2d at 44, 346 P.2d at 12.

Under New Mexico's statute, N.M. Stat. Ann. § 30-2-3 (Supp. 1984), manslaughter was defined: "Manslaughter is the unlawful killing of a human being without malice. A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion." In *State v. Lopez*, 79 N.M. 282, 442 P.2d 594 (1968), Lopez and one of his longtime acquaintances had an argument. Shortly after the argument Lopez was seated behind the driver's wheel of his automobile when the "decedent" opened the driver's door, and, almost

instantaneously, a gunshot from within the vehicle felled the victim. Lopez testified that he did not intend to shoot the victim and did not know how or why the gun he was holding discharged. Lopez contended that the victim had grabbed hold of Lopez's jacket and right arm in a manner that such contact might have caused the gun to discharge. On appeal, Lopez argued that the evidence was insufficient to sustain his manslaughter conviction. However, the court, noting the dispute in testimony concerning the fatal occurrence, held that there was sufficient evidence to sustain a conviction for voluntary manslaughter and stated:

> We have not overlooked appellant's argument that the killing was accidental, based upon his testimony that he did not intend to pull the trigger, and didn't intend to shoot. That an accidental killing will not support a conviction of voluntary manslaughter goes without saying. However, just because the appellant testified to this effect does not make it so. The evidence is not undisputed, as contended by appellant.

Id. at 285, 442 P.2d at 597.

The Supreme Court of Wyoming, in *Searles v. State*, 589 P.2d 386 (1979), construed Wyo. Stat. § 6-58 (1957), which contained: "Whoever unlawfully kills any human being without malice, expressed or implied, either voluntarily, upon a sudden heat of passion, or involuntarily . . . ." The court in *Searles* stated: "In order to sustain a conviction for voluntary manslaughter, the wrongful act of killing must have been intentional. [Citation omitted.] An accidental killing is not voluntary manslaughter. [Citation omitted.]" 589 P.2d at 389.

Idaho's manslaughter statute, Idaho Code § 18-4006 (1979) provided: "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary . . . ." The Idaho court decided that "[t]he elements of voluntary manslaughter are: (a) an unlawful killing, with (b) the intent to kill, but without malice." *State v. Atwood*, 105 Idaho 315, 318, 669 P.2d 204, 207 (1983). See, also, *Commonwealth v. Pitts*, 486 Pa. 212, 404 A.2d 1305 (1979) (voluntary manslaughter involves the defendant's intentional or voluntary act, that is,

"involves the specific intent to kill but, by reason of passion and provocation, contains no legal malice." 404 A.2d at 1308).

Thus, other courts, construing manslaughter statutes which have language substantially similar, if not identical, to the language of § 28-305(1), have agreed with this court's expression in *Boche v. State*, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909), regarding voluntary manslaughter, that is, killing another, without malice, "upon a sudden quarrel," namely: "the homicide must have been intentional, but in sudden passion or heat of blood caused by a reasonable provocation, and without malice . . . ." We note that *Boche* has never been overruled.

Consequently, we hold that, to sustain a conviction for voluntary manslaughter under § 28-305(1), that is, a conviction for killing another, without malice, "upon a sudden quarrel," the State, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another. Thus, intentional criminal homicide as the result of legally recognized provocation distinguishes voluntary manslaughter "upon a sudden quarrel" from another intentional criminal homicide, murder in the second degree, namely, "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." § 28-304.

This court, in *Bohanan v. The State*, 15 Neb. 209, 18 N.W. 129 (1883), set aside Bohanan's manslaughter conviction because the trial court erroneously denied a hearing on Bohanan's plea in abatement, wherein Bohanan asserted that the grand jury which returned the indictment against Bohanan was illegally constituted. As stated in *Bohanan*: "For the error in denying the prisoner a trial on the issue taken on his plea in abatement, the judgment must be reversed, the verdict set aside, and the cause remanded to the court below for further proceedings conformable to this opinion." 15 Neb. at 215, 18 N.W. at 131. Notwithstanding its determination that reversible error existed as the result of the trial court's refusal to grant a hearing on Bohanan's plea in abatement, the court, in dicta pertaining to one of Bohanan's tendered instructions rejected by the trial court, found general suitability in an instruction: " 'Manslaughter is the unlawful killing of another without

malice, either express or implied, which may be either involuntary, upon a sudden heat of passion, or inadvertently, upon the commission of some unlawful act.' " *Id.* As noted, however, the comment in *Bohanan* concerning the tendered instruction is dicta. Also, some 25 years after *Bohanan*, but construing the same manslaughter statute which existed when *Bohanan* was decided, this court unequivocally stated that, concerning a criminal homicide involved in manslaughter which occurred "in a sudden quarrel," the "homicide must have been intentional, but in a sudden passion or heat of blood caused by a reasonable provocation and without malice . . . ." *Boche v. State, supra* at 854, 122 N.W. at 75. Thus, remarks about manslaughter in *Bohanan* are unquestionably dicta and, nevertheless, were superseded by the court's dispositive statement on manslaughter in *Boche*.

In *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), Batiste was convicted of first degree murder on account of the victim's strangulation death. Batiste contended that the evidence was insufficient to sustain her murder conviction and that the evidence showed only the basis for a manslaughter conviction for a "killing [which] was a result of a sudden quarrel." 231 Neb. at 486, 437 N.W.2d at 129. In *Batiste*, we concluded: "The facts developed by direct and circumstantial evidence concerning [the victim's] death clearly justified the jury in finding beyond a reasonable doubt a higher degree of homicide than manslaughter," 231 Neb. at 488, 437 N.W.2d at 130; but, having determined that there was sufficient evidence to sustain Batiste's murder conviction, we, nevertheless, expressed: "Thus, to constitute manslaughter, the slayer must have no intention of doing the wrongful act of killing another without just cause or excuse." *Id.*

As a result of today's decision, reaffirming *Boche v. State, supra*, we disapprove of the language in *Batiste* to the effect that an intentional killing is not an element of voluntary manslaughter described in § 28-305(1).

Today's decision, however, does not alter our position that an unintentional killing "while in the commission of an unlawful act" is manslaughter proscribed by § 28-305(1). See *State v. Bachkora*, 229 Neb. 421, 427 N.W.2d 71 (1988).

SUFFICIENCY OF EVIDENCE

Pettit argues that the evidence is insufficient to submit the manslaughter question to the jury.

> "On a defendant's motion to dismiss for insufficient evidence of the crime charged against such defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence."

State v. Pierce, 231 Neb. 966, 970, 439 N.W.2d 435, 439-40 (1989). See, also, *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

> In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

State v. Pierce, supra at 970, 439 N.W.2d at 440. See, also, *State v. Watkins, supra*.

> A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence.

State v. Blue Bird, 232 Neb. 336, 339, 440 N.W.2d 474, 476 (1989).

> Intent is the state of the actor's mind when the actor's conduct occurs. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). "*Intentionally* means willfully or purposely, and not accidentally or involuntarily." *State v. Schott*, 222 Neb. 456, 462, 384 N.W.2d 620, 624 (1986). The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident. *State v. Schott, supra*. "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*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987).

State v. Pierce, supra at 971, 439 N.W.2d at 440.

It is without reasonable dispute that Frank Pettit's rifle was pointed in the direction of Pandora Pettit when the weapon discharged unless the fatal bullet was a ricochet. During the period shortly before the shooting, whether there was an argument about Frank Pettit's excessive drinking is unclear, but, clearly, Frank Pettit and Pandora Pettit dramatically discussed their very marked differences of opinion concerning Frank's taking his own life. However, in reference to Frank Pettit's conduct, Pandora Pettit's exclamation, "Frank, don't. . . . Stop, Frank," is equivocal. Did the exclamation relate to the rifle intentionally pointed or aimed at Pandora Pettit—a criminal assault? See § 28-310(1)(b). Or was the exclamation directed toward Frank Pettit's effort to commit suicide? Also, approximately 15 seconds elapsed between Pandora Pettit's exclamation and the fatal gunshot.

Physical evidence in Frank Pettit's trial was susceptible to various interpretations. A perpendicular path of the bullet into Pandora Pettit's body may indicate that Pandora was standing upright and that Frank Pettit was also standing upright when the rifle discharged, substantiating a theory that Frank Pettit was aware that he was aiming or pointing the rifle at Pandora and intentionally fired the fatal shot at her. On the other hand, it may be that Pandora Pettit, as she was removing the nylon jacket, leaned over or near Frank Pettit as he was attempting to extract the clip or magazine from the rifle, a situation which might account for lack of alignment between the bullet hole in the jacket and the wound in Pandora Pettit's chest. Perhaps in acute alarm or pathetic protection, Pandora Pettit was raising her hands above her head, when the rifle discharged, thus explaining the lack of alignment between the bullet hole in the jacket and the mortal wound. There may be other theories and inferences based on the evidence, but the equivocality of the evidence, which we have indicated, presented the jury with the question: How did the shooting occur? The court correctly overruled Frank Pettit's motion for directed verdict and

dismissal of the charges against Pettit.

INSTRUCTION ON VOLUNTARY MANSLAUGHTER

Frank Pettit claims error in the court's refusal to give the tendered instruction on "accident."

> To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction; (2) the tendered instruction is a correct statement of the law; and (3) the tendered instruction is warranted by the evidence.

Burns v. Veterans of Foreign Wars, 231 Neb. 844, 853, 438 N.W.2d 485, 491 (1989).

"A trial court, whether requested or not, must instruct the jury on the law of the case, and failure to do so constitutes prejudicial error." *State v. Pierce*, 231 Neb. 966, 975, 439 N.W.2d 435, 443 (1989).

In *Hendricks v. Commonwealth*, 550 S.W.2d 551 (Ky. 1977), the court rejected the defendant's contention that "accident" was a defense to a charge of voluntary manslaughter and stated:

> That a killing was purely accidental is not a "defense" which, under the Penal Code, must be negated if there is evidence to raise it. [Citation omitted.] It is simply a denial that the act was done with the culpable state of mind required by the instructions as a condition precedent to a consideration. Hence, it was not necessary to give a defensive instruction on the theory of accident, because in order to find the appellant guilty the jury necessarily had to negate the explanation (rather than "defense") of accidental killing. [Citation omitted.]

550 S.W.2d at 553.

We agree with the analysis of the Supreme Court of Kentucky concerning the claimed "defense" of "accident" and conclude that "accident" is not a defense to the crime of voluntary manslaughter under § 28-305(1), but does relate to intent to kill, which is an element of the crime of manslaughter committed "upon a sudden quarrel." Therefore, if a court instructs the jury that intent to kill is an element of voluntary manslaughter committed "upon a sudden quarrel," and

otherwise sufficiently defines *intent* or *intentional* relative to the defendant's conduct, the trial court is not required to give a separate instruction on the theory of accident pertaining to the homicide which is the subject of the manslaughter charge against a defendant.

Without our reiterating each item of evidence in Frank Pettit's case, including Pandora's statement shortly before her death, "It was an accident," there was evidence which, if believed, negated Frank Pettit's intention to kill Pandora Pettit, an intent which is an element of voluntary manslaughter categorized in § 28-305(1)—an intentional killing of another, without malice, "upon a sudden quarrel." Under the circumstances, the district court should have instructed the jury that a finding of intent to kill was required to convict Frank Pettit of voluntary manslaughter committed "upon a sudden quarrel." Because Frank Pettit was charged in the alternative, that is, voluntary or involuntary manslaughter, the general verdict supplies no means to ascertain whether the jury found Frank Pettit guilty of involuntary manslaughter rather than voluntary manslaughter. Any further attempted analysis of the verdict would be based on absolute speculation. We are, therefore, unable to conclude that absence of an instruction on intent to kill, as an element of voluntary manslaughter, is harmless error. "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, 686, 419 N.W.2d 660, 666 (1988). See, also, *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). For that reason, failure to instruct on intent to kill as an element of voluntary manslaughter constitutes reversible error and requires our setting aside the manslaughter conviction of Frank Pettit.

FRANK PETTIT'S OTHER ASSIGNED ERRORS

We have reviewed the record and find that Frank Pettit's other assignments are without merit and, under the circumstances, do not warrant discussion. Consequently, because we have found reversible error in the trial court's failure

to instruct on the voluntary manslaughter charge against Frank Pettit, we need not discuss the assignments of error pertaining to amendment of the information, adduction of evidence, and the allegedly excessive sentence.

REVERSED AND REMANDED FOR A NEW TRIAL.

FAHRNBRUCH, J., dissenting.

Because the majority of the court abolishes a critical distinction between the crime of second degree murder and the crime of manslaughter committed upon a sudden quarrel, I am compelled to dissent. To be guilty of manslaughter committed upon a sudden quarrel, the majority holds, the killer must commit the slaying with intent to kill.

I contend that Nebraska's manslaughter statute abrogates the common law and that the majority fails to give sufficient weight to pronouncements of this court, one of which declares that "[t]o come within the provisions of the manslaughter statute, the killing must not have been intentional or with a design to effect death." *State v. Worley*, 178 Neb. 232, 236, 132 N.W.2d 764, 767 (1965).

COMMON LAW

Common law recognized two types of criminal homicide: murder and manslaughter. Murder was defined as " '[w]hen a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied.' " 2 W. Blackstone, Commentaries on the Laws of England § 229 at 2397 (W. Jones ed. 1916), citing 3 E. Coke, Institutes of the Laws of England ch. VII (1797). Manslaughter was divided into two branches, voluntary and involuntary.

Blackstone defined voluntary manslaughter as follows:

> *If upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter* . . . and the law pays that regard to human frailty as not to put a hasty and deliberate act upon the same footing with regard to guilt. So, also, if a man be greatly provoked . . . and immediately kills the aggressor, though this is not excusable *se defendendo* (in self-defense), since there is no absolute necessity for doing it to preserve himself, yet

> neither is it murder, *for there is no previous malice,* but it is manslaughter. But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder. . . . Manslaughter, therefore, on a sudden provocation differs from excusable homicide *se defendendo* (in self-defense) in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge.

(Emphasis supplied.) 2 W. Blackstone, *supra*, § 225 at 2391-92.

Involuntary manslaughter "differs also from homicide excusable by misadventure in this: that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one." 2 W. Blackstone, *supra*, § 226 at 2392.

NEBRASKA STATUTES

In 1866, in a session before statehood, the legislative assembly of the Territory of Nebraska adopted a criminal code including the following homicide definitions:

> Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome and death thereby occasioned.

Rev. Stat. § 18 (1866).

> Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without any deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

Rev. Stat. § 21 (1866).

In cases of voluntary manslaughter, there must be a

> serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

Rev. Stat. § 22 (1866).

> *The killing must be the result of that sudden, violent impulse of passion, supposed to be* ***irresistible****; for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as a murder.*

(Emphasis supplied.) Rev. Stat. § 23 (1866). (It is noted that Nebraska does not recognize as a defense the concept of "irresistible impulse." *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).)

> Involuntary manslaughter shall consist in the killing of a human being without any intent so to do, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner . . . .

Rev. Stat. § 24 (1866).

In 1873, the ninth session of the Legislature of the State of Nebraska adopted a new criminal code, patterned after Ohio's criminal code. See *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897). That code included the following homicide definitions:

> If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or, if any person, by wilful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death.

Gen. Stat. § 3 (1873).

> If any person shall purposely and maliciously, but

> without deliberation and premeditation, kill another; every such person shall be deemed guilty of murder in the second degree; and on conviction thereof, shall be imprisoned in the penitentiary not less than ten years, or during life, in the discretion of the court.

Gen. Stat. § 4 (1873).

> If any person shall unlawfully kill another *without malice*, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter; and, upon conviction thereof, shall be imprisoned in the penitentiary, not more than ten years, nor less than one year.

(Emphasis supplied.) Gen. Stat. § 5 (1873).

The 1873 definitions have remained substantially unchanged. Current homicide definitions are found in Neb. Rev. Stat. §§ 28-303, 28-304, and 28-305 (Reissue 1985), and provide:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

§ 28-303.

> A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

§ 28-304(1).

> A person commits manslaughter if he kills another *without malice*, either upon a sudden quarrel, or causes the death of another unintentionally while in the

commission of an unlawful act.

(Emphasis supplied.) § 28-305(1).

The most obvious differences between the 1866 homicide definitions and those adopted in 1873 are the inclusion of second degree murder and the deletion of the voluntary/involuntary manslaughter distinction. In fact, the words "voluntary" and "involuntary" no longer appear in the statute. Legislative history does not exist for this time period; however, it defies logic to assert that the changes made are unimportant.

SECOND DEGREE MURDER AND MALICE

The majority opinion, quoting *State v. Hutter*, 145 Neb. 798, 18 N.W.2d 203 (1945), states:

> "The different degrees of homicide as defined by our statute are all carved out of murder and manslaughter as known to the common law. No new offense has been created, and no homicide which was not criminal at common law is made so by statute, but it is divided into degrees and the punishment graded to meet the circumstances of the particular case. The decisions of this court clearly hold to this view."

It is my position that common-law voluntary manslaughter was subsumed by the crime of second degree murder.

The majority states,

> "The *usual* type of *voluntary manslaughter* involves the intentional killing of another while under the influence of a reasonably-induced emotional disturbance (in earlier terminology, while in a 'heat of passion') causing a temporary loss of normal self-control. Except for this reasonable emotional condition, the intentional killing would be murder."

(Emphasis supplied.) (Quoting 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.10(a) (1986).)

LaFave and Scott also point out:

> [V]oluntary manslaughter is *often* defined in the cases (and, sometimes, by statute) *as if* intent to kill were a required ingredient. *But, theoretically* at least, they might be of the intent-to-do-serious-bodily-injury, or of the

> depraved-heart, types. Thus—to take the most common sort of voluntary manslaughter, a killing while in a reasonable "heat of passion"—*in most cases* the defendant *intentionally kills* the one who has aroused this passion in him. But if, in the throes of such a passion, he should intend instead to do his tormentor serious bodily injury short of death, or if he should, *without intending to kill him*, endanger his life by very reckless (depraved heart) conduct, the resulting death ought equally to be voluntary manslaughter rather than murder or no crime. The great majority of modern statutes, either by a reference to all cases which would otherwise be murder or by similar general language, take this broad view.

(Emphasis supplied.) *Id.* at 253. In my view, Nebraska case law and Nebraska's homicide statutes reflect that Nebraska has done away with the common-law distinctions of voluntary and involuntary manslaughter. Moreover, in Nebraska, a person is only exempt from criminal responsibility when he kills another while the killer is insane (Neb. Rev. Stat. § 29-2203 (Reissue 1985)) or is justified in killing under Neb. Rev. Stat. §§ 28-1406 to 28-1416 (Reissue 1985), Nebraska's justification of use of force act. The Legislature has not seen fit to exempt from criminal responsibility a person who kills another upon a sudden quarrel even though the killing was unintentional. The majority has by judicial fiat made such an exemption.

NEBRASKA CASE LAW

The majority holds that Nebraska's manslaughter statute follows the common law in that it divides manslaughter into two types: voluntary and involuntary. Section 28-305(1) states: "A person commits manslaughter if he kills another *without malice*, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." (Emphasis supplied.)

In support of its voluntary/involuntary conclusion, the majority relies upon *Boche v. State*, 84 Neb. 845, 122 N.W. 72 (1909), in which it was stated that the manslaughter statute did not change the common law. At that time, Nebraska's manslaughter statute was substantially similar to the one

quoted above: "If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter . . . ." Comp. Stat. § 5 (1909).

Boche further held that when the homicide is upon a sudden quarrel, the killing must have been intentional, "but in sudden passion or heat of blood caused by a reasonable provocation . . . ." *Boche* at 854, 122 N.W. at 75. After citing this language, the majority states: "Consequently, we hold that, to sustain a conviction for voluntary manslaughter under § 28-305 (1), that is, a conviction for killing another, without malice, 'upon a sudden quarrel,' the State, by evidence beyond a reasonable doubt, must prove that the defendant *intended to kill*, and did kill, another." (Emphasis supplied.)

Prior to *Boche*, in *Bohanan v. The State*, 15 Neb. 209, 18 N.W. 129 (1883), although the case was decided upon other grounds, this court considered a refused jury instruction defining manslaughter as " 'the unlawful killing of another without malice, either express or implied, *which may be either involuntary, upon a sudden heat of passion*, or inadvertently, upon the commission of some unlawful act.' " (Emphasis supplied.) *Id.* at 215, 18 N.W. at 131.

The court affirmed the trial court's refusal to give this instruction, saying:

> As a general definition of manslaughter *under our statute this was correct.* But it was faulty in this, that the last clause had no application to the evidence. There was no pretense that the act was done "inadvertently upon the commission of some unlawful act." This instruction was, therefore, rightly refused.

(Emphasis supplied.) *Id.*

The *Bohanan* court also wrote, "A *malicious killing*, although done upon a sudden quarrel and in the heat of passion, is murder in the second degree at least." (Emphasis supplied.) *Id.* at 214, 18 N.W. at 131. In 1883, at least, this court recognized that Nebraska's homicide definitions changed the common law.

A decision of this court after *Boche*, *State v. Worley*, 178

Neb. 232, 132 N.W.2d 764 (1965), supports the rationale of *Bohanan*. In *Worley*, the court found that the facts of the case would support a conclusion that the killing occurred either upon a sudden quarrel or in the commission of an unlawful act. After making this finding, the court stated, "To come within the provisions of the manslaughter statute, *the killing must not have been intentional or with a design to effect death*." (Emphasis supplied.) *Id.* at 236, 132 N.W.2d at 767.

In *State v. Drew*, 216 Neb. 685, 344 N.W.2d 923 (1984), the defendant was charged with second degree murder. Drew was convicted of the lesser crime of manslaughter. The defendant claimed that she was acting in self-defense when the decedent was shot and died as a result of a bullet's striking the victim. The transcript reveals that the trial court, when it came to manslaughter, instructed the jury both upon the sudden quarrel and upon the unlawful act theories. No "intent" instruction was given in regard to manslaughter. Drew claimed the trial court erred in failing to instruct the jury that the burden was upon the State to prove beyond a reasonable doubt that the killing was not accidental. In upholding Drew's manslaughter conviction, this court declared:

> The threatening use of a firearm is an unlawful assault sufficient to convict one of manslaughter, when defined as causing the death of another unintentionally while in the commission of an unlawful act. . . . *Similarly, the accidental discharge of a gun, the use of which was not justified under the circumstances, is not a defense to manslaughter when the killing occurred upon a sudden quarrel.*

(Emphasis supplied.) *Id.* at 687-88, 344 N.W.2d at 925.

In *State v. Rincker,* 228 Neb. 522, 423 N.W.2d 434 (1988), this court affirmed the manslaughter conviction of the defendant. Rincker assigned as error the trial court's giving a manslaughter instruction, because he did not request such an instruction. We said: "The jury could well have concluded from the evidence that Rincker's wife was lying on the bed between the victim and Siegrist and that Rincker reacted to that scene *without any prior intention to kill the victim. That alone required the trial court to instruct the jury concerning*

manslaughter." (Emphasis supplied.) *Id.* at 534, 423 N.W.2d at 442.

In *Rincker*, this court also pointed out that "the fact remains that he [Rincker], albeit unintentionally, took a life," *id.* at 535, 423 N.W.2d at 442, and "[t]he manslaughter was an unintentional act; bringing the knife to the scene was an intentional act," *id.* at 535, 423 N.W.2d at 443. Nowhere does the opinion hold that it was illegal for Rincker to carry the knife to the scene.

These cases indicate that manslaughter in Nebraska does not require an intent to kill, whether the killing be upon a sudden quarrel or in the commission of an illegal act. I contend that *Boche*, sub silentio, has been overruled and that Nebraska no longer recognizes common-law voluntary and involuntary manslaughter or that intent to kill is an element of voluntary manslaughter.

The majority cites cases from California, Wyoming, New Mexico, and Idaho. Each out-of-state case is distinguishable in that the statutes considered *all specifically denote and define voluntary and involuntary manslaughter*. As shown above, the Nebraska statutes have not recognized these two types of manslaughter since 1873.

Even though the words "voluntary" and "involuntary" have not been a part of Nebraska's manslaughter statute since 1873, the majority insists upon reading them into our manslaughter statute.

Prior to adoption of the current criminal code in 1977, the second degree murder statute required that the killing be done "purposely and maliciously." Neb. Rev. Stat. § 28-402 (Reissue 1975). The new code defined second degree murder as a killing done "intentionally, but without premeditation." § 28-304. However, malice continues to be judicially required as an element of second degree murder. See *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). This construction comports with legislative history which states that the new section is "comparable" to the former section. Summary of Contents L.B. 38, Judiciary Committee, 85th Leg., 1st Sess. 3 (1977).

It is my contention that "malice" is a judicially supplied essential element in second degree murder to distinguish second

degree murder from an intentional killing that is permitted by law under certain circumstances, i.e., a person's or law enforcement officer's killing someone where legally permissible under Nebraska's justification for use of force statutes, §§ 28-1406 to 28-1416.

This court's first attempt at defining malice after adoption of the 1873 criminal code appears to have been in *Milton v. The State*, 6 Neb. 136 (1877). That case held that malice is " '[t]he doing a wrongful act intentionally without just cause or excuse.' 2 Bouv. Law Dict., 91." 6 Neb. at 143.

This rule was expanded in *Carr v. State*, 23 Neb. 749, 756, 37 N.W. 630, 633 (1888), which defined malice as

> a wicked and mischievous purpose which characterizes the perpetration of a wrongful or injurious act intentionally committed without lawful excuse. It is a mental condition on the part of the actor supposed to exist at the time of the commission of the offense, and is *imputed* to "doing of an unlawful act intentionally, without just cause or excuse."

The court in *Carr* cited *Milton*, but felt the rule was incomplete. *Carr* also cites the following definition:

> "Malice, in the definition of murder, is imputed to an act done willfully, *malo animo*, an act wrong in itself, and injurious to another, and for which there is no apparent justification or excuse. . . . The natural or necessary conclusion and inference from such an act, willfully done without apparent excuse, are, that it was done *malo animo* in furtherance of the wrongful, injurious purpose, *previously*, though perhaps suddenly, formed, and is, therefore, 'a homicide with malice of forethought,' which is the true definition of murder."

Carr at 755-56, 37 N.W. at 633.

Carr was discussed in *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895). This court stated that " ' "[m]alice," in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind.' " *Id.* at 167-68, 61 N.W. at 572. The court further stated that the above definition was substantially within the definition approved in *Carr*.

The definition of malice announced in *Housh* is nearly the same as the definition stated in *State v. Batiste*, 231 Neb. 481, 488, 437 N.W.2d 125, 130 (1989): " '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." Obviously, the definition of malice has changed very little since 1877 and not at all since 1895.

The difference between second degree murder and manslaughter is significant. Second degree murder is committed when the killing is done intentionally without just cause or excuse, i.e., with malice; manslaughter is committed when the killing is without malice. Regardless of what the common-law definition may have been, malice, in Nebraska, is the intentional doing of an unlawful act without just cause or excuse. If a person is killed intentionally, whether done "upon a sudden quarrel" or not, the act is obviously done with malice, because killing another is an unlawful act unless the killing is exempt under §§ 28-1406 to 28-1416. It is logically impossible to distinguish between a killing done intentionally and one done with malice. A killing committed without malice is one committed unintentionally.

WHITE, J., joins in this dissent.

BOSLAUGH, J., dissenting.

I agree that the judgment in this case must be reversed, but it is my opinion that the cause should be remanded with directions to dismiss.

I agree with Judge Fahrnbruch that under the statutes of Nebraska the distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill.

Under our present statutes, murder is the unjustified intentional killing of another. Manslaughter is the unjustified killing of another *without malice*, upon a sudden quarrel or while in the commission of an unlawful act. Malice is the *intentional* doing of a wrongful act without just cause or excuse. Since manslaughter is a killing *without malice*, there can be no intention to kill in committing manslaughter.

In my opinion, there is not sufficient evidence to permit a

jury to find beyond a reasonable doubt that the defendant was guilty of manslaughter. As the majority opinion points out in great detail, the evidence as to how the victim was killed is equivocal.

In determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. *State v. Earlywine*, 191 Neb. 533, 215 N.W.2d 895 (1974). Conjecture, speculation, or the choice of quantitative possibilities is not proof. *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978). The State may not rely alone on inferences that would support a finding of guilt where several inferences are deducible from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved. *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 360 N.W.2d 488 (1985).

It seems to me that the inference that the killing was accidental is at least as strong as the inference that it was a crime. Under those circumstances, a jury cannot be permitted to speculate as to how the victim came to her death.

WHITE and FAHRNBRUCH, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GARY W. JOHNS, APPELLANT.
445 N.W.2d 914

Filed September 22, 1989. No. 88-581.

1. **Convictions: Appeal and Error.** In reviewing 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.
2. **Prior Convictions: Habitual Criminals.** This state may establish whatever procedural requirements it deems necessary for processing challenges to prior convictions in habitual criminal proceedings.
3. **Prior Convictions: Habitual Criminals: Appeal and Error.** A challenge to a prior conviction may only be raised in a direct appeal or in a separate proceeding

commenced for the express purpose of setting aside the judgment alleged to be invalid, and not in habitual criminal proceedings.

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

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

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

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

FAHRNBRUCH, J.

Gary W. Johns appeals both a Douglas County District Court jury verdict finding him guilty of felony theft by receiving stolen property of the value of $800, and the trial court's finding that he is a habitual criminal.

Johns was sentenced to not less than 20 nor more than 30 years' imprisonment. We affirm.

The defendant was charged under Neb. Rev. Stat. § 28-517 (Reissue 1985), which provides that "[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." If the property has a value of not less than $300, but not over $1,000, the offense is a Class IV felony, carrying a penalty of up to 5 years' imprisonment. Neb. Rev. Stat. §§ 28-105 and 28-518(2) (Reissue 1985).

In his appeal, Johns alleges two assignments of error: (1) that the evidence was insufficient to convict him and (2) that the trial court erred in finding him to be a habitual criminal.

> In reviewing 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.

(Citation omitted.) *State v. Andersen*, 232 Neb. 187, 191, 440 N.W.2d 203, 209 (1989).

Taking the view most favorable to the State, a jury could conclude that the State proved the following facts beyond a reasonable doubt.

Mark Trustin's residence in Omaha, Douglas County, Nebraska, was burglarized between the hours of 3 and 8 p.m. on December 22, 1987. Entry was gained through the back door by breaking the door's glass. A portable television set, a videocassette recorder, and a shotgun, the double-barrel of which was enclosed by a canvas cover with Trustin's name printed on it, were taken. The value of the items stolen totaled $800.

At approximately 7:09 on that same evening, Sharri Fletcher, a police officer employed by the Omaha Police Division, observed a brown station wagon with expired license plates being driven near 52nd Street and Kansas Avenue in Omaha. When Fletcher attempted to stop the vehicle, the station wagon driver tried to elude her. A short chase ensued, during which the station wagon reached speeds of up to 55 miles per hour. The station wagon crashed into a tree. Abandoning the vehicle and stolen property and leaving the key in the ignition and the motor running, the driver fled on foot. Fletcher pursued the driver, but was unable to apprehend him. The policewoman, who at times during the chase came within 10 to 15 feet of the driver, testified that the fleeing driver matched Johns' description.

When Police Officer W. David Dussetschleger arrived at the accident scene about 7:12 p.m. to offer assistance, he turned the key in the ignition, stopping the motor. Since the station wagon and stolen goods were abandoned, Dussetschleger inventoried the vehicle for valuables and found Trustin's stolen property on a rear seat in the station wagon. The stolen property was covered with a plastic tarp. Two latent fingerprints, later identified as those of the defendant, were obtained from the bottom of the television set.

Through a license plate check and additional investigation, police discovered that the station wagon had been recently purchased by the defendant's mother, with whom the defendant

lived. There was evidence that the defendant had borrowed and was using the vehicle on the night in question. There was also evidence that there was only one key to the station wagon and that, when not in use, it was kept in the home where Johns lived.

With respect to his first assignment of error, Johns points to Fletcher's inability to positively identify him at trial. Johns further argues that John More, the crime laboratory technician who testified regarding the identification of the fingerprints found on the television set, should be discredited because More had earlier characterized several points of identification differently in a deposition than he did at trial. Finally, Johns argues that the foregoing, combined with the testimony of several witnesses that the defendant was with them on December 22 and that the vehicle was not operative, demonstrates that the evidence is insufficient to convict him.

The defendant is essentially asking this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, and weigh the evidence. Such is not the province of the Supreme Court but, rather, the province of the fact finder, in this case the jury. *State v. Andersen, supra.* It is apparent from the verdict that the jury did not believe Johns' alibi defense or that the station wagon was not operative. Even though the evidence in large part was circumstantial, it is sufficient to support the jury's guilty verdict. See *State v. Durst*, 232 Neb. 639, 441 N.W.2d 627 (1989).

In his second assignment of error, Johns argues that under *Gonzales v. Grammer*, 848 F.2d 894 (8th Cir. 1988), his two prior convictions may not be used to support a finding that he is a habitual criminal.

It is first noted that Neb. Rev. Stat. § 29-2221 (Reissue 1985) provides in substance that a person who is convicted of a felony and who previously has been twice convicted of a felony and sentenced to prison for terms of not less than 1 year shall be punished for not less than 10 nor more than 60 years. Johns claims the records of his prior convictions do not affirmatively show that he was advised of his constitutional rights or waived them when he entered his pleas of nolo contendere and guilty.

The decision announced in *Gonzales* was subsequently

reviewed in *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). In *Oliver*, the defendant attacked a sentence enhancement for third offense driving while under the influence of alcoholic liquor because his prior convictions failed to show that his guilty pleas had been entered voluntarily and intelligently. This court noted that the U.S. Court of Appeals for the Eighth Circuit held in *Gonzales* that states are free to establish whatever procedural requirements they deem necessary for processing challenges to prior convictions in habitual criminal proceedings. Significantly, the court of appeals based its determination on our holding in *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984), that a defendant could raise in an enhancement proceeding the constitutional invalidity of a prior conviction. However, in *Oliver, supra*, we disapproved our 1984 holding in *State v. Gonzales*. We then held that "such an issue may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid." *Oliver, supra* at 870, 434 N.W.2d at 298. Consequently, Johns may not collaterally attack his prior convictions in this direct appeal. "[I]t has been the rule in this State that 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." *Id.* at 869, 434 N.W.2d at 297, citing *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987). Therefore, the record must be examined to determine if there exist two counseled prior convictions.

In Johns' case, certified copies of Douglas County District Court proceedings and certified copies of penal complex records were received in evidence. Those records reflect that on October 8, 1975, with counsel present, Johns entered a nolo contendere plea to a felony charge of theft by receiving stolen property. On November 12, 1975, again with counsel present, Johns was sentenced to not less than 2 nor more than 7 years' imprisonment. He was committed to, and received at, the penal complex. This sentence was set aside after a postconviction relief hearing, and Johns, with counsel present, was resentenced on his plea of October 8, 1975, to not less than 2 nor more than 4 years' imprisonment. The evidence shows he was

committed to and served his sentence at the Nebraska Penal Complex. The record further reflects that on September 11, 1980, with counsel present, Johns appeared in the Douglas County District Court and entered a plea of guilty to a felony charge of theft by receiving stolen property. On October 3, 1980, Johns again appeared with counsel in Douglas County District Court and was sentenced to not less than 1⅔ nor more than 5 years' imprisonment. The record reflects he was committed to the penal complex, where he served that sentence. The record establishes the existence of two prior counseled felony convictions. Therefore, Johns' second assignment of error is without merit.

The defendant's conviction and sentence are affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

In *State v. Oliver,* 230 Neb. 864, 434 N.W.2d 293 (1989), I dissented and pointed up the deficiencies in Nebraska's criminal procedure, which, under existing statutes and decisions of this court, does not allow a criminal defendant to challenge a prior plea-based conviction obtained in violation or denial of a right constitutionally guaranteed to the defendant, including the rights specifically mentioned in *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), namely, the rights to trial by jury, to remain silent, and to confront accusers. A procedure which a state "deems necessary" to challenge a prior plea-based conviction may be vastly different from a procedure which comports with constitutional guarantees, a dramatically crucial difference which actually exists in Nebraska's procedure to challenge the constitutional validity of a prior plea-based conviction. The absence of an adequate procedure for an effectual challenge to a prior plea-based conviction which is constitutionally invalid offends due process required by the Nebraska and U.S. Constitutions. Since there has been no change, through the Legislature or this court, after *Oliver* to provide a criminal defendant with a means to challenge a prior conviction unconstitutionally obtained, "there is no new thing under the sun," and, hence, with no new twist to *Oliver,* I renew my dissent to the denial of fundamental fairness and due process.