Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
11/08/2026 12:12 PM CST

# REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 8, 1989 and APRIL 5, 1990

IN THE

# Supreme Court of Nebraska

---

## VOLUME CCXXXIV

---

STEVEN R. SCHROEDER

OFFICIAL REPORTER

---

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1990

Copyright A. D. 1990

By Steven R. Schroeder, Reporter of the Supreme Court

For the benefit of the State of Nebraska

## SUPREME COURT
## DURING THE PERIOD OF THESE REPORTS

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

STEVEN R. SCHROEDER ..... Reporter
LANET ASMUSSEN ..... Clerk
JOSEPH C. STEELE ..... State Court Administrator

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

# JUDICIAL DISTRICTS AND COUNTY JUDGES

| Number of District | Counties in District | Judges in District | City |
|---|---|---|---|
| First | Johnson, Nemaha, Pawnee, and Richardson | Thomas J. Gist | Falls City |
| Second | Cass, Otoe, and Sarpy | Jeffrey L. Campbell | Papillion |
| | | Albert C. Walsh | Papillion |
| | | Randall L. Rehmeier | Nebraska City |
| Third | Lancaster | James L. Foster | Lincoln |
| | | Gale Pokorny | Lincoln |
| | | Janice L. Gradwohl | Lincoln |
| | | Donald R. Grant | Lincoln |
| | | Jack B. Lindner | Lincoln |
| | | Richard H. Williams | Lincoln |
| Fourth | Douglas | Samuel V. Cooper | Omaha |
| | | Walter H. Cropper | Omaha |
| | | John J. McGrath | Omaha |
| | | Joseph S. Troia | Omaha |
| | | Robert C. Vondrasek | Omaha |
| | | Jane H. Prochaska | Omaha |
| | | Stephen M. Swartz | Omaha |
| | | Lyn V. Ferer | Omaha |
| | | Thomas G. McQuade | Omaha |
| | | Richard M. Jones | Omaha |
| | | 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<br>Philip R. Riley<br>Richard W. Krepela | Neligh<br>Creighton<br>Madison |
| Tenth | Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster | Harry C. Haverly<br>Jack Robert Ott | Hastings<br>Hastings |
| Eleventh | Hall and Howard | Richard E. Weaver<br>David A. Bush | Grand Island<br>Grand Island |
| Twelfth | Buffalo and Sherman | John P. Icenogle | Kearney |
| Thirteenth | Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas | Lloyd G. Kaufman<br>Kristine R. Cecava<br>James M. O'Rourke | Lexington<br>Ogallala<br>North Platte |
| Fourteenth | Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow | Cloyd Clark<br>B. Bert Leffler | McCook<br>Benkelman |
| Fifteenth | Boyd, Brown, Cherry, Holt, Keya Paha, and Rock | August F. Schuman<br>Alan L. Brodbeck | Ainsworth<br>O'Neill |
| Sixteenth | Box Butte, Dawes, Grant, Sheridan, and Sioux | Glen A. Fiebig<br>James T. Hansen | Alliance<br>Chadron |
| Seventeenth | Garden, Morrill, and Scotts Bluff | James L. Macken<br>G. Glenn Camerer | Gering<br>Gering |
| Eighteenth | Gage and Jefferson | Steven Bruce Timm | Beatrice |
| Nineteenth | Banner, Cheyenne, Deuel, and Kimball | Thomas H. Dorwart<br>C. G. Wallace | Sidney<br>Kimball |
| Twentieth | Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler | Keith J. Kovanda<br>Robert E. Wheeler | Burwell<br>Broken Bow |
| Twenty-first | Boone, Colfax, Merrick, Nance, and Platte | Gerald E. Rouse<br>Gary F. Hatfield<br>Lyle Winkle | Columbus<br>Central City<br>Columbus |

## ATTORNEYS

### Admitted Since the Publication of Volume 233

JAMES E. BRICK
RICHARD L. DEFORGE
JOE C. FREEMAN, JR.
D. EUGENE GARNER
MICHAEL J. GUYERSON
ROBERT L. HARRIS
TIMOTHY L. JAMES
STEVEN R. JENSEN
LEO P. MARTIN
GARY L. MCPHERSON
THOMAS RICHARD MERKEL
JAMES M. PFEFFER
HENRY E. PFEIFFER
LINDA S. PORTER
RONALD OLANDUS ROSS
ANNA WILLIAMS SHAVERS
BAIBA DZIRNIS SIMMONS
DAVID H. SKILTON
JOHN M. STROHMAN
JAMES J. THEISEN, JR.
CLINTON WILLIAM THUTE
PETER E. VAN ETTEN
THOMAS VAN HOUTEN

# TABLE OF CASES REPORTED


Aanenson; IBP, inc. v. ..... 603
American Stores Packing Co.; Behrens v. ..... 25
Application of Slack, In re ..... 704
Armendariz; State v. ..... 170

Babka v. Babka ..... 674
Bailey; Union Ins. Co. v. ..... 257
Batterman; Wheat Belt Pub. Power Dist. v. ..... 589
Behrens v. American Stores Packing Co. ..... 25
Beran v. Beran ..... 296
Bituminous Casualty Corp. v. Deyle ..... 537
Blue Cross; Goodlett v. ..... 5
Boppre; State v. ..... 922
Brazee v. City of Lincoln ..... 680
Bridge; State v. ..... 781
Briggs v. Consolidated Freightways ..... 410
Brooke v. Brooke ..... 968
Buchan; State ex rel. NSBA v. ..... 216
Bunner; State v. ..... 879
Burlington Northern RR. Co.; Crewdson v. ..... 631

C.C. and E.C., In re Interest of ..... 218
C.N.S. and A.I.S., In re Interest of ..... 406
Capek; State v. ..... 214
Carter; State v. ..... 378
Carter v. Weyerhaeuser Co. ..... 558
Chapman; State v. ..... 369
City of Columbus; Mossman v. ..... 78
City of Lincoln; Brazee v. ..... 680
City of Lincoln; Rose v. ..... 67
City of Lincoln; Whitehead Oil Co. v. ..... 527
Cochran; Ourada v. ..... 63
College View Properties; Shibata v. ..... 134
Columbus, City of; Mossman v. ..... 78
Conservatorship of Mosel, In re ..... 86
Consolidated Freightways; Briggs v. ..... 410
Contra Costa Cty. ex rel. Petersen v. Petersen ..... 418
County of Keith v. Fuller ..... 518
Crewdson v. Burlington Northern RR. Co. ..... 631

Crowdell; State v. ..... 469
Crowley v. McCoy ..... 88

Dammann v. Litty ..... 664
Deets; State v. ..... 307
Dennis v. State ..... 427
Department of Soc. Servs.; H.H.N.H., Inc. v. ..... 363
Department of Soc. Servs. v. Person ..... 865
Deyle; Bituminous Casualty Corp. v. ..... 537
Diversified Health Servs.; Swartzbaugh v. ..... 256
Domingus; State v. ..... 267
Donaldson; State v. ..... 683
Don Peterson & Assoc. Ins. Agency; Peterson v. ..... 651
Dotzler v. Tuttle ..... 176
Douglas County; Kumar v. ..... 511

Egger; State v. ..... 175
El-Tabech; State v. ..... 831
Ensrud v. Ensrud ..... 377
Equal Opportunity Comm.; Perkins v. ..... 359
Erlewine; State v. ..... 855

Faatz; State v. ..... 796
Farmland Service Co-op v. Peterson ..... 660
Foley; State v. ..... 304
Formanack v. Formanack ..... 325
Frazier; State v. ..... 107
Froelich; Otoe Cty. Nat. Bank v. ..... 1
Fuller; County of Keith v. ..... 518

Gas 'N Shop v. State ..... 309
Ginn v. Lamp ..... 198
Goodlett v. Blue Cross ..... 5
Graham; State v. ..... 275

H.H.N.H., Inc. v. Department of Soc. Servs. ..... 363
Hardy v. Hardy ..... 702
Harwager v. Harwager ..... 703
Helms v. Helms ..... 630
Henricksen v. Henricksen ..... 659
Henry v. Reeves ..... 794
Home Fed. Sav. & Loan Assn. v. McDermott & Miller ..... 11
Houser; State v. ..... 310
Howard v. Howard ..... 661
Hunter; State v. ..... 567

IBP, inc. v. Aanenson ..... 603
In re Application of Slack ..... 704
In re Conservatorship of Mosel ..... 86

In re Interest of C.C. and E.C. ..... 218
In re Interest of C.N.S. and A.I.S. ..... 406
In re Interest of J.L.M. et al. ..... 381
In re Interest of M.L.S. ..... 570
In re Interest of M.M., C.M., and D.M. ..... 839
In re Interest of N.L.B. ..... 280
In re Interest of T.W. et al. ..... 966
OO (Infinity) S Development Co.; John v. ..... 190
Iowa State Bank v. Trail ..... 59

J.L.M. et al., In re Interest of ..... 381
John v. OO (Infinity) S Development Co. ..... 190
Johnson; State v. ..... 110
Johnston; State ex rel. NSBA v. ..... 217
Juhl; State v. ..... 33

Keever; State v. ..... 289
Keith, County of v. Fuller ..... 518
King; Starr v. ..... 339
Kipf; State v. ..... 227
Kumar v. Douglas County ..... 511

LaChapelle; State v. ..... 458
Lamp; Ginn v. ..... 198
LeDoux v. LeDoux ..... 479
Lesiak; State v. ..... 163
Letscher; State v. ..... 858
Lincoln, City of; Brazee v. ..... 680
Lincoln, City of; Rose v. ..... 67
Lincoln, City of; Whitehead Oil Co. v. ..... 527
Litty; Dammann v. ..... 664
Loveless; State v. ..... 463
Luevano; Russell v. ..... 581

M.L.S., In re Interest of ..... 570
M.M., C.M., and D.M., In re Interest of ..... 839
Maurices Inc.; S.N. Mart, Ltd. v. ..... 343
McCoy; Crowley v. ..... 88
McDermott & Miller; Home Fed. Sav. & Loan Assn. v. ..... 11
Middagh v. Stanal Sound Ltd. ..... 576
Mosel, In re Conservatorship of ..... 86
Mossman v. City of Columbus ..... 78

N.L.B., In re Interest of ..... 280
NSBA, State ex rel. v. Buchan ..... 216
NSBA, State ex rel. v. Johnston ..... 217
NSBA, State ex rel. v. Neumeister ..... 47
NSBA, State ex rel. v. Rhodes ..... 799

NSBA, State ex rel. v. Schafer ..... 862
Nebraska State Bank v. Pedersen ..... 499
Neumeister; State ex rel. NSBA v. ..... 47

OO (Infinity) S Development Co.; John v. ..... 190
Omega Re-Bar, Inc.; Thomas v. ..... 449
Otoe Cty. Nat. Bank v. Froelich ..... 1
Ourada v. Cochran ..... 63

Parker v. Parker ..... 167
Pedersen; Nebraska State Bank v. ..... 499
Perkins v. Equal Opportunity Comm. ..... 359
Person; Department of Soc. Servs. v. ..... 865
Petersen; Contra Costa Cty. ex rel. Petersen v. ..... 418
Peterson; Farmland Service Co-op v. ..... 660
Peterson v. Don Peterson & Assoc. Ins. Agency ..... 651
Pratt; State v. ..... 596

Quandt; State v. ..... 402

Reeves; Henry v. ..... 794
Reeves; State v. ..... 711
Rein; State v. ..... 917
Rhodes; State ex rel. NSBA v. ..... 799
Ritter v. Ritter ..... 203
Roach; State v. ..... 620
Rose v. City of Lincoln ..... 67
Rowland; State v. ..... 846
Russell v. Luevano ..... 581
Ruyle; State v. ..... 760

S.N. Mart, Ltd. v. Maurices Inc. ..... 343
Schaaf; State v. ..... 144
Schafer; State ex rel. NSBA v. ..... 862
Schall; State v. ..... 101
Shibata v. College View Properties ..... 134
Slack, In re Application of ..... 704
Sloss v. Sloss ..... 649
St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co. ..... 789
Stanal Sound Ltd.; Middagh v. ..... 576
Starr v. King ..... 339
State; Dennis v. ..... 427
State ex rel. NSBA v. Buchan ..... 216
State ex rel. NSBA v. Johnston ..... 217
State ex rel. NSBA v. Neumeister ..... 47
State ex rel. NSBA v. Rhodes ..... 799
State ex rel. NSBA v. Schafer ..... 862
State; Gas 'N Shop v. ..... 309

State v. Armendariz ..... 170
State v. Boppre ..... 922
State v. Bridge ..... 781
State v. Bunner ..... 879
State v. Capek ..... 214
State v. Carter ..... 378
State v. Chapman ..... 369
State v. Crowdell ..... 469
State v. Deets ..... 307
State v. Domingus ..... 267
State v. Donaldson ..... 683
State v. Egger ..... 175
State v. El-Tabech ..... 831
State v. Erlewine ..... 855
State v. Faatz ..... 796
State v. Foley ..... 304
State v. Frazier ..... 107
State v. Graham ..... 275
State v. Houser ..... 310
State v. Hunter ..... 567
State v. Johnson ..... 110
State v. Juhl ..... 33
State v. Keever ..... 289
State v. Kipf ..... 227
State v. LaChapelle ..... 458
State v. Lesiak ..... 163
State v. Letscher ..... 858
State v. Loveless ..... 463
State v. Pratt ..... 596
State v. Quandt ..... 402
State v. Reeves ..... 711
State v. Rein ..... 917
State v. Roach ..... 620
State v. Rowland ..... 846
State v. Ruyle ..... 760
State v. Schaaf ..... 144
State v. Schall ..... 101
State v. Tamerius ..... 121
State v. Taylor ..... 18
State v. Tyrrell ..... 901
State v. Van Ackeren ..... 535
State v. Vermuele ..... 973
State v. Von Busch ..... 119
State v. Von Dorn ..... 93
State v. Whiteley ..... 693
State v. Whitmore ..... 557

State v. Williams ..... 890
State v. Wilmart ..... 320
State v. Wren ..... 291
State v. Wyatt ..... 349
Stava v. Stava ..... 189
Sutter v. Sutter ..... 118
Swartzbaugh v. Diversified Health Servs. ..... 256

T.W. et al., In re Interest of ..... 966
Tamerius; State v. ..... 121
Taylor; State v. ..... 18
Thiem v. Thiem ..... 255
Thomas v. Omega Re-Bar, Inc. ..... 449
Touche Ross & Co.; St. Paul Fire & Marine Ins. Co. v. ..... 789
Trail; Iowa State Bank v. ..... 59
Tri-County Bank & Trust Co. v. Watts ..... 124
Tuttle; Dotzler v. ..... 176
Tyrrell; State v. ..... 901

Union Ins. Co. v. Bailey ..... 257

Van Ackeren; State v. ..... 535
Vermuele; State v. ..... 973
Von Busch; State v. ..... 119
Von Dorn; State v. ..... 93

Walker v. Walker ..... 864
Watts; Tri-County Bank & Trust Co. v. ..... 124
Weyerhaeuser Co.; Carter v. ..... 558
Wheat Belt Pub. Power Dist. v. Batterman ..... 589
Whitehead Oil Co. v. City of Lincoln ..... 527
Whiteley; State v. ..... 693
Whitmore; State v. ..... 557
Williams; State v. ..... 890
Wilmart; State v. ..... 320
Wren; State v. ..... 291
Wyatt; State v. ..... 349

## APPELLATE DIVISION OF THE DISTRICT COURT CASES

Upon consideration by the Supreme Court of Nebraska of the records, briefs, and recommendations of the Appellate Division of the District Court, the judgments in the following cases were affirmed.

No. 87-693, filed January 26, 1990: **Theobald v. Theobald.** Appeal from the District Court for Fillmore County: Orville L. Coady, Judge. Heard before Reagan, Endacott, and Olberding, District Judges.

No. 87-1047, filed February 23, 1990: **Peterson v. City of Genoa.** Appeal from the District Court for Nance County: John M. Brower, Judge. Heard before Reagan, Endacott, and Olberding, District Judges.

No. 87-1109, filed March 30, 1990: **Overland Nat. Bank of Grand Island v. Alexander.** Appeal from the District Court for Sherman County: Dewayne Wolf, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 87-1111, filed December 22, 1989: **King v. French.** Appeal from the District Court for Thurston County: Darvid D. Quist, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 87-1122, filed March 9, 1990: **Toomey v. Mid-Plains Tech. Comm. College Area.** Appeal from the District Court for Lincoln County: Donald E. Rowlands II, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 87-1144, filed December 22, 1989: **Stuertz v. Stuertz.** Appeal from the District Court for Lancaster County: Bernard J. McGinn, Judge. Appellee awarded $750 attorney fees. Heard before Moran, Wolf, and Hannon, District Judges.

No. 88-022, filed March 9, 1990: **Buettner v. County of Boone.** Appeal from the District Court for Boone County: John M. Brower, Judge. Heard before Blue, Hickman, and

Burkhard, District Judges.

No. 88-030, filed February 9, 1990: **Weyerhaeuser Co. v. Brentwood Homes.** Appeal from the District Court for Buffalo County: Dewayne Wolf, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 88-137, filed February 23, 1990: **Mosel v. Camp.** Appeal from the District Court for Buffalo County: Dewayne Wolf, Judge. Heard before Reagan, Endacott, and Olberding, District Judges. White, Shanahan, and Grant, Judges, dissent.

No. 88-140, filed December 22, 1989: **Reed-Merrill, Inc. v. Karg Land & Cattle Co.** Appeal from the District Court for Chase County: Jack H. Hendrix, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 88-161, filed February 16, 1990: **Kallio v. Dubuque Packing Co.** Appeal from the District Court for Douglas County: James M. Murphy, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 88-162, filed February 23, 1990: **Mieth v. Reinke Manuf. Co.** Appeal from the District Court for Thayer County: Orville L. Coady, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 88-178, filed December 8, 1989: **Savage & Findley v. Czerwinski.** Appeal from the District Court for Douglas County: James A. Buckley, Judge. Heard before Moran, Wolf, and Hannon, District Judges.

No. 88-203, filed January 26, 1990: **Brenner v. Ramirez.** Appeal from the District Court for Scotts Bluff County: Alfred J. Kortum, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 88-231, filed December 22, 1989: **Vana v. Hy-Vee Food Stores, Inc.** Appeal from the District Court for Sarpy County: Ronald E. Reagan, Judge. Heard before Moran, Wolf, and Hannon, District Judges.

No. 88-237, filed March 9, 1990: **Anderson v. Bowers.** Appeal from the District Court for Lincoln County: Donald E. Rowlands II, Judge. Heard before Reagan, Endacott, and Olberding, District Judges.

No. 88-257, filed March 9, 1990: **State v. Thelander.** Appeal from the District Court for York County: Bryce Bartu, Judge.

Heard before Reagan, Endacott, and Olberding, District Judges.

No. 88-301, filed February 9, 1990: **Tollefsen v. Scotts Bluff Cty. Bd. of Equal.** Appeal from the District Court for Scotts Bluff County: Alfred J. Kortum, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 88-441, filed March 23, 1990: **First Nat. Bank in Morrill v. Lewis.** Appeal from the District Court for Scotts Bluff County: Robert O. Hippe, Judge. Heard before Fuhrman, Howard, and Mullen, District Judges.

No. 88-463, filed February 9, 1990: **Nebraska State Bank v. Gordon Livestock Auction.** Appeal from the District Court for Sheridan County: Paul D. Empson, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 88-534, filed March 23, 1990: **Carmine v. Carmine.** Appeal from the District Court for Johnson County: Robert T. Finn, Judge. Heard before Blue, Hickman, and Burkhard, District Judges.

No. 88-611, filed March 30, 1990: **Federal Land Bank of Omaha v. Cihlar.** Appeal from the District Court for Knox County: Merritt C. Warren, Judge. Heard before Fuhrman, Howard, and Mullen, District Judges.

No. 88-639, filed March 30, 1990: **Schnacker v. Cornhusker Cas. Co.** Appeal from the District Court for Dawson County: Donald E. Rowlands II, Judge. Heard before Fuhrman, Howard, and Mullen, District Judges.

No. 88-1030, filed December 22, 1989: **State v. Blanco.** Appeal from the District Court for Scotts Bluff County: Robert O. Hippe, Judge. Heard before Moran, Wolf, and Hannon, District Judges.

No. 88-1085, filed December 22, 1989: **State v. Washington.** Appeal from the District Court for Lancaster County: Earl J. Witthoff, Judge. Heard before Moran, Wolf, and Hannon, District Judges.

No. 89-010, filed March 9, 1990: **Reinhardt v. Henningson.** Appeal from the Nebraska Workers' Compensation Court. Heard before Moran, Wolf, and Hannon, District Judges.

No. 89-055, filed December 8, 1989: **State v. Baker.** Appeal from the District Court for Douglas County: Donald J.

Hamilton, Judge. Heard before Moran, Wolf, and Hannon, District Judges.

No. 89-079, filed December 22, 1989: **State v. Gildea.** Appeal from the District Court for Dodge County: Mark J. Fuhrman, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 89-109, filed January 12, 1990: **State v. Lang.** Appeal from the District Court for Fillmore County: Orville L. Coady, Judge. Heard before Reagan, Endacott, and Olberding, District Judges.

No. 89-136, filed March 30, 1990: **State v. Yellow Horse.** Appeal from the District Court for Dawes County: Paul D. Empson, Judge. Heard before Fuhrman, Howard, and Mullen, District Judges.

No. 89-196, filed December 22, 1989: **Umland v. Umland.** Appeal from the District Court for Cass County: Raymond J. Case, Judge. Heard before Moran, Wolf, and Hannon, District Judges.

No. 89-496, filed March 30, 1990: **State v. Johnson.** Appeal from the District Court for Lancaster County: Donald E. Endacott, Judge. Heard before Fuhrman, Howard, and Mullen, District Judges.

## CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 86-1046: **Department of Banking v. Copple.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-498: **County of Cherry v. Toy National Bank.** Stipulation allowed; appeal dismissed.

No. 88-184: **Yost v. Fringer.** Stipulation allowed; appeal dismissed.

No. 88-228: **Patrick v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 88-296: **Women in Community Service v. State.** Appeal dismissed.

No. 88-352: **Patterson v. Federal Reserve Bank.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 88-358: **Jacobson v. Lexington Mill & Elevator Co.** Stipulation allowed; appeal dismissed without prejudice at cost of appellant.

No. 88-398: **Bennett v. Piatt.** Appeal dismissed.

No. 88-471: **Ricketts v. Rasmussen.** Stipulation to dismiss appeal allowed; appeal dismissed; each party to pay own costs.

No. 88-489: **In re Estate of Parkos.** Stipulation allowed; appeal dismissed.

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

No. 88-575: **Albright v. Albee.** Stipulation allowed; appeal dismissed with prejudice.

No. 88-601: **Production Credit Assn. v. Stecker.** By order of the court, appeal dismissed for failure to file briefs.

No. 88-620: **Judds Bros. Construction v. Burlington Northern RR. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-726: **Berry v. Bishof.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 88-811: **Dworak v. Gottsleben.** Stipulation allowed; appeal dismissed.

No. 89-090: **Paesl v. Prokop.** Stipulation allowed; appeal dismissed.

No. 89-306: **Blank v. Wagner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-359: **Bradley v. Gunter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-373: **State v. Blank.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-402: **Forney v. Forney.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-442: **Judds Bros. Construction v. HWS Engineering.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-495: **State v. Hertzel.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-498: **State v. Timm.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-506: **State v. Fisher.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-676: **State v. Burke.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 89-686: **Coates v. O'Neill.** Stipulation allowed; appeal dismissed.

No. 89-714: **State v. Martinez.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-719: **Hesemann v. Village of Orleans.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-743: **Burmood v. West Point Medical Clinic.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-745: **Sickles v. Johnson.** Affirmed. See Rule 7A(1).

No. 89-750: **State v. Chilsted.** Cause having not been shown,

exceptions of appellant sustained; judgment of district court summarily reversed; and cause remanded to district court for further proceedings.

No. 89-751: **State v. Eichelberger.** Cause having not been shown, exceptions of appellant sustained; judgment of district court summarily reversed; and cause remanded to district court for further proceedings.

No. 89-753: **State v. Anderson.** Cause having not been shown, exceptions of appellant sustained; judgment of district court summarily reversed; and cause remanded to district court for further proceedings.

No. 89-754: **State v. Isaacson.** Cause having not been shown, exceptions of appellant sustained; judgment of district court summarily reversed; and cause remanded to district court for further proceedings.

No. 89-755: **State v. Schmale.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-765: **State v. Kreifels.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-769: **Zipursky v. Bernt.** Stipulation allowed; appeal dismissed.

No. 89-773: **State v. Ebert.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-779: **Beckenhauer v. Beckenhauer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-783: **State v. Royal.** Stipulation allowed; appeal dismissed.

No. 89-785: **Federal Land Bank v. Erickson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-789: **State v. Morehead.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-791: **State v. Everett.** Affirmed. See Rule 7A(1).

No. 89-792: **In re Interest of Bernard.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-795: **Occidental Life v. Flott Constr. Co.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-798: **State v. Walker.** Affirmed. See Rule 7A(1).

No. 89-799: **State v. Hawthorne.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-800: **State v. Belford.** Affirmed. See Rule 7A(1).

No. 89-802: **State v. Isaacson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-808: **State v. Carroll.** Affirmed. See Rule 7A(1).

No. 89-810: **State v. Kouma.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-812: **Carrillo v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-815: **Sports Courts of Omaha v. Schuessler.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-820: **State v. Butler.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-821: **State v. Dean.** Affirmed. See Rule 7A(1).

No. 89-823: **State v. Haywood.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-824: **Fraternal Order of Police v. County of Douglas.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-833: **State v. Muratella.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-834: **Bernt v. Satellite Development Co.** Stipulation allowed; appeal dismissed.

No. 89-836: **State v. Scaletta.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-843: **State v. Lawson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-852: **State v. Stoner.** Motion of appellant to dismiss

appeal sustained; appeal dismissed at cost of appellant.

No. 89-860: **State v. Macias.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-862: **State v. Powers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-863: **State v. Huff.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-867: **Chubb v. Garnsey.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-870: **Ellis v. Blend.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-872: **State v. Tolbert.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-873: **State v. Nutt.** Affirmed. See Rule 7A(1).

No. 89-876: **Allied Mutual Ins. v. Loup Basin Reclamation Dist.** Stipulation allowed; appeal dismissed.

No. 89-877: **State v. Peters.** Affirmed. See Rule 7A(1).

No. 89-879: **McRae v. Martin.** Stipulation allowed; appeal dismissed.

No. 89-881: **State v. Kurkowski.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-882: **State v. Ostrander.** Confession of error noted; cause remanded for modification of sentence.

No. 89-883: **State v. Jinright.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-886: **State v. Walter.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-887: **Hinrichs v. Nadrchal.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-888: **State v. Reliford.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-892: **State v. Boone.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-977: **Harlan County Bank v. Board of Equal.** Motion sustained; appeal dismissed.

No. 89-978: **Washington County Bank v. Board of Equal.**

Motion sustained; appeal dismissed.

No. 89-979: **Farmers & Merchants State Bank v. Board of Equal.** Motion sustained; appeal dismissed.

No. 89-991: **Kriz-Davis Co. v. Board of Equal.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1004: **Land & Sky, Inc. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1005: **Charles Sargent Irrigation, Inc. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1006: **Sargent Pipe Company, Inc. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1007: **Snyder Industries, Inc. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1008: **Weathercraft Co. of Lincoln v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1009: **Weathercraft Mech. Co. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1010: **Weathercraft Plumbing Co. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1011: **Woods, Aitken et al. v. State Bd. of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1012: **Hawkins Construction v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1098: **Banclease, Inc. v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1099: **First National Bank & Trust Company of North Platte v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1100: **First National Leasing, Inc. v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1101: **First of Omaha Savings Company v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1102: **First National Bank & Trust Company of Columbus v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1103: **First National Bank & Trust Company v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1104: **First National Bank of Omaha v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1105: **First Security Savings Company v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1106: **Kutak, Rock & Campbell v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1107: **Brandeis Food Management Limited Partnership v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1108: **Budget T.V. Rental, Inc. v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1120: **American Charter Federal Savings & Loan v. Board of Equal.** Stipulation allowed; appeal dismissed.

No. 89-1137: **Swensen's of Nebraska, Ltd. v. Board of Equal.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1139: **State v. Gardner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1140: **State v. Thomas.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1142: **State v. Coburn.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 89-1149: **State v. Stahn.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1150: **Abdullah v. Department of Correctional Services.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1154: **State v. Lyons.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1159: **State v. Ulrich.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1163: **State v. Rees.** Affirmed. See Rule 7A(1).

No. 89-1183: **State v. Coulter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1184: **State v. Turner.** Motion of appellee for summary affirmance sustained, judgment affirmed; see Rule

7B(2).

No. 89-1186: **Bennett v. J.C. Robinson Seed Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1191: **State v. Hooper.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1197: **State v. Jones.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1198: **State v. Penner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1200: **State v. Gilcrist.** Affirmed. See Rule 7A(1).

No. 89-1203: **State v. Cozad.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1204: **State v. Mazour.** Affirmed. See Rule 7A(1).

No. 89-1206: **State v. Hansen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1207: **State v. Polk.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1208: **State v. Zdan.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 89-1209: **Norwest Bank v. Almy.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-1211: **Blessing v. Department of Motor Vehicles.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1222: **State v. Nelson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1224: **State v. Piper.** Affirmed. See Rule 7A(1).

No. 89-1225: **State v. Adair.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1230: **State v. Marco.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1232: **State v. Kava.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 89-1233: **State v. Glouser.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 89-1239: **Roeber v. Wistrom.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1240: **Pepper Creek Ranch v. Bank of Chadron.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1243: **Weakland v. Weakland.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-1246: **In re Interest of Butler.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 89-1248: **Kiger v. Albertson's, Inc.** Stipulation allowed; appeal dismissed.

No. 89-1251: **State v. Brooks.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1260: **Smith v. Household Finance.** Stipulation allowed; appeal dismissed.

No. 89-1264: **First National Bank v. Elliott Ranch.** Appeal dismissed for lack of jurisdiction, lack of a final order, and failure to file the proper transcript pursuant to order to show cause. See Rule 7A(2).

No. 89-1272: **Krueger v. Zarley.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1274: **State v. Otte.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1277: **State v. Finley.** Appeal dismissed for lack of jurisdiction. See Rule 7A(2).

No. 89-1278: **State v. Cullum.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1279: **In re Interest of Schweigart.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1280: **In re Interest of Schweigart.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1285: **State v. Freeman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1294: **State v. Young.** Motion of appellee for

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

No. 89-1297: **State v. Grigsby.** Affirmed. See Rule 7A(1).

No. 89-1309: **State v. Franklin.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1310: **State v. Neal.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1312: **Bachman v. Bachman.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 89-1313: **State v. Pratt.** Affirmed. See Rule 7A(1).

No. 89-1314: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1320: **Pejic v. Connecticut General Life Ins. Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-1321: **State v. Pettis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1323: **Hohman v. Painter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1337: **State v. Caton.** Appeal dismissed. See Rule 7A(2).

No. 89-1339: **State v. Rangel.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 89-1340, 89-1341: **State v. Wells.** Appeal dismissed. See Rule 7A(2).

No. 89-1342: **State v. Jackson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1348: **State v. Vrtatko.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1363: **State v. Tablazon.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1364: **State ex rel. Northern Natural Gas v. Boehm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1368: **State v. Vasquez.** Motion of appellee for

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

No. 89-1376: **State v. Vasquez.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1377: **Meyer v. Meyer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1380: **State v. Prater.** By order of the court, appeal dismissed for want of prosecution.

No. 89-1391: **State v. Winnie.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 89-1414: **State v. Wright.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1424: **State v. Smith.** Stipulation allowed; appeal dismissed.

No. 89-1425: **State v. Smith.** Stipulation allowed; appeal dismissed.

No. 89-1433: **State v. Nice.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1438: **State v. Aguilar.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1446: **State v. Smith.** Stipulation considered; sentence vacated and set aside; cause remanded to district court for resentencing; defendant given credit for any and all time served pursuant to previously imposed sentence.

No. 89-1448: **State v. Smith.** Stipulation considered; sentence vacated and set aside; cause remanded to district court for resentencing; defendant given credit for any and all time served pursuant to previously imposed sentence.

No. 89-1466: **State v. Dougherty.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 89-1475: **State v. Grant.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1479: **State ex rel. McGill v. Albert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-011: **Kephart v. West Nebraska General Hosp.** Stipulation allowed; appeal dismissed.

No. 90-012: **State v. Whitemagpie.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-031: **Sillanpaa v. Immanuel Medical Center.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-082: **State v. Cunningham.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-132: **Safarik v. Safarik.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-139: **State v. Smith.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-286: **State v. Schiessl.** By order of the court, exceptions of appellant sustained; judgment of district court summarily reversed; and cause remanded to district court for further proceedings.

## IN MEMORIAM

## DONALD BRODKEY

CHIEF JUSTICE WILLIAM C. HASTINGS.

We have met on this sixth day of February 1990 in ceremonial session to celebrate the life of Judge Donald Brodkey and to take note of his many contributions to the profession which he so loved and served so ably.

Don was a colleague of mine for nearly 25 years on the district and Supreme Courts, and, more importantly to me, he was my friend. It is for that reason that I am so pleased to be privileged to preside over this special session of the court.

At this time the court recognizes Jack W. Marer, chairman of the special memorial committee and a longtime friend of Don's, who will conduct these proceedings.

MR. JACK W. MARER.

MAY IT PLEASE THE COURT, HONORABLE CHIEF JUSTICE WILLIAM C. HASTINGS AND ASSOCIATE JUSTICES, MRS. DONALD BRODKEY AND MEMBERS OF HER FAMILY, MEMBERS OF THE JUDICIARY, MEMBERS OF THE BAR, AND FRIENDS OF DONALD BRODKEY:

We gather today to remember and to talk about Donald Brodkey the man—a man of stature, high integrity, and strong principles.

We also gather to remember and talk about a devoted husband and a caring father of three charming and accomplished children.

We meet today to remember and to talk about Donald Brodkey, the lawyer, the judge, and an associate justice of this court, and his outstanding service to this state.

We assemble to remember and to talk about Donald Brodkey as a humanitarian, a friend, an interested citizen who always

remembered his roots, and who had a keen sense of humor, a warm, winning smile, and a sparkle in his eyes.

All of this made up this man—thoughtful of his fellow men, compassionate in his attitude, and ready to listen and to learn. This briefly is Donald Brodkey, a member of this court for 8 years, and who wrote many opinions which have, and will continue to have, a strong impact upon the lives of our people.

Born in Sioux City, Iowa, January 17, 1910, he attended the public school of Avon, South Dakota, and the University of South Dakota—then to the University of Iowa, where he graduated in law in 1931. He married Gertrude Rothkop on May 30, 1943. He was admitted to practice in Nebraska on the second day of October 1933.

Those of us who had the opportunity to know him in those early years soon recognized in him a love for the law and a scholar. When an opportunity arose in 1956 to support him for judgeship on the old municipal court in Omaha, we did so. He was elected and served on that bench until 1960, when he was appointed to the district court of Douglas County. That court provided the opportunity to demonstrate his knowledge of the law and to exercise his good judgment. His strength upon the trial bench was his desire to be absolutely fair and impartial at all times to all people. He was appointed to this court on April 5, 1974, where he served continuously until his retirement in 1982. He was recalled to serve on this court many times thereafter and to assist in deciding difficult and important cases. He died October 2, 1989.

This is but a brief outline of his life as a lawyer and a judge. Other members of this committee will speak of his life and his accomplishments based upon their individual experiences with him. Personally, I have known him since he arrived in Omaha. I have been privileged to see him grow and develop into a splendid jurist and a devout student of the law. His record and his life are impeccable.

HONORABLE ROBERT M. SPIRE.

CHIEF JUSTICE HASTINGS, MEMBERS OF THE COURT, MR. MARER, DEAR GERTRUDE BRODKEY, FAMILY MEMBERS, AND FRIENDS:

A number of years ago when Judge Donald Brodkey was serving as a district judge, I visited with him in his chambers about the Omaha Legal Aid Society.

The Legal Aid Society had grave problems. There was considerable public debate about the society's basic mission. Its financial support from both federal and local sources was under attack. Clearly, the society needed constructive guidance.

On behalf of the society's board of directors, I sought Judge Brodkey's counsel on these difficult legal aid issues. We chose to seek Judge Brodkey's advice because we knew it would be intelligent, well considered, responsive to the issues involved, compassionate, and realistic. In other words, the human qualities which made Donald Brodkey such a magnificent judge equipped him to serve us well as we sought direction in leading the Legal Aid Society.

In a wide-ranging and lengthy visit, Judge Brodkey gave me thoughtful and wise advice on the many concerns of the Legal Aid Society. But what I remember most, and surely shall never forget, is his parting remark to me as I left his chambers. He said, "Bob, just do what you know is right."

The judge's statement, "just do what you know is right," was both down-to-earth and insightful. In one cogent phrase he caught the essential thrust of our lengthy discussion. It also so well expressed the fundamental philosophy which governed Judge Brodkey's approach to his judicial duties, for the judge always did what he knew in his heart was right.

Throughout his distinguished career as a practicing attorney, municipal court judge, district court judge, and Supreme Court justice, Judge Brodkey repeatedly demonstrated four special characteristics:

First, he was a genuine legal scholar. Second, he was a thoughtful, wise, sensitive, and balanced decisionmaker. Third, he was a constant and effective advocate for the integrity of the legal process. Fourth, and most important of all, he was a tireless proponent of that fundamental concept which is the cornerstone of our nation's legitimacy: justice.

Judge Donald Brodkey was not bigger than life itself. No one is. But he truly was a role model for all of us. Through his example he has given us a legacy which will extend far beyond

our lives and serve the cause of justice indefinitely. This profound legacy is the result of Judge Brodkey living a life in which he actually put into practice his own advice. He did what he knew was right.

Judge Brodkey, we love you. We salute you. We shall honor you by trying to do what we know is right because that is precisely what you would have us do.

HONORABLE ROMAN L. HRUSKA.

MAY IT PLEASE THE COURT:

It is a point of high personal privilege for me to have been invited to take part in this commemoration of the life and the career of Don Brodkey.

Those who would eulogize him no doubt are legion, because he had served, after all, for well over a half century as a member of the Bar and, of course, practiced and judged the law. He devoted his talents and his energies to that profession and to that calling. It can be truly said that he made a just, honorable, and fruitful contribution to the annals of the Bar and judiciary.

However, I shall defer to others the opportunity to talk about his practice and judging of the law. They are better able to do that than I, inasmuch as in my own career, I was led into another branch of the government and was thus denied association with Don in the field of law, except for a very few years many, many years ago. Hence, my remarks will be devoted to Don himself and to the family he headed.

All who knew him recall his kindly, friendly, and gentle personality whatever the occasion: at Bar conferences, a casual meeting on the street, or at social events. His appearance with his beloved Gertrude, whenever occasion permitted, enhanced greatly their true nature as folks genuinely interested in the community at large. His camera was frequently used in meetings, and its products found early way to the mails to the subject whose likeness was recorded.

Whenever it was suitable there was expressed, and so fully justified, his great pride in the family which he and Gertrude had so well nurtured and guided, each of whom became established as a worthy member of his or her community.

But a deeper and more lasting appreciation and memory of

Don Brodkey will ever abide with me, namely, his thinking and his beliefs about human life in its entirety: its objectives, destiny, and values—in short, philosophical thinkings and ruminations.

It was pleasant and rewarding to visit with him in this regard, to exchange views, each of us from the vantage of our respective origins in terms of family history, as well as our ancestral cultures in terms of generations and even in terms of centuries.

The latest and, in fact, the last occasion of such nature occurred within this past year. It is still vivid in my memory. It was at an evening gathering of members, and their spouses on that occasion, of a fraternal order in which for many years Don and I shared and coveted membership. The dinner was in honor of a nationally known lecturer in his field of the history and the place of humankind. Following his message, a general discussion ensued.

Don, in his turn, spoke pertinent observations to the theme at hand. He also alluded to a book he was currently reading on the very subject discussed, and he offered to share it with any of his fellow members who might want to pursue the subject further.

One phase of that discussion, and one of the focal teachings of the order, related to the eternal, insoluble topic of the ultimate destiny of man, what he most desires in life, and in contemplating the mysteries of being.

The teaching referred to is a supplement to the religious and personal convictions held by each member. It seeks to develop the concept that what men most desire is light—light which will help our understanding and guidance in the earthly pilgrimage in which each of us engages.

Sometimes there is added to that idea that light is what man most desires, the further thought that what he also desires is peace of mind.

In reverent retrospect, we know that Don Brodkey lived and worked with a will derived from the faith of his fathers; that he proceeded through life with light to help guide him; and that as life went on he became possessed of a peace of mind which we all seek and cherish.

So here in this ceremony, we gratefully recall and note the

hard try which he made to live by his chosen precepts, and to note and long remember the signal and successful progress which he achieved.

MR. JAMES W.R. BROWN.

MAY IT PLEASE THE COURT:

This memorial service provides us an opportunity to reflect on and express appreciation for the contributions that Don Brodkey has made to his profession, his family, and our community. We are passing through a narrow segment of time when traditional values derived from centuries of experience, the ideas and ideals of our greatest minds, and our heritage of spiritual beliefs and moral principles are being challenged.

The family, once considered the basic unit of society, is under attack. The preoccupation of so many of our citizens with the immediate gratification of desires at the expense of long-term values threatens our ability to govern ourselves, and the breakdown in respect for law makes us wary even of walking our streets alone.

Don Brodkey's intelligence, his education, his heritage, and his sense of historical perspective enabled him to recognize and hold fast to those values that bring real happiness and real progress.

Others here have recounted his accomplishments as a lawyer, as a trial judge, and as a member of this court. Such success requires a bright mind, an excellent education, thorough training in logic, hard work, a sense of duty, and a sense of humor. Don had all these.

As my part of this proceeding, I would like to comment very briefly on his education. Before doing so, however, I want to point out the major contribution he has made to society through his family. Don and his lovely wife, Gertrude, who is also a talented lawyer, contributed to our society two sons and a daughter, all of whom are making major contributions to their respective fields of law and medicine.

They received from Don and Gertrude very bright minds and have learned from them the importance of an excellent education, a commitment to the search for truth, and the need for hard work. Don's contributions are continuing through

them.

Don was a graduate of the University of Iowa College of Law. This led me to seek him out when I first came to Omaha to practice, since I was also a graduate of that institution. This initial meeting was followed by a long and close friendship.

We shared the conviction that an outstanding legal education was made available to us. And, fortunately, Don took full advantage of this opportunity. He was elected to membership in the Order of the Coif, a symbol of academic excellence in law school. The Phi Beta Kappa key, which he earned in undergraduate school at the university, reflected similar academic excellence in the broader field of liberal arts. He also served on the board of editors of the Iowa Law Review, a singular recognition of his scholarship.

This commitment of a facile and analytical mind to the hypothetical problems of the academic forum was carried over into his professional career. As a result, we are today recognizing and expressing our appreciation for the accomplishments of Donald Brodkey as a lawyer, a judge, and a citizen.

In doing so, we are also, hopefully, making a greater commitment to those values that have contributed to and are reflected by those accomplishments. To this extent, we will be joining with his family in continuing and enhancing the contributions Justice Brodkey has made to the improvement of our society and the administration of justice.

MR. HAROLD L. ROCK.

MAY IT PLEASE THE COURT:

It is indeed an honor to participate today in remembering Judge Donald Brodkey. On January 17, I sat down to make a few notes in preparation for this memorial service. That was the day Judge Brodkey would have finished his 80th year on this earth. He was most fortunate to have spent those years in hard work that brought him to prominence as a member of this court. Twenty-five years of public service as a judge in Nebraska was a great contribution.

I recall the times when Judge Brodkey looked down on me from this bench, from the district bench in Omaha, and from

the municipal bench in Omaha when I was a new lawyer. Judge Brodkey was a generation ahead of me in life. Whatever bench he occupied, he seemed a benign and gracious judge.

He was my own father's age when he was a municipal judge and I was a novice beginning in Omaha. He treated all the young lawyers without condescension, but we felt his avuncular interest in our progress, with thoughtful acceptance of our arguments. He gave us confidence that, although we might not prevail, at least he had understood our points. Even later, in this court and in his retirement, his interest in us did not change. The judge always seemed interested in what people felt and thought, how they were getting along in life, and how they were getting along in the practice of law.

His intellectual curiosity and scholarship, exhibited in college and evidenced by his 2 years on the Iowa Law Review and his Phi Beta Kappa and Order of the Coif memberships, made him a respected judge. He not only understood your points, he took the time to delve further, to look it up. He was ready for you. He enjoyed discussions of the finer points and liked to probe a little deeper.

As a product of the New Deal days, he knew what tough times were, and he learned to practice law when the Depression days came down around his ears. But the New Deal days also were a lesson in what a very important part the law can play in people's lives. He saw the social legislation of the New Deal and studied the ways the courts and lawyers handled the changing laws. He carried those lessons with him to the bench.

Although he was by no means a single-subject man, the law played a central role in his life. Even Judge Brodkey's good spouse, Gertrude, was a lawyer when they were married in 1943. His auto plate spoke volumes—de jure were the words on his auto plate. He was really pleased to have thought of that one before some of his brethren on the bench thought of it.

Judge Brodkey was a happy man. You could expect a little laugh or a great smile and always a genuine hello. He made you feel he was happy to have a chance to visit a minute. He liked a chance to laugh with you.

He is an example of the truth that one can, without having great power in the political or governmental sense, make of

integrity and credibility a great asset. Lincoln's words are apropos in remembering him: "I do the very best I can. The very best I know how, and I mean to keep doing so until the end. If the end brings me out right, what is said against me won't amount to anything."

Judge Brodkey made the world a better place to the full extent of his considerable talent and energy. What more could we have asked of him?

ASSOCIATE JUSTICE LESLIE BOSLAUGH.

It is an honor for me to be asked to respond briefly to the court in this ceremony where we honor our colleague. Judge Donald Brodkey became a member of this court on the occasion of his appointment April 1, 1974. He served with distinction until the occasion of his retirement on January 17, 1982.

Judge Brodkey served in this court on many occasions both before his appointment and after his formal retirement. Judge Brodkey enjoyed the work of the court and was always willing to lend a helping hand whenever it was necessary.

During his service as a judge of this court, he wrote 305 signed opinions. The first was published April 22, 1966, approximately 8 years before his appointment to the court. The last was published March 25, 1988, more than 6 years after his formal retirement. They appear in approximately 50 volumes of the Nebraska Reports. They attest to his valuable service to this court and to the State of Nebraska. They do not include the per curiam opinions, orders, and reports which are dispositive of perhaps half of the cases we decide and are part of the daily work of the court.

I hesitate to attempt to discuss what might be said to be leading opinions of the many that he authored, but I believe that the *Royal Indemnity* case, decided in 1975, is representative of those. In that case the rule against contribution between negligent joint tort-feasors which had existed in this state for many years was abolished. It was truly a landmark decision.

When we lost Judge Brodkey, we lost much more than a distinguished member of the court. We all lost a close personal

friend.

If I were to select what I believe was the outstanding quality that Judge Brodkey possessed as a jurist, I think I would say that it was his scholarly approach to his work. Judge Brodkey had a very fine sense of humor, but he approached his judicial work with a very serious vein. A favorite statement of his was that there are no unimportant cases. Every case is important to someone.

In preparing his opinions, Judge Brodkey studied the record, studied the authorities, gave careful consideration to each contention that any of the parties had made, and then commenced preparation of his opinion, but only after he was satisfied how each question in the case should be determined.

Judge Brodkey will always be remembered as an outstanding jurist, a thorough scholar, and a very fine friend.

MR. JACK W. MARER.

On behalf of the family of Judge Brodkey, his relatives and friends, and this Committee, I desire to thank the court for this occasion so that we might express our feelings concerning Judge Brodkey, his accomplishments, and his life, and for your very kind consideration of his life and of the work of Judge Brodkey. This completes the formal presentation of this memorial service. I would like to offer, Mr. Chief Justice, a resolution.

Be it resolved that these proceedings be spread upon the records of this court and that a copy thereof be provided to Mrs. Brodkey and her family.

CHIEF JUSTICE WILLIAM C. HASTINGS.

It is so ordered. We are adjourned.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

---

# OTOE COUNTY NATIONAL BANK, APPELLANT, V. WILLIAM J. FROELICH, JR., APPELLEE, NANCY FROELICH BERIGAN, TRUSTEE OF THE TESTAMENTARY TRUST OF WILLIAM JOSEPH FROELICH, DECEASED, GARNISHEE-APPELLEE.

448 N.W.2d 917

Filed December 8, 1989. No. 87-991.

1. **Garnishment: Appeal and Error.** Garnishment is a legal, not an equitable, remedy. The factual findings of the trial court in a law action tried without a jury have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Decedents' Estates: Garnishment: Courts.** An heir's distributive share of a decedent's estate, as decreed by the county court, in the hands of an administrator is not subject to garnishment under process from the district court.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

Emmett D. Childers for appellant.

Thurman Gay for garnishee-appellee.

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

FAHRNBRUCH, J.

Otoe County National Bank (Otoe Bank) appeals an order of the district court for Holt County finding that a garnishment brought by the bank must fail because William Joseph Froelich's testamentary trust had never been funded and because no person ever acted as a trustee. We affirm.

Otoe Bank served garnishment papers upon "Nancy Froelich Berigan, Trustee of testamentary trust created within the Estate of William Joseph Froelich, deceased, in County

Court of Holt County, Nebraska, Estate No. 6272." To succeed in this garnishment, it was necessary for the bank to prove by a preponderance of evidence (1) that Nancy Froelich Berigan (Nancy Froelich) at the time of the garnishment was the trustee of William Joseph Froelich's testamentary trust and (2) that as such trustee, Nancy Froelich had funds in her hands belonging to William J. Froelich, Jr. (Bill Froelich), which were subject to garnishment.

"Garnishment is a legal, not an equitable, remedy. The factual findings of the trial court in a law action tried without a jury have the effect of a finding by a jury and, on appeal, will not be set aside unless clearly wrong." *Action Heating & Air Cond. v. Petersen*, 229 Neb. 796, 799, 429 N.W.2d 1, 3 (1988).

William Froelich died February 5, 1980. His last will and testament provided for a marital deduction trust with a power of appointment in his widow and a residuary trust. Under the marital trust, Irma Froelich, William's surviving spouse, was given the net trust income for her life and, under certain conditions, distributions of the corpus. The residuary trust provided income for Irma Froelich and the children and descendants of deceased children of William Froelich. In case of inadequate income from the residuary trust and other sources, distributions of the residuary trust were possible. If Irma Froelich failed to exercise her power of appointment, the residue of the marital trust spilled over into the residuary trust.

The residuary trust was to terminate upon the death of the widow and was to be distributed by right of representation to William Froelich's children and any of a deceased child. Irma Froelich, Charles Froelich, and Nancy Froelich Berigan were named William Froelich's personal representatives and testamentary trustees. A codicil added Bill Froelich as a personal representative and trustee.

When he died, William Froelich was survived by his widow, Irma, and his children, Charles, Bill, James, Nancy, and Mary. One child, James Froelich, was deceased and was survived by his four children at the time of the garnishment hearing. On March 31, 1980, William Froelich's will was admitted to probate in the Holt County Court. Nancy and Bill Froelich declined to serve as personal representatives. Charles and Irma

Froelich initially served as copersonal representatives of the estate. They filed an original inventory in February 1981, showing a net estate value of $1,177,219.48. They also filed a federal estate tax return. An inventory of estate property as of December 1, 1986, was filed on January 6, 1987. It reflected a net estate value of $1,665,981.

Nancy Froelich testified that she succeeded Charles Froelich as a copersonal representative of William Froelich's estate after Charles borrowed money for the use of himself and Bill Froelich. He pledged and sold estate property to clear up the loans and gave promissory notes to the estate. After her mother's death on September 24, 1986, Nancy Froelich filed a petition for formal probate of Irma Froelich's will. Nancy testified that her mother's will was being contested.

Appellant Otoe Bank in 1982 loaned money to an Oklahoma oilfield trucking corporation. Bill Froelich was the corporation's majority stockholder. He and two other individuals personally guaranteed the Otoe Bank loan. The corporation defaulted on the loan and declared bankruptcy. Otoe Bank obtained a federal court judgment for $1,217,720 plus interest, fees, and costs against Bill Froelich. A federal bankruptcy court held that the judgment was not discharged by Bill Froelich's bankruptcy in Florida. The Oklahoma judgment was registered as a foreign judgment in the district court for Holt County. An execution of the judgment was returned unsatisfied. Otoe Bank had summons and interrogatories in garnishment served upon Nancy Froelich as the trustee of the William Froelich testamentary trust. She reported that as trustee she was not indebted to Bill Froelich. Thereupon, Otoe Bank filed an application to hold Nancy Froelich as testamentary trustee liable for the judgment against Bill Froelich. A hearing was held on September 2, 1987, and the court held against Otoe Bank.

In its appeal, Otoe Bank alleges several assignments of error, which may be summarized as claiming that the district court erred in finding that William Froelich's property was held by Nancy Froelich in her capacity as personal representative of William Froelich's estate and that therefore Nancy Froelich would not be subject to garnishment process issued to collect

the foreign judgment against Bill Froelich.

Otoe Bank called Nancy Froelich to testify in support of its position that she was William Froelich's testamentary trustee and that she held trust assets. On direct examination, Nancy testified that she was a trustee and had been performing the duties of a trustee, that the family residence was owned by the trust at the time of the garnishment, that the net proceeds of the sale of some bank shares were invested in securities which were being held by Nancy and her sister, and that Nancy filed fiduciary tax returns in connection with the trust. Any legal conclusions by Nancy Froelich are not binding on the trier of fact. The Froelich home and the securities referred to in Nancy's testimony were listed as assets in the estate inventory filed January 6, 1987. After a hearing, the Holt County Court, on August 7, 1987, held that Charles Froelich contracted away any interest he had in the family home and that the home was an asset of William Froelich's estate.

Moreover, on cross-examination Nancy Froelich testified that neither she, nor Charles Froelich during his tenure as a copersonal representative, ever established a trust. The trial court found there was no evidence that the testamentary trust had ever been funded. Nothing in the inventories or the accounting submitted by the personal representative demonstrates that the trusts were ever funded. The trial court expressly found that no person ever acted or purported to act as a testamentary trustee and that William Froelich's testamentary trust was never funded. That being true, there were no funds subject to garnishment in the hands of Nancy Froelich as testamentary trustee. After a review of the record, we cannot say that the trial court was clearly wrong in finding that Nancy Froelich acted as a personal representative and never as a testamentary trustee, or in finding that the testamentary trust was never funded.

Since funding of William Froelich's testamentary trust was to be from his estate, and since Nancy Froelich never acted as trustee, it follows that any property from her father's estate in her hands was estate property. We have held that an heir's distributive share of a decedent's estate, as decreed by the county court, in the hands of an administrator is not subject to

garnishment under process from the district court. *American State Bank of Springfield v. Phelps*, 120 Neb. 370, 232 N.W. 612 (1930). Further, the evidence only reflects that Bill Froelich *may* have some interest remaining in the estate, but that is subject to any setoffs the estate might properly claim against his distributive share. Nancy Froelich testified that it is her position as personal representative that Bill Froelich owes the estate at least $127,500. The trial court found that it was Nancy Froelich's position that at the time of the garnishment Bill Froelich no longer possessed a distributive share in William Froelich's estate.

Otoe Bank next contends that it is entitled to garnishment under our holding in *First Nat. Bank of Omaha v. First Cadco Corp.*, 189 Neb. 734, 205 N.W.2d 115 (1973). There, we held that when the period of a spendthrift trust has expired and the beneficiary has the unrestricted right to demand the trust res, the property may be reached by garnishment even though the trustee has delayed making actual distribution.

The holding in *First Cadco Corp., supra*, is distinguishable on its facts. In *Cadco*, there was a trustee and a trust res. In the Otoe Bank case, the trial court found that at the time of garnishment no person had acted as a trustee and there was no trust res, since William Froelich's testamentary trust had not been funded. We cannot say that the trial court was clearly wrong in finding those facts to be true. The trial court's judgment is affirmed.

AFFIRMED.

---

## LEORA GOODLETT, APPELLANT, V. BLUE CROSS AND BLUE SHIELD OF NEBRASKA, A CORPORATION, APPELLEE.

449 N.W.2d 9

Filed December 8, 1989. No. 88-197.

1. **Motions to Dismiss: Directed Verdict.** In considering a motion to dismiss or a motion for a directed verdict at trial, 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 only 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.

2. **Employment Contracts: Termination of Employment.** When the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, generally, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability.
3. **Employment Contracts.** Where an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude job security provisions in an employee handbook from becoming part of the employment contract.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Patrick W. Healey, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellant.

Soren S. Jensen and J Russell Derr, of Erickson & Sederstrom, P.C., for appellee.

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

WHITE, J.

This is an appeal from an order of the Lancaster County District Court sustaining defendant's motion to dismiss at the close of plaintiff's case.

In considering a motion to dismiss or for a directed verdict at trial, this court has held that 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 only 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. *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989); *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989).

Leora Goodlett was employed in the customer service department of Blue Cross and Blue Shield of Nebraska (the employer) in the Lincoln office. Goodlett's supervisor informed her of complaints about her job performance from customers. The employer decided to transfer Goodlett to the Omaha office for closer supervision. Goodlett was directed to report for work in Omaha on January 6, 1986. Despite being warned about the consequences of the act, Goodlett reported for work on January 6 in Lincoln, and was served with a written request to leave the building because she was not authorized to be in the building. Goodlett's employment was subsequently terminated.

On July 24, 1986, Goodlett filed a petition alleging that her employment was terminated by the employer without following the disciplinary procedure contained in the employee handbook. The case was heard on January 26, 1988. At the close of Goodlett's evidence, the employer moved to dismiss, which motion was sustained. Goodlett has appealed to this court, contending the trial court erred in sustaining the motion.

On appeal, Goodlett first contends that the disciplinary procedure contained in the employee handbook created expectancies of continued employment which were contractual in nature. The employee handbook which was received into evidence provided for a four-step procedure for disciplinary action. The handbook noted:

> Progressive disciplinary steps and formal grievance procedure ensure that no one is terminated for disciplinary reasons from employment without formal counseling to solve the employment problem.
>
> . . . [T]hese progressive steps . . . ensure that no employee is terminated because of race, color, religion, national origin, age, sex, disability including pregnancy, or veteran status.

Step 1 provided that an employee was to be given an oral warning for the violation of a corporate policy. Step 2 provided for a written warning if the problem with the employee persisted. This step also provided, "The written warning explicitly describes the nature of the violations, date, times, places, and other pertinent details. Additional documentation

should be attached." Step 3 provided for formal probation if the problem continued. Formal probation could last 30, 60, or 90 days, during which time the employee was expected to resolve the problem or be terminated from employment. Step 4 provided that if the employee repeated the same problem within 1 year of the start of oral or written warning, the next disciplinary action would follow.

The law in Nebraska is quite clear that when the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, generally, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988); *Stratton v. Chevrolet Motor Div.*, 229 Neb. 771, 428 N.W.2d 910 (1988); *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987); *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983). This court expanded this rule in *Morris, supra*, where we held that where an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude job security provisions in an employee handbook from becoming part of the employment contract. In the present case, then, the procedure for disciplinary action could become part of Goodlett's oral contract of employment, and the employer could be liable for breaches of that contract.

However, viewing the evidence in the present case, we can reach only one conclusion: The employer did not breach the employment contract because the employer followed the disciplinary procedure contained in the handbook. On November 8, 1985, Goodlett received a disciplinary action report from Lori Rimington, who supervises Goodlett's immediate supervisor, Deb Hemmingsen. This report informed Goodlett that the employer had recently received a complaint from the State of Nebraska group that several of their employees had complained of lack of service and rudeness on Goodlett's part. The employer felt there was a need for closer supervision, and therefore directed Goodlett to report for work in the Omaha office on a permanent basis effective January 6, 1986. On November 14, 1985, Goodlett received a written memo from Rimington, which stated in pertinent part:

Formal disciplinary action begins with a written warning which describes the problem and the action to be taken to correct the specific problem. If definite progress is not shown within 2 weeks, formal probation would be the next step. However, if the problem is of a very serious nature and requires immediate attention, termination may be required without going through the entire disciplinary process.

As discussed with you last Friday, you were given a written warning because of complaints from a major group of lack of service which includes giving incorrect information and rudeness. These types of complaints are very serious since it could result in the loss of major group business. The purpose of the written warning was to provide a positive approach to remedying the situation by transferring you to the Omaha office on a regular basis effective January 6, 1986 where you would receive more direct supervision. The warning was for 90 days to allow you time to make the transition. The 90 day period was effective with our conversation on Friday, November 8.

Since our conversation Monday, November 11, I have received two additional complaints of incorrect information which will be discussed with you in the very near future.

Since the consequences of complaints from any group is [sic] serious and affects our marketing capabilities, any further complaints received after November 8 will result in immediate termination.

If you wish to discuss this further, please contact me or Dianna Wheeler in Human Resources.

The employer later offered Goodlett $500 reimbursement, should she decide to permanently relocate in Omaha. Through subsequent correspondence between Goodlett's attorney and the employer's attorney, Goodlett was warned that if she did not report for work in Omaha on January 6, her employment would be terminated.

Goodlett contends the employer violated the disciplinary procedure in several respects. She contends the company did not follow the procedural steps because they did not give her an

oral warning about her alleged misconduct and because they did not give her specific facts regarding the alleged complaints. We note here that Goodlett's own testimony was conflicting on whether oral notice was given. Even assuming, however, that oral notice was not given to Goodlett, this omission would not violate the employer's established disciplinary procedure. The handbook, following step 3, provides that "[i]f the offense is of a very serious nature and requires immediate action, the manager is not required to go through Steps 1 and 2." These provisions permit the employer to modify its disciplinary procedure in appropriate circumstances.

By the terms of the handbook, the employer was obligated to give neither oral warning nor explicit description of the violation, as required by steps 1 and 2, if the employer deemed the misconduct to be sufficiently serious. The November 14 memorandum indicates the employer regarded the situation as very serious. The employer, therefore, was not required to provide steps 1 and 2. The November 14 memorandum notifies Goodlett of the disciplinary procedure the employer will follow. Simply put, the employer followed the procedure set out in the employee handbook.

Second, Goodlett argues that where an employee handbook provides procedures to be followed before termination, certain due process requirements must be met. This due process, Goodlett contends, should include timely and adequate notice detailing reasons for the initiation of the action; effective opportunity to defend by confronting adverse witnesses; the opportunity for representation by counsel; an impartial decision maker; a decision resting solely on legal rules and evidence adduced at the hearing; and the decision maker's reasons for the decision and the evidence on which the decision was based.

Goodlett's arguments are misplaced. In order to maintain an action against an otherwise at-will employer, the contract relied on defines the due process to which the employee is entitled.

As noted above, the employer complied with the terms of the handbook. Therefore, the trial court's order dismissing the petition must be affirmed.

We observe that a separate grievance procedure is set forth in

the handbook. Goodlett chose not to accept the transfer and not to avail herself of the grievance procedure. She may not be heard to complain here of the consequences of her free choice.

AFFIRMED.

---

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF GRAND ISLAND, A SAVINGS AND LOAN ASSOCIATION, APPELLEE, V. McDERMOTT & MILLER, A PARTNERSHIP, ET AL., APPELLANTS.
449 N.W.2d 12

Filed December 8, 1989. No. 88-261.

**Contracts: Assignments: Security Interests: Uniform Commercial Code: Words and Phrases.** Rights to payment under a written contract for the sale of a business which are pledged as collateral pursuant to a security agreement are general intangibles and, as such, are governed by article 9 of the Uniform Commercial Code.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Appeal dismissed in part, and in part affirmed as modified.

Les Seiler, of Brock, Seiler & Smith, for appellants.

Daniel M. Placzek, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

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

CAPORALE, J.

This is a suit on a security agreement Martin Chapman executed in favor of plaintiff-appellee, Home Federal Savings and Loan Association of Grand Island, and in connection with which he assigned to Home Federal sums to become due him from defendants-appellants, McDermott & Miller, a partnership, McDermott & Miller, P.C., a professional corporation, and Integrated Computer Concepts, Inc., a business corporation. Following a bench trial, the district court entered judgment in favor of Home Federal and against the

partnership. For reasons which are not explained by the record, the district court made no ruling with respect to either the professional corporation or the business corporation, this notwithstanding the fact that its failure to do so was specifically called to the district court's attention in defendants' motion for new trial. Nonetheless, all three defendants have appealed to this court. Since, as to the professional and business corporations, the suit remains under submission to the district court, the appeal as to them is dismissed as premature. For this reason, the practice of deciding only part of a case is disapproved. The assignment of error which remains operative is the partnership's claim that the district court should have found that Chapman's assignment to Home Federal was invalid. For the reasons which follow, the judgment of the district court against the partnership is affirmed as modified.

Although the professional and business corporations are not parties to this appeal, they are integral parts of the transactions which give rise to this suit. Thus, their role is discussed to the extent necessary to resolve the partnership's assignment of error.

The partnership is composed of Curtis Griess, Niels McDermott, Robert Miller, and Martin Chapman, and was engaged in the practice of accounting and the business of processing data. On January 2, 1979, the partnership sold its accounting practice to the professional corporation and on the same date sold its data processing business to the business corporation, which was originally called McDermott and Miller, EDP, Inc.

The initial shareholders of the professional corporation were the four members of the partnership and three individuals who had been previously employed by it. These seven individuals apparently also comprised the initial shareholders of the business corporation, but the record is not entirely clear in this regard. The business corporation changed its original name to W.O.R.K., Inc., which changed its name to Integrated Computer Concepts, Inc. Integrated subsequently sold its assets to the professional corporation and was thereafter dissolved.

The January 2, 1979, installment sale agreement with respect

to the sale of the accounting practice by the partnership to the professional corporation set the price of the accounting practice at $1,066,763 and called for a $240,000 downpayment, with the remaining $826,673 to be paid in 120 monthly installments of an amount sufficient to fully amortize the unpaid balance, including interest at a rate of 9 percent per annum. This contract called for interest payments in March, April, and May of 1979, and 120 monthly payments of $10,472 commencing July 1, 1979.

The January 2, 1979, installment sale agreement with respect to the sale of the data processing business by the partnership to the business corporation set the price of the data processing business at $216,252 and called for a $48,600 downpayment, with the remaining $167,652 to be paid in 120 monthly installments of an amount sufficient to fully amortize the unpaid balance, including interest at the rate of 9 percent per annum. This contract called for interest payments in March, April, and May of 1979, and 120 monthly payments of $2,123.78 commencing July 1, 1979.

After purchasing the business corporation's assets, the professional corporation assumed the monthly payments the business corporation had been required to make under its January 2, 1979, contract to purchase the data processing business. These payments were made through July 1987, after which the professional corporation ceased making contract payments.

Early in 1981, one of the partners, Martin Chapman, experienced financial problems. As a result, Chapman negotiated an agreement causing the professional corporation to accelerate its payments due the partnership under the January 2, 1979, accounting practice sale agreement. This accelerated payment agreement between Chapman, the partnership, and the professional corporation required the professional corporation to make prepayments of $15,000 on February 13, 1981, and $42,500 on May 1, 1981; required the partnership to distribute these prepayments to Chapman; and required Chapman to use these prepayments to reduce his indebtedness at Overland National Bank and Commercial National Bank, both of Grand Island, Nebraska.

The accelerated payment agreement also provides the following:

> This Agreement shall be binding upon the heirs, successors, and assigns of the parties hereto, and shall inure to their benefit likewise. CHAPMAN agrees not to make any assignments of this Agreement or Exhibit "A" without the express written consent of [the professional corporation] and [the partnership] nor shall he pledge this Agreement or Exhibit "A" as collateral security without the express written consent of [the professional corporation] and [the partnership].

The "Exhibit 'A' " referenced in the foregoing quotation is apparently the January 2, 1979, accounting practice sale agreement between the partnership and the professional corporation, which is mentioned in the recitals portion of the accelerated payment agreement. The accelerated payment agreement does not affect the data processing business sale agreement.

On May 27, 1983, Home Federal loaned Chapman $35,000. Home Federal advanced an additional $10,000 on November 7, 1983, and on November 29, 1983, both notes were renewed in the form of one $45,000 note. This $45,000 note was again renewed on June 11, 1984. The June 11, 1984, note recites that it "is a renewal of a Financing Statement and Note dated May 27, 1983, and which statement was filed with the Hall County Clerk April 13, 1984 to secure said payment of a $45,000.00 loan."

The security agreement/financing statement which accompanies the June 11, 1984, note is dated April 4, 1984, and lists as collateral, among other things, contract receivables from the professional corporation and the business corporation "subject to the present assignment held by Commercial National Bank & Trust Company." Home Federal also filed a financing statement with the Secretary of State; while we cannot be absolutely certain of the date of this filing due to the poor quality of the copy of the document contained in the record, it appears to have been filed on May 9, 1984, and covers Chapman's contract receivables from the professional corporation and the business corporation.

At the time the April 4, 1984, security agreement/financing statement was signed, the partnership was distributing two monthly payments to Commercial National Bank of Grand Island for the benefit of Chapman. These distributions represented Chapman's share of payments received by the partnership under the accounting practice sale agreement and the data processing business sale agreement.

One of these monthly payments was approximately $2,035 per month and represented Chapman's share of the proceeds from the accounting practice sale agreement. The other monthly payment amounted to approximately $465 per month, representing Chapman's share of the installment sale agreement for the sale of the data processing business. Each month, the partnership forwarded each of these payments directly to the bank to reduce amounts owed by Chapman.

On August 1, 1985, Home Federal's counsel sent a letter to the partnership informing it of Home Federal's perfected security interest in Chapman's contract receivables from the partnership and the professional corporation, subject to a prior assignment to Omaha National Bank, the successor in interest to Commercial National Bank. This letter also informed the partnership of Chapman's default and directed the partnership to make future payments to Home Federal.

On that very day, the partnership made three payments to Home Federal, one in the sum of $1,271.02, reflecting Chapman's $2,035.42 share of the regular monthly payment due the partnership under the contract to sell the accounting practice, less $764.40 which represented the final payment under the assignment by Chapman to Omaha National Bank. The other two payments of $472.67 each represented Chapman's share of the July and August 1985 payments to the partnership under the contract to sell the data processing business. Correspondence from partner Griess accompanying these partnership payments stated that the next month's payments would be combined into one check to Home Federal and that Griess would mail future checks to Home Federal as he received payments.

Because of disputes with Chapman, the professional corporation has, since August 1, 1985, withheld payments

which would otherwise have been made to the partnership for Chapman's share of payments arising under the accounting practice installment sale agreement. Consequently, not having received these payments, the partnership has made no distributions to Home Federal.

While the partnership distributed to the other three partners their respective shares of the monthly payments received from the professional corporation after August 1, 1985, for the sale of the data processing business, the partnership has retained Chapman's share of those payments. These retained payments consist of 24 payments of $472.67 each, for a total of $11,344.08.

Griess testified that Chapman's share of these payments was held in escrow by the partnership on the advice of the partnership's attorney after Chapman declared bankruptcy on August 26, 1985. At this point, however, the partnership seems to be holding these payments because of a dispute arising out of an amended employment agreement between Chapman and the professional corporation.

The partnership argues that the district court erred in deciding the case in favor of Home Federal because the accelerated payment agreement specifically prohibits Chapman from assigning or pledging funds receivable under the accounting practice sale agreement without the express written consent of the partnership and professional corporation. However, the answer to this issue is clearly set forth in the Nebraska Uniform Commercial Code.

First, it should be noted that by virtue of its security agreement and financing statement, Home Federal has a perfected security interest in Chapman's contract receivables. This security interest is governed by article 9 of the Uniform Commercial Code. See, Neb. U.C.C. § 9-102 (Reissue 1980) (general applicability of article 9); Neb. U.C.C. § 9-201 (Reissue 1980) (general validity of a security agreement); Neb. U.C.C. § 9-203(1) and (2) (Reissue 1980) (attachment and enforceability of security interests); Neb. U.C.C. § 9-302 (Reissue 1980) (filing to perfect security interest).

The asset which Chapman has pledged to Home Federal is a "general intangible" under Neb. U.C.C. § 9-106 (Reissue

1980), which reads:

> "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

See *Crichton v. Himlie Properties*, 105 Wash. 2d 191, 713 P.2d 108 (1986) (seller's rights under contract for conveyance of real estate held to be a general intangible).

We next note the relevancy of Neb. U.C.C. § 9-318(4) (Reissue 1980), which provides:

> A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

Neb. U.C.C. § 9-105 (Reissue 1980) defines account debtor: "(1) In this article unless the context otherwise requires: (a) 'Account debtor' means the person who is obligated on an account, chattel paper, or general intangible." Furthermore, the term "person" in § 9-105 includes organizations. Neb. U.C.C. § 1-201(30) (Reissue 1980).

Thus, it is clear that § 9-318(4) negated any provision in the February 13, 1981, accelerated payment agreement restricting Chapman from pledging moneys receivable under the accounting practice sale agreement as collateral for his loan from Home Federal.

The partnership offers other affirmative defenses which may be available to the professional corporation. Disputes which the professional corporation may have with Chapman do not affect the partnership's obligation on Chapman's assignment to Home Federal. However, the partnership is not an obligor under the contracts which Chapman has assigned; the

partnership is only an intermediary through which payments it receives from the professional corporation on Chapman's behalf flow to Home Federal. Thus, while the partnership cannot assert defenses which may be available to the professional corporation, neither can the partnership be required to distribute to Home Federal payments it does not receive from the professional corporation. The judgment against the partnership must therefore be reduced to the amount of the undistributed payments it has received from the professional corporation, that is, $11,344.08. Since these damages are liquidated and the cause of action accrued prior to January 1, 1987, *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989), Home Federal is entitled to prejudgment interest, *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989). The judgment of the district court is affirmed as so modified.

Whether Home Federal has established the right to recover from the corporations is a matter, in the first instance, for the district court to resolve on the record already made before it.

APPEAL DISMISSED IN PART, AND IN PART AFFIRMED AS MODIFIED.

---

## STATE OF NEBRASKA, APPELLEE, V. CARL TAYLOR, APPELLANT.

448 N.W.2d 920

Filed December 8, 1989. No. 88-1071.

1. **Postconviction: Appeal and Error.** The trial court's findings on a motion for postconviction relief will be upheld unless they are clearly wrong.
2. **Minors: Arrests: Notice: Jurisdiction.** The finding required by Neb. Rev. Stat. § 29-401(2) (Reissue 1985) that the parents of a child under the age of 18 years have been notified of the child's arrest or that reasonable efforts to notify have been made is not jurisdictional.
3. **Minors: Arrests: Notice: Due Process.** Parental notification statutes are only intended to furnish an additional safeguard to ensure that the juvenile's basic right to due process is not violated.
4. **Constitutional Law: Attorney and Client: Conflict of Interest: Effectiveness of Counsel.** Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict

of interest exists and that conflict affects the performance of counsel.

5. **Constitutional Law: Conflict of Interest: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel due to a conflict of interest, the defendant has the burden to prove (1) his attorney actively represented conflicting interests and (2) an actual conflict adversely impacted his attorney's performance, resulting in detriment to the defendant.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Steven M. Lathrop, of Hauptman, O'Brien, Wolf, Hadley & Lathrop, P.C., for appellant.

Carl Taylor, pro se.

Robert M. Spire, Attorney General, and Melanie J. Whittamore for appellee.

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

BOSLAUGH, J.

Upon pleas of guilty to two counts of robbery and one count of first degree forcible sexual assault, the defendant, Carl Taylor, was sentenced on February 17, 1982, to imprisonment for terms of 5 to 10 years for the robberies and to a term of 12 to 15 years for the sexual assault, all sentences to be served consecutively. Upon direct appeal, the judgments were affirmed.

On October 19, 1987, the defendant filed a pro se "Motion to Vacate and Set Aside Judgement and Sentence" in the trial court. On March 16, 1988, after counsel had been appointed, an amended petition for postconviction relief was filed.

An evidential hearing was held on August 18, 1988. The trial court found that although the defendant was less than 18 years of age at the time of his arrest and that no direct notification to the defendant's parents of his arrest was made by the office of the county attorney or the office of the public defender, the defendant's grandmother with whom the defendant was living knew of the arrest and that the defendant was going to plead guilty; that the whereabouts of the defendant's father was unknown; that both the public defender and the defendant's grandmother had talked with the defendant's mother, who was

in Michigan, by telephone; and that although the requirement of Neb. Rev. Stat. § 29-401(2) (Reissue 1985) had not been complied with, there was no prejudice to the defendant, and he had not been denied due process of law or fundamental fairness. The trial court further found that the defendant had not been denied effective assistance of counsel because the same lawyer had represented both the defendant and his brother in the trial court. The motion for postconviction relief was denied, and the defendant has appealed.

The brief filed in this court by the defendant's counsel assigns as error the two matters on which the trial court made extensive findings.

The defendant was born June 23, 1964, and was a senior in high school at the time the offenses were committed.

The first robbery and the sexual assault took place on September 4, 1981. The defendant and his 18-year-old brother, Tobin, broke into the home of the victim, a woman who was 81 years of age, intending to steal money. They took money, two cameras, and other items, including a diamond ring which the defendant removed from the finger of the victim. The defendant's brother sexually assaulted the victim while the defendant assisted him by holding a pillow over the face of the victim.

The second robbery took place on September 19, 1981. The defendant and his brother broke into the home of the victim and took various items including a 9-millimeter automatic revolver and a jewelry box containing several rings.

After the defendant and his brother had been arrested, they both gave statements to the police concerning the crimes. The defendant's pleas were the result of a plea bargain that involved the dismissal of a separate burglary charge and a separate robbery charge that had been filed against the defendant and an agreement that other burglary charges would not be filed.

The record of the arraignment shows that the defendant's pleas were made voluntarily and intelligently after a full explanation of the defendant's constitutional rights. The trial court advised the defendant concerning the nature of the charges, the right to assistance of counsel, the right to confront the witnesses against him, the right to a jury trial, the right to

remain silent and the privilege against self-incrimination, and the range of penalties for the crimes with which he was charged. The trial court also determined there was a factual basis for the pleas by the defendant's statements made in open court and the statement of the county attorney.

The statute in effect at the time of the crimes and arrest, § 29-401 (Reissue 1979), provided:

> Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman, police officer, or peace officer as defined in subdivision (17) of section 49-801, shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained; *Provided*, that (1) within twenty-four hours of the arrest, with or without warrant, of any child under eighteen years of age, the parent, guardian, or custodian of such child shall be notified of the arrest, and (2) the court in which the child is to appear shall not accept a plea from the child until finding that the parents of the child have been notified or that reasonable efforts to notify such parents have been made.

At the time the defendant's pleas were accepted, the trial court did not make the finding required by subsection (2) of that section, which subsection remains unchanged in the current statute.

The evidence shows that at the time the defendant was arrested, he was living with his grandmother in Omaha, Nebraska. Thomas Riley, the chief deputy public defender for Douglas County, who was appointed to represent the defendant and his brother in 1981, testified in this proceeding that although he could not be positive, he thought he had talked with the defendant's grandmother by telephone before the defendant had entered his pleas. He also talked with the defendant's mother, but he was unable to recall whether the conversation with the mother was before the defendant had entered his pleas, but thought that it was before the sentencing hearing.

The defendant's grandmother testified that she found out "[o]n the news" that the defendant had been arrested because

"their pictures and everything" were on the television.

The presentence report, of which the trial court took judicial notice, shows that a search warrant was obtained and served on the defendant's grandmother on the day of the arrest. When the warrant was served, the officers explained to the grandmother why they were there and needed to search her apartment. A number of the articles stolen in the robberies were found in the grandmother's apartment, and she assisted the officers in identifying property that did not belong to her, the defendant, or his brother.

The grandmother saw the defendant and his brother while they were being held in the Douglas County Correctional Center and knew that they were going to plead guilty to "something" and would be sentenced to prison. She also testified that she called the defendant's mother soon after he had been arrested and that the defendant's mother came to Omaha and was in Omaha on the day of the sentencing hearing, but did not go to the hearing. The defendant's grandmother further testified that she talked with the defendant's counsel, but not until after the defendant had entered his pleas of guilty.

The defendant testified that he called his grandmother and that on another occasion she visited him while he was confined, both visits occurring prior to the entry of his guilty pleas.

The trial court's findings on a motion for postconviction relief will be upheld unless they are clearly wrong. *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989).

The evidence in this case supports the trial court's finding that the defendant's grandmother, who was in the position of being the defendant's parent at the time of his arrest, knew of his arrest at the time it occurred. Consequently, the failure to notify her of the arrest could not have resulted in any prejudice to the defendant.

The defendant argues that the requirements of § 29-401 are jurisdictional and that the trial court cannot accept a plea without first finding that the parents have been notified or that reasonable efforts have been made to notify the parents.

In *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985), we held that the failure to provide parental notification of the State's temporary custody of a juvenile, as now required

by Neb. Rev. Stat. § 43-250 (Reissue 1988), did not deprive the juvenile court of jurisdiction. In the absence of statutory language providing for a loss of jurisdiction for failure to comply with the procedure, the district court did not lose jurisdiction by failing to make the required finding.

In *McDonald v. Black*, 820 F.2d 260 (8th Cir. 1987), the defendant argued that the failure of the police to comply with the parental notification requirements of Neb. Rev. Stat. § 43-205.02 (Reissue 1978), which are basically the same requirements currently contained in § 43-250, denied him due process.

The court of appeals found that the notification requirement of *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), and the Nebraska statutes did not implicate any constitutionally protected right. *McDonald, supra*. The court stated that parental notification statutes are " 'only intended to furnish an additional safeguard to insure that the juvenile's basic right to due process is not violated.' " *Id.* at 261, quoting *Rone v. Wyrick*, 764 F.2d 532 (8th Cir. 1985). The failure to comply with the notification procedure alone did not entitle McDonald to habeas corpus relief, and unless the State's failure to follow its notification requirement deprived the defendant of fundamental fairness in his criminal trial, the Constitution was not violated. *McDonald, supra*.

The defendant has failed to show how the trial court's failure to comply with the requirements of § 29-401 prejudiced him in any way or deprived him of due process or fundamental fairness. The assignment of error is without merit.

With regard to the defendant's second assignment of error, the record fails to show how he was prejudiced in any way by the fact that the same counsel represented both the defendant and his brother. "[M]ultiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel." *State v. Anderson*, 229 Neb. 427, 432, 427 N.W.2d 764, 768 (1988). In order to sustain a claim of ineffective assistance of counsel due to a conflict of interest, the defendant has the burden to prove (1) his attorney actively represented conflicting interests and (2)

an actual conflict adversely impacted his attorney's performance, resulting in detriment to the defendant. *State v. Anderson, supra*. Joint representation of codefendants is not a per se violation of the sixth amendment right to effective assistance of counsel. *Id.*

The defendant testified by deposition that he first told the police that he had not had anything to do with the sexual assault, "that I wasn't even there," but then changed his story to the police to help his brother. He further testified that in fact he had nothing to do with the sexual assault and had told his defense counsel that he had nothing to do with it, but then said, "Well, I had some part in it and that's the reason I told the police that," to help his brother. Several questions later, the defendant said he had never told Riley that he had participated in the sexual assault. He testified, "I tried to tell him over and over again that I didn't have anything to do with it . . . . 'Well — but I don't have anything to do with this' . . . . I was telling him all along that I wasn't there."

The defendant also testified that Riley never talked to him about the possibility of representation by separate attorneys or of Riley's withdrawal as the defendant's counsel.

Riley testified flatly that the defendant had never told him that he had nothing to do with the crimes and noted that the victim's statement corroborated the statement the defendant had made in court. Riley also testified that both the defendant and his brother wanted to plead guilty and that he discussed the possible conflict in representing both of them in that Tobin had a greater culpability in regard to the sexual assault. At the sentencing hearing, Riley argued that the defendant should receive a lesser sentence than Tobin, who at that time had already been sentenced.

Whatever conflict there may have been related to the sentencing and was not prejudicial to the defendant under the circumstances in this case.

The defendant's deposition testimony conflicted with the statements he made at the time of his pleas and appears to have been an effort to make a case where none exists. It is apparent that the trial court rejected the defendant's deposition testimony, and the record supports that determination.

The defendant filed a separate pro se brief containing additional assignments of error. We have considered these assignments of error and find they are not supported by the record and are without merit.

The judgment is affirmed.

AFFIRMED.

---

RICHARD H. BEHRENS, APPELLANT, V. AMERICAN STORES PACKING CO. ET AL., APPELLEES.

449 N.W.2d 197

Filed December 8, 1989. No. 89-131.

1. **Workers' Compensation.** The determination of whether the plaintiff's refusal to submit to a medical examination requested under Neb. Rev. Stat. § 48-134 (Reissue 1988) was unreasonable under the circumstances is a fact question.
2. **Workers' Compensation: Appeal and Error.** Findings of fact made 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.
3. **Workers' Compensation: Attorney Fees.** If a workers' compensation case is remanded for a rehearing on an issue as to which this court determined that a proper rehearing had not been held, the hearing held after our remand would be a rehearing in which expenses and attorney fees may be awarded.
4. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures.** The concept of the presence of a reasonable controversy is to be applied only to the determination as to whether an employee is entitled to the statutory penalties, not including attorney fees, as set out in Neb. Rev. Stat. § 48-125 (Reissue 1985).

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded.

T.J. Hallinan, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

GRANT, J.

This is an appeal from two orders of the Workers' Compensation Court, each of which was filed by a panel on January 30, 1989. The first order disqualified the plaintiff-appellant, Richard H. Behrens, from receiving disability benefits for a period of $4\frac{1}{7}$ weeks for refusing to submit to a medical examination as requested by the defendants-appellees American Stores Packing Co. and Kemper Insurance Co. The second order denied the plaintiff attorney fees for the legal services he incurred in the hearing following the remand of *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988), hereinafter referred to as *Behrens I*.

*Behrens I* involved an appeal from an order of a three-judge panel affirming one judge's denial of defendants' application for a modification of plaintiff's benefits, in which appeal this court reversed the three-judge panel's determination as to the payment of certain physical therapy medical claims and remanded the cause for the determination of the proper payments. In *Behrens I*, the Supreme Court held, inter alia, that plaintiff remained temporarily totally disabled and therefore continued to be entitled to benefits. Subsequent to this ruling and pursuant to Neb. Rev. Stat. § 48-134 (Reissue 1988), defendants asked plaintiff to submit to a medical examination. Plaintiff refused defendants' request in a letter dated September 14, 1988. Defendants moved for an order of the compensation court to require plaintiff to submit to such an examination, and on October 12, 1988, the court granted the motion.

On October 14, 1988, defendants filed a motion seeking an order denying plaintiff benefits from the time he refused to submit to the medical examination until the compensation court ordered him to do so. A single judge determined that the plaintiff's refusal was unreasonable and denied him benefits for the period of the refusal. On rehearing, a three-judge panel of the court affirmed the decision of the single judge.

Also, a hearing before a three-judge panel was held May 18, 1988, pursuant to the remand from this court of *Behrens I, supra*. In *Behrens I*, we stated:

> It was error for the court to either consider or apply rule IV [of the Workers' Compensation Court] and the RVS [relative value study] chart when assessing the reasonableness of the physical therapy expenses. . . . The record shows, and the trial court found, that there was great conflict in the record relating to the claims for physical therapy services, and there is a suggestion in the record that some of the therapy did not relate to plaintiff's compensable injury. Since we review for error only, and the reasonableness of these medical charges is a fact question to be determined by the trial court, we reverse and remand to the court for further proceedings in accord with this opinion to determine plaintiff's medical claims, if any.

*Id.* at 25-26, 421 N.W.2d at 17.

At the hearing after this court's remand, the panel "considered the evidence it received at the rehearing, the evidence received at the Hearing on Remand, the evidence received post Remand hearing but disregarded the relative value schedules chart and rule 4," and assessed the reasonableness of the medical charges. The court ordered the plaintiff's physical therapy charges be paid in an increased amount.

Plaintiff contends that he is entitled to attorney fees under Neb. Rev. Stat. § 48-125 (Reissue 1988) for his attorney fees and expenses incurred on remand. Following a hearing on the issue, the three-judge panel denied the plaintiff attorney fees and expenses in that regard.

The plaintiff timely appealed each of the foregoing orders to this court and assigns two errors: (1) The court erred in failing to find that the plaintiff's refusal to submit to the medical exam was not unreasonable under the circumstances then and there existing, and (2) the court erred in failing to find that plaintiff was entitled to a reasonable attorney fee for obtaining payment of plaintiff's therapy bills on remand of *Behrens I*. We affirm as to the first assignment of error and reverse and remand on the second.

With respect to the first assignment of error, § 48-134 provides:

> After an employee has given notice of an injury, as

> provided in section 48-133, and from time to time thereafter during the continuance of his or her disability, he or she shall, if so requested by the employer or the insurance company carrying such risk, submit himself or herself to an examination by a physician or surgeon legally authorized to practice medicine under the laws of the state in which he or she practices, furnished and paid for by the employer, or the insurance company carrying such risk, as the case may be. . . . The unreasonable refusal of the employee to submit to such examination shall deprive him or her of the right to compensation under the Nebraska Workers' Compensation Act during the continuance of such refusal . . . .

Thus, under the statute, an employer or insurance company may request the employee to submit to an examination, and an employee's unreasonable refusal shall result in the claimant's being denied compensation during the time of the refusal. The only factual determination which the compensation court must make under the statute is whether an employee's refusal to submit to such an examination is reasonable.

Plaintiff's argument here focuses on the dispute over whether the physician selected by the defendants was an independent examiner or one who would carry out an adversarial purpose. Plaintiff contends that his refusal was not unreasonable because the defendant did not provide him with the physician's qualifications, and asserts that he had reservations about the reputation of the physician selected. Following a hearing on October 11, 1988, the plaintiff was ordered to submit to an examination by an orthopedic surgeon as selected by the defendants, pursuant to § 48-134.

The determination of whether the plaintiff's refusal to submit to a medical examination requested under § 48-134 was unreasonable under the circumstances is a fact question. Findings of fact made 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. Neb. Rev. Stat. § 48-185 (Reissue 1988); *McMichael v. Lancaster Cty. Sch. Dist. 001,* 233 Neb. 603, 447 N.W.2d 35 (1989); *LaPage v. City of Lincoln,* 233 Neb. 576, 446 N.W.2d 738

(1989). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *McMichael, supra*; *LaPage, supra*.

Although the plaintiff allegedly had reservations about the qualifications of the physician, the record shows that the plaintiff submitted no evidence challenging the physician's qualifications. The only evidence received concerning plaintiff's refusal to submit to the exam was his statements of reluctance and that he desired to be examined by a physician other than the one selected by the defendants. Such reluctance or desire does not rise to the level of a reasonable refusal to submit to a requested medical examination.

As the panel stated in its order after rehearing, "The Court finds nothing in 48-134 that requires an employee to be consulted by the employer in the selection of such examining physician." We have stated that "[i]t is not within the province of the Supreme Court, the Workers' Compensation Court, or any other tribunal to read a meaning into a statute which is not warranted by its language." *Spangler v. State*, 233 Neb. 790, 799, 448 N.W.2d 145, 152 (1989). In short, § 48-134 places the selection of the examining physician solely within the employer's or insurance company's discretion, so long as the physician selected is one legally authorized as set out in § 48-134. Plaintiff's first assignment of error is without merit.

Regarding the second assignment of error, concerning the compensation court's refusal to order the payment of plaintiff's attorney fees and expenses on remand, the panel held:

> Plaintiff's motion should be denied for reasons that (1) the Court was not cited and is not aware of any statutory authority permitting it to award attorney fees for a hearing on remand of a decision from the Supreme Court of the State of Nebraska and (2) even if such authority exists the Court finds there was at least a reasonable controversy as to the amounts allowable for physical therapy charges and therefore no attorney fee would be allowed to the prevailing plaintiff.

Section 48-125 allows attorney fees in workers' compensation cases, in certain circumstances, on rehearing and

on appeal, but does not specifically address the issue of attorney fees on remand from this court. The panel determined that it had no statutory authority to award attorney fees in hearings after remand from this court and that in any event, the "reasonable controversy" test required that plaintiff's claim be denied. Plaintiff contends that this test is not applicable and that § 48-125, which provides that a reasonable attorney fee shall be allowed "in all cases when the employee receives an award," should govern our determination.

With regard to the first basis of the compensation court's holding on this issue, that is, that the statute does not permit it to award attorney fees after remand, we determine that the compensation court's position is not correct. After a cause has been remanded by this court, whether expenses and a fee are to be allowed is to be determined by the nature of the proceeding before the compensation court in the hearing directed to be held on remand. A rehearing before a panel, after remand from this court, is still a rehearing. That is to say, if a workers' compensation case is remanded for a rehearing on an issue as to which this court determined that a proper rehearing had not been held, the hearing held after our remand would be a rehearing in which expenses and attorney fees may be awarded. That is what occurred in this case. The court remanded the cause for a proper rehearing before a panel to determine the amount of physical therapy payments.

As far as the hearing itself, it is clear that after hearing on remand, the panel increased the amount to be paid for plaintiff's physical therapy medical bills. Under § 48-125, plaintiff has obtained "an increase in the amount of such award" if it is considered that payment of a plaintiff's medical bills is a part of his award. We have so held. In *Gourley v. City of Grand Island*, 168 Neb. 538, 541, 96 N.W.2d 309, 312 (1959), quoting *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445, 225 N.W. 117 (1929), we said, " 'Where an employer furnishes medical, surgical, and hospital services to an employee . . . the payments therefor constitute payment of compensation within the meaning of the [Workers' Compensation Act].' " In *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984), we treated the payment of medical expenses as a part of

the award.

With regard to the second basis of the compensation court's holding on this issue, that is, that because there was a reasonable controversy as to the amount of the medical bills, no attorney fees would be allowed, we determine that the court was in error on that point.

Section 48-125 provides that attorney fees and expenses are to be awarded in four basic situations: (1) A reasonable fee shall be awarded, both in the compensation court and in this court, when the employer refuses payment, or neglects to pay compensation for 30 days after an employee's injury, and the compensation court later makes an award (this award of fees is authorized in connection with the proviso in the statute that "fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability"); (2) a reasonable fee shall be awarded when an employer files an application for rehearing before the compensation court from an award of a single judge of that court and does not obtain a reduction in the award; (3) a reasonable fee may be awarded when an employee applies for a rehearing from the order of a single judge denying any award and obtains an award on rehearing; and (4) a reasonable fee may be awarded when an employee applies for a rehearing from an award of a single judge and increases the award on rehearing.

The first of these situations is in connection with the penalty provision providing for a waiting time award of 50 percent for all delinquent payments after 30 days' notice. As set out above, an attorney fee must be awarded in that situation. It is also in this situation where a penalty exists that the concept of "reasonable controversy" has developed in our law, apparently beginning with the case of *Updike Grain Co. v. Swanson*, 104 Neb. 661, 178 N.W. 618 (1920). In the *Updike* case, the phrase "reasonable controversy," as well as "just controversy," was used in determining that the employer need not be subjected to the statutory penalty.

In *Marshall v. Columbus Steel Supply*, 187 Neb. 102, 103, 187 N.W.2d 607, 608 (1971), the compensation court "found no penalty or attorney's fees assessable against defendant because

a reasonable controversy existed." The distinction between penalties awarded and attorney fees awarded began to become blurred. The attorney fees in the *Marshall* case were not awarded because the facts did not support the award of a penalty. Without the existence of the penalty, no attorney fees were awarded—not because there was a reasonable controversy, but because a penalty was not rendered.

The blurring was continued. In *Savage v. Hensel Phelps Constr. Co.*, 208 Neb. 676, 680, 305 N.W.2d 375, 378 (1981), we stated:

> We cannot say that the compensation court's finding that there was a reasonable controversy is without support in the record. That being the case, we are not at liberty to reverse that finding and therefore we affirm the action of the compensation court in denying penalties.
>
> As to the matter of attorney fees, what we have said with regard to the compensation court's refusal to order the payment of a penalty applies to its refusing to order the payment of an attorney fee.

These sentences, unfortunately, may be construed as stating that the reason for denying attorney fees is that there was a reasonable controversy. That is not the case. As the *Savage* case goes on to say, the awarding of attorney fees in compensation cases is purely statutory. *Savage* did not present facts necessary to establish he was entitled to a penalty, and therefore he was not entitled to a statutory attorney fee, which was coupled with a penalty in the law in force at that time.

The concept of the presence of a reasonable controversy is to be applied only to the determination as to whether an employee is entitled to the statutory penalties, not including attorney fees, as set out in § 48-125.

Attorney fees are allowable only pursuant to statutory authorization. *Savage, supra*; *Harrington v. State*, 198 Neb. 4, 251 N.W.2d 653 (1977). Whether there is a reasonable controversy or not has nothing to do with the award of attorney fees in workers' compensation cases, except in cases where an employer has erroneously refused to make payments after having been given 30 days' notice of disability. In every case tried before the compensation court, there is a reasonable

controversy as to some facts before the court. Section 48-125 provides when fees are to be awarded.

In the present case, plaintiff has increased his award on rehearing and therefore may be entitled to a reasonable attorney fee in the compensation court. The plaintiff also may be entitled to a fee in this court.

In view of the facts that the plaintiff received fees in the initial rehearing and in this court in *Behrens I*, and in view of the facts that the plaintiff was only partially successful in his appeal to this court and that the issue at the rehearing on remand was narrow, plaintiff is awarded the sum of $500 for attorney fees in this court. The cause is remanded to the compensation court to determine if an attorney fee should be awarded in that court, and if so, the amount of that fee.

The order of the compensation court denying plaintiff benefits during the time of his refusal to be examined by a doctor of defendants' choice is affirmed. The order of the compensation court denying plaintiff a fee on the rehearing after the remand is reversed, and the cause is remanded on that issue.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

HASTINGS, C.J., not participating.

---

STATE OF NEBRASKA, APPELLEE, V. CLAIR JUHL, APPELLANT.
449 N.W.2d 202

Filed December 15, 1989. No. 88-586.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.

3. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** If police have acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
4. **Constitutional Law: Search and Seizure.** Pursuant to the 4th and 14th amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, a citizen has a right to be free from an unreasonable search and seizure.
5. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from unreasonable search and seizure, guaranteed by the fourth amendment to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, can be waived by the consent of the citizen.
6. **Search and Seizure.** Whether a person consented to a search is determined from all the circumstances surrounding the search.
7. **Search and Seizure: Duress.** Any consent to a search must be voluntary and not the result of duress or coercion—express, implied, physical, or psychological.
8. **Trial: Evidence: Photographs: Appeal and Error.** Admission or exclusion of photographs as evidence is within the discretion of a trial court, whose evidential ruling on the photographs will be upheld on appeal unless the trial court abused its discretion.
9. **Trial: Evidence.** Relevancy of offered evidence and exclusion of relevant evidence involve a trial court's discretion.
10. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
11. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection, which specifies the ground of the objection to the offered evidence.
12. _____: _____: _____. An objection which is based on a specific ground and properly overruled does not preserve an evidential question for appellate review on any other ground.
13. **Habitual Criminals: Indictments and Informations.** For application of the enhanced penalty under the Nebraska habitual criminal act, the information must contain allegations that the defendant has been (1) twice previously convicted of a crime, (2) sentenced for the previous convictions, and (3) committed to prison for a term of not less than 1 year for each of the previous convictions and sentences.
14. **Trial: Proof: Appeal and Error.** With the exception of an erroneous admission or exclusion of evidence, a defendant, as the appellant claiming reversible error in a criminal case, must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.

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

Gary L. Hogg, Buffalo County Public Defender, for appellant.

Clair Juhl, pro se.

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

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

SHANAHAN, J.

On May 19, 1988, a jury, in the district court for Buffalo County, convicted Clair Juhl of felonious theft. See Neb. Rev. Stat. § 28-511(1) (Reissue 1985) (theft by unlawful taking) and Neb. Rev. Stat. § 28-518(2) (Reissue 1985) (grading of theft offenses; property valued at more than $300, but less than $1,000). Later, after receiving evidence at a hearing concerning Juhl's prior felony convictions, the district court determined that Juhl was a habitual criminal and sentenced Juhl to imprisonment for not less than 10 nor more than 20 years, pursuant to Nebraska's habitual criminal act, Neb. Rev. Stat. §§ 29-2221 et seq. (Reissue 1985).

## ASSIGNMENTS OF ERROR

Juhl contends that the district court erred in (1) overruling his motion to suppress physical evidence obtained by a search of Juhl's person contrary to constitutional protection against an unreasonable search and seizure, (2) receiving certain photographs as evidence in Juhl's trial, (3) allowing the State to introduce into evidence two jackets allegedly worn by Juhl when he was apprehended, and (4) receiving at the sentence hearing documentary evidence of Juhl's previous felony convictions for which the dates in the documents did not coincide with the dates alleged in the information filed against Juhl.

## THE WAYFARER INCIDENT

At approximately 2 a.m. on December 14, 1987, the Buffalo County Sheriff's Department received a call from a private citizen who stated that a theft from a semi-trailer rig was taking place in the parking lot of the Wayfarer Motel, which is located

near the Elm Creek interchange for Interstate 80.

Deputy Sheriff Steven Jensen, responding to the citizen's call, proceeded to the Wayfarer and, when he was driving into the Wayfarer's parking lot, observed a semi which consisted of a cab-over tractor and a flatbed trailer. On the trailer were four truck chassis and cab units, stacked piggyback. Jensen drove his cruiser toward the semi and activated the high beams of the cruiser's headlights to see if anyone was near the semi. The high beams illuminated a man who was stepping away from the semi. As the man turned toward Jensen's approaching cruiser, he brought his hands above his head and then dropped his hands to his side as he proceeded toward Jensen's cruiser. Jensen stopped his cruiser, got out, and walked to the man, whom he recognized as Clair Juhl, who had had prior contacts with the sheriff's department.

After Jensen told Juhl that there had been a report of a theft from the semi, Juhl stated that he was drunk and en route to his room at the Wayfarer. When Jensen asked why Juhl was in the area of the semi, Juhl replied, "I'm a man." Jensen suggested that Juhl head to his room at the Wayfarer. During this conversation, Officer Duane Bond of the Elm Creek Police Department arrived at the scene. While Juhl was walking to a motel stairway, Jensen and Bond investigated the semi but found no evidence of criminal activity. As the officers were standing in the parking lot near the semi and discussing the situation, Jensen observed an Oldsmobile Toronado, with its trunk open, about 50 feet from the semi. Both Jensen and Bond approached the Toronado and observed in its open trunk three large industrial-type batteries.

Jensen walked back to the semi and noticed that three batteries were missing from one of the cab units on the trailer and that the battery terminal nuts and cables had been removed from another unit on which the batteries had been pulled forward. The batteries which were still attached to the chassis and cab units on the trailer were similar to those in the Toronado's open trunk.

Juhl, who had been standing by the motel during the officers' investigation, walked toward Jensen and met him in the middle of the parking lot. At this time, Jensen noticed that

the right pocket of the jacket worn by Juhl was sagging and hanging lower than the left side of Juhl's jacket, indicating that a heavy object, perhaps a weapon, was contained in the jacket's right pocket. Jensen asked Juhl what was in the jacket's pocket. Juhl raised his right arm and said, "[C]heck." Jensen reached into Juhl's right jacket pocket and extracted a socket wrench and five bolt-type metal nuts.

Bond took the metal nuts and, on examining the batteries on the chassis and cab units located on the semi, determined that the metal nuts taken from Juhl's jacket pocket were the same type as the battery nuts for the equipment being hauled on the semi's trailer.

While Bond was inspecting the batteries on the semi's trailer, Jensen asked Juhl if he knew who owned the Toronado which had its trunk open. Juhl answered that the car was owned by his friend but that Juhl had been using it. After Bond told Jensen about the results of Bond's examination of the equipment on the semi's trailer, Jensen arrested Juhl for theft, and Juhl was immediately transported to the Buffalo County Detention Center.

## SUPPRESSION HEARING

Pursuant to Neb. Rev. Stat. § 29-822 (Reissue 1985), Juhl filed a pretrial motion to suppress the physical evidence obtained from his person, namely, the battery nuts and related equipment. In his suppression motion, Juhl alleged that the search of his person was conducted without a search warrant or probable cause and, consequently, was an unreasonable search contrary to constitutional safeguards. See, U.S. Const. amends. IV and XIV; Neb. Const. art. I, § 7. On the basis of the circumstances surrounding the search of Juhl, as set forth above in this opinion, the trial court overruled Juhl's suppression motion.

## THE INFORMATION

In its amended information against Juhl, which was filed on January 15, 1988, the State charged Juhl with felony theft and alleged that on May 7, 1980, Juhl was convicted in the district court for Buffalo County on three felony charges (terroristic threats, use of a firearm to commit a felony, and possession of a

firearm by a felon), was sentenced on February 8, 1982, and thereafter was delivered to the Nebraska Penal and Correctional Complex, where he served the sentences imposed. Also, the State alleged that on November 27, 1985, in the U.S. District Court for the District of Nebraska, Juhl was convicted of felonious possession of a firearm and, on January 3, 1986, was delivered to the federal penitentiary at Terre Haute, Indiana, where he served the federal sentence. The case or file numbers for each previous prosecution, conviction, and sentence in the state and federal courts appeared in the allegations for imposition of the habitual criminal penalty.

## JUHL'S TRIAL

At Juhl's trial, the State offered 11 photographs as evidence. The photographs mainly depicted locations of objects in the Wayfarer parking area, such as the Toronado with its open trunk and the vehicles on the semi's trailer. Concerning the photographs, the photographer testified that each photograph was an accurate depiction of the place or object in the photographs taken on December 14 and 15, 1987. On the basis of foundation and relevance, Juhl objected to the introduction of each photograph. The court overruled Juhl's objections to the photographs.

The State also offered two jackets which the State claimed Juhl was wearing when he was apprehended at the Wayfarer. Tim Sutherland, chief corrections officer of the Buffalo County Detention Center, testified that a property inventory is taken for every inmate who is admitted to the detention center and that as one of his duties, Sutherland maintains all the detention center's records. Although Sutherland was not present when Juhl was brought into the detention center, the detention center's records include an itemized inventory of all Juhl's property on his person when he was admitted to the detention center. Sutherland read a list of Juhl's inventoried property, which included the jackets. When Sutherland was handed the two jackets, he testified, without objection, that the jackets had been brought to court from the detention center's property room where the jackets had been kept in a property container marked "Clair Juhl." Sutherland further testified

that he is in the property room on a daily basis and that he had seen the jackets in the property room since Juhl's admission to the detention center. When the State offered the jackets as exhibits, Juhl objected "for the reason this officer [Sutherland] wasn't present when [the two jackets] were allegedly taken from the defendant and has no personal knowledge as to the identity or the ownership thereof." The court overruled the objection and received the two jackets into evidence.

At the conclusion of the evidence and after instruction, on May 19, 1988, the jury found Juhl guilty of felony theft.

## THE ENHANCEMENT HEARING

At the sentence hearing on June 20, 1988, and to show that Juhl could be sentenced as a habitual criminal under the Nebraska habitual criminal act, §§ 29-2221 et seq., the State requested permission to amend the information instanter and by interlineation or to defer such amendment until completion of the State's proof for imposition of the enhanced penalty. The proposed amendments related to the date alleged for previous sentencing on the state convictions and the date for Juhl's conviction in federal court. Regarding the previous convictions and sentences in the state court, the information contained the allegation that Juhl was sentenced on February 8, 1982, for his convictions of terroristic threats, use of a firearm to commit a felony, and possession of a firearm by a felon, whereas sentencing actually occurred on February 5, 1982. Concerning Juhl's felony conviction and sentence in federal court, the information's allegations indicated that November 27, 1985, was the date of Juhl's conviction, whereas the real date for Juhl's federal conviction was November 14, 1985. The court overruled Juhl's objection to the State's proposed amendments. The State's proof at the enhancement hearing established that Juhl's sentencing in the state court occurred on February 5, 1982, as reflected in the court's records offered as exhibits concerning Juhl's previous convictions and sentences in state court and, similarly, established Juhl's federal conviction on November 14, 1985, and sentence in federal court on November 27, 1985, as reflected by court records offered as exhibits. On the basis of the evidence at the enhancement hearing, the court

found that the requirements were satisfied for imposition of the enhanced penalty available under the Nebraska habitual criminal act and sentenced Juhl to imprisonment for not less than 10 nor more than 20 years, with credit for Juhl's jail time in awaiting trial on the theft charge and sentencing after conviction.

STANDARD OF REVIEW—SUPPRESSION HEARING

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Blakely, supra*. See, also, *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

If police have acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

Pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968), Juhl argues that Deputy Jensen was limited to conducting only a pat-down search of Juhl. In *Terry v. Ohio, supra*, the U.S. Supreme Court held that in appropriate circumstances, even without probable cause, an officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of . . . persons in an attempt to discover weapons which might be used to assault him." 392 U.S. at 30. In *Sibron v. New York, supra*, a companion case to *Terry*, the Court determined that an incident search without probable cause "may not precede an arrest and serve as part of its justification." 392 U.S. at 63. However, the Court recognized that pursuant to *Terry*, an initial incident search may be justified if the officer has

reasonable grounds to believe a person may be armed.

Juhl argues that, in view of *Terry* and *Sibron*, Jensen did not possess a reasonable basis for detaining and searching Juhl, and, even if a search were justified, the officer was limited to a pat-down search of Juhl's jacket and was not constitutionally entitled to intrude into the jacket's pocket to extract the physical evidence.

It is certainly true that, as Juhl maintains, pursuant to the 4th and 14th amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, a citizen has a right to be free from an unreasonable search and seizure. Furthermore, as *Terry* and *Sibron* indicate, an officer must have a reasonable basis for even a brief investigatory stop and search of an individual.

However, the question whether Jensen had the requisite reasonable basis to make a *Terry* stop and search need not be answered, because the right to be free from unreasonable search and seizure, guaranteed by the fourth amendment to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, can be waived by the consent of the citizen. *State v. Horn*, 218 Neb. 524, 357 N.W.2d 437 (1984).

The consent required to support a consensual search must be essentially free and unconstrained choice and not the product of a will "overborne" and a critically impaired "capacity for self-determination." *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Horn, supra*. Cf. *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976). Whether a person consented to a search is determined from all the circumstances surrounding the search. *Schneckloth v. Bustamonte, supra*; *State v. Horn, supra*; *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975). Any consent to a search must be voluntary and not the result of duress or coercion—express, implied, physical, or psychological. *Schneckloth v. Bustamonte, supra*; *United States v. Fike*, 449 F.2d 191 (5th Cir. 1971); *Phelper v. Decker*, 401 F.2d 232 (5th Cir. 1968).

There is no evidence that any officer used or directed force against Juhl in obtaining the physical evidence from Juhl. When Deputy Jensen asked what Juhl had in his jacket's

pocket, Juhl raised his right arm and responded, "[C]heck"—an unequivocal invitation for Jensen's search of Juhl's jacket. Juhl's right to be free from an unreasonable search and seizure was not violated, since Juhl consented to the search by Jensen, and, thus, the trial court's overruling of Juhl's motion to suppress was correct.

ADMISSIBILITY OF PHOTOGRAPHS AND JACKETS

Admission or exclusion of photographs as evidence is within the discretion of a trial court, whose evidential ruling on the photographs will be upheld on appeal unless the trial court abused its discretion. *State v. Birge*, 215 Neb. 761, 340 N.W.2d 434 (1983).

In addition to questions of admissibility regarding photographs as evidence, relevancy of offered evidence and exclusion of relevant evidence involve a trial court's discretion. Thus, whether a particular item of evidence has probative value and is, therefore, relevant, see Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)), or whether an item of evidence, although relevant, is excludable on account of the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay in the proceedings, waste of time, or needless presentation of cumulative evidence, see Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1985)), may depend on a trial court's exercise of judicial discretion.

In *Wachtel v. Beer*, 229 Neb. 392, 405, 427 N.W.2d 56, 64 (1988), this court characterized "abuse of discretion":

> A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986); *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

The preceding characterization or description of "abuse of discretion" is somewhat incomplete, for the description does not contain reference to choice as a component of "discretion."

In its ordinary meaning, discretion is

> power of decision: individual judgment . . . power of free decision or choice within certain legal bounds . . . *specif*: the latitude of decision within which a court or judge decides questions arising in a particular case not expressly controlled by fixed rules of law according to the circumstances and according to the judgment of the court or judge . . . ability to make decisions which represent a responsible choice and for which an understanding of what is lawful, right, or wise may be presupposed.

Webster's Third New International Dictionary, Unabridged 647 (1981).

In *Spalding v. Spalding*, 355 Mich. 382, 384, 94 N.W.2d 810, 811-12 (1959), the Supreme Court of Michigan noted: "[A]n abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations."

Consequently, a judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. See, *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 279 N.W.2d 860 (1979); *Spalding v. Spalding, supra*; K.C. Davis, Discretionary Justice: A Preliminary Inquiry (1969); Rosenberg, *Judicial Discretion*, 38 The Ohio Bar 819 (1965).

In Juhl's case, the photographs not only depicted the setting at the scene of the theft but corroborated the officers' accounts of their investigation and encounter with Juhl. Therefore, the photographs were relevant. See Rule 401. Moreover, Juhl has failed to demonstrate how he was unfairly deprived of a substantial right by the trial court's determination regarding the photographs' admissibility. We find no abuse of discretion in the trial court's admitting the photographs as proper evidence to prove the theft charge against Juhl.

Next, Juhl argues that the jackets were improperly admitted

because they were introduced through a witness, Sutherland, who had no personal knowledge of what Juhl was wearing on admission to the detention center. According to Juhl, Sutherland's testimony concerning the two jackets is inadmissible under Neb. Evid. R. 602 (Neb. Rev. Stat. § 27-602 (Reissue 1985)), which provides in part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

On admission to the detention center, every detainee surrendered all personal property, which was inventoried and kept in a property container. Evidence was received concerning the detention center's property records and the property container inscribed "Clair Juhl." After Deputy Jensen searched Juhl's jacket at the Wayfarer parking lot and arrested him, an officer brought Juhl directly from the Wayfarer parking lot to the detention center. Consequently, Sutherland's testimony about his daily observations supplied a factual basis for the permissible inference that the jackets, kept at the detention center and produced at trial, were the same jackets worn by Juhl when he was arrested at the Wayfarer parking lot, the scene of the theft. The fact that Sutherland's observations were part of the bases for the inference does not render Sutherland's testimony inadmissible under Rule 602. On the basis of Juhl's objection, the trial court properly overruled Juhl's objection and admitted the jackets as evidence. See Rule 401 (definition of relevance).

Juhl also argues that Sutherland was incompetent to testify about jail records. Juhl contends that he was not given reasonable notice before trial concerning use of a public record and reports, in conformity with Neb. Evid. R. 803(7) (hearsay exceptions) (Neb. Rev. Stat. § 27-803(7) (Reissue 1985)), which provides:

> Upon reasonable notice to the opposing party prior to trial, records, reports, statements or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law, unless the sources of information or the method or circumstances of the investigation are shown by the

opposing party to indicate a lack of trustworthiness.

"To preserve a claimed error in admission of evidence, a litigant must make a timely objection, which specifies the ground of the objection to the offered evidence." *State v. Cox*, 231 Neb. 495, 502, 437 N.W.2d 134, 139 (1989). Juhl did not make a hearsay objection to Sutherland's testimony. Rather, Juhl's objection was directed to Sutherland's competency as a witness and, apparently, was based on Rule 602. An objection which is based on a specific ground and properly overruled does not preserve an evidential question for appellate review on any other ground. See, *State v. Cox, supra*; *Havlicek v. State*, 101 Neb. 782, 165 N.W. 251 (1917). There is no error regarding the trial court's admission of Sutherland's testimony over Juhl's objection concerning the records of the detention center.

## ENHANCEMENT HEARING/ HABITUAL CRIMINAL ACT

Juhl contends that the enhanced penalty under the Nebraska habitual criminal act, §§ 29-2221 et seq., is unavailable in view of the discrepancy between the dates alleged in the information and the dates established by the State's proof at the enhancement hearing.

For application of the enhanced penalty under the Nebraska habitual criminal act, the information must contain allegations that the defendant has been (1) twice previously convicted of a crime, (2) sentenced for the previous convictions, and (3) committed to prison for a term of not less than 1 year for each of the previous convictions and sentences. *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982).

As we have previously noted in this opinion, the date for Juhl's sentencing in the state court was February 5, 1982, not February 8, 1982, as alleged in the information against Juhl. Also, the date for Juhl's conviction in federal court was November 14, 1985, not November 27, 1985, as alleged in the information. The trial court received evidence which established the correct dates for the imposition of sentences in the state court and conviction in federal court.

With the exception of an erroneous admission or exclusion of evidence, a defendant, as the appellant claiming reversible

error in a criminal case, must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. See, *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989) (rejection of appellant's tendered instruction); *State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986) (jury instruction); *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984) (overruling appellant's motion for mistrial). Cf., *Bishop v. Farm Bureau Life Ins. Co.*, 228 Neb. 74, 421 N.W.2d 423 (1988) (rejection of appellant's tendered instruction); *Hyde v. Cleveland*, 203 Neb. 420, 279 N.W.2d 105 (1979) (irregularity in order of proof); *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976) (mischaracterization of procedure). Also, cf., *State v. Cox, supra* at 504, 437 N.W.2d at 140 ("In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt"); *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988).

Juhl has not shown that he was misled or confused regarding the dates in question or that any prejudice resulted from the incorrect dates which initially appeared in the information. Therefore, Juhl has failed to demonstrate reversible error in the enhancement hearing for the habitual criminal penalty under § 29-2221.

## CONCLUSION

All assignments of error asserted by Juhl are without merit. Accordingly, we affirm Juhl's conviction and sentence.

AFFIRMED.

# STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. HARVEY A. NEUMEISTER, RESPONDENT.

449 N.W.2d 17

Filed December 15, 1989. No. 88-765.

1. **Disciplinary Proceedings: Appeal and Error.** In a disciplinary proceeding, the determination by the Supreme Court as to whether discipline should be imposed and what discipline is appropriate is made upon a de novo review of the record.
2. **Attorneys at Law: Witnesses.** It is against sound principles of professional ethics for one who knows that he is to be called as a material witness in a case to appear as attorney therein.
3. **Disciplinary Proceedings.** In determining what is appropriate discipline, consideration must be given to the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

Original action. Judgment of suspension.

Alison L. Larson, Assistant Counsel for Discipline, for relator.

Vard R. Johnson and Kent J. Neumeister for respondent.

BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and BLUE and MERRITT, D. JJ.

PER CURIAM.

This is an original disciplinary proceeding brought by the State of Nebraska ex rel. Nebraska State Bar Association against Harvey A. Neumeister, respondent, an attorney and member of the association. On January 5, 1988, respondent was formally charged with violating his oath of office under Neb. Rev. Stat. § 7-104 (Reissue 1987) and Canon 1, DR 1-102(A), and Canon 5, DR 5-101(B) and DR 5-102(A), of the Code of Professional Responsibility.

The charges allege generally that respondent violated the advocate-witness rule and particularly that respondent testified about substantive matters and submitted personal affidavits pertaining to substantive issues during his representation in an extensively litigated guardianship case. That case was disposed of by an opinion of the Supreme Court in *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721

(1987).

A referee was appointed and a disciplinary hearing was held beginning January 24, 1989. The referee filed her 17-page report on April 12, 1989. The referee found respondent in violation of DR 5-101(B) and DR 5-102(A), and recommended that respondent be given a public reprimand and be suspended from the practice of law for 2 months. The relator filed exceptions to the referee's report, accepting the referee's findings of fact but alleging that the suspension was too lenient under the circumstances of the case.

Respondent first filed a 56-page document setting out 74 exceptions to the report (two of which are identified as No. 60). This document has attached 106 pages of exhibits, consisting primarily of respondent's 80-page brief filed with the referee. Respondent later filed "supplemental" exceptions Nos. 74 to 77 (11 pages) and a 9-page motion with an attached exhibit of 43 pages. On September 5, 1989, respondent filed exception No. 78, consisting of 28 pages with 11 pages of exhibits.

We set out the foregoing only to show the incredibly convoluted approach that respondent and his attorneys have taken. The practical result, of course, is that respondent has submitted more than 260 pages of briefing information to this court, in addition to his 50-page brief allowed by the rules of this court. The net result of respondent's activities in this case is that the record presented to this court to review respondent's conduct has grown from the "more than 45 pounds of paper" in the underlying case, *In re Guardianship and Conservatorship of Sim, supra* at 201, 403 N.W.2d at 735, to more than 83 pounds of paper.

We will not set out, again, the underlying facts, but refer to the underlying *Sim* case for a statement of the facts. Further, we will not dispose of, individually, respondent's exceptions to the referee's report. Many of the stated exceptions have absolutely no relevance to the questions presented, and most of them shed no light on the ultimate determination we must make. All of respondent's submissions were read, and those worthy of consideration were given weight in our decision.

The scope of our review is clear. "In a disciplinary proceeding, the determination by the Supreme Court as to

whether discipline should be imposed and what discipline is appropriate is made upon a de novo review of the record." *State ex rel. NSBA v. Cohen*, 231 Neb. 405, 408, 436 N.W.2d 202, 205 (1989). The relator must establish the charges by clear and convincing evidence. *State ex rel. NSBA v. Roubicek*, 225 Neb. 509, 406 N.W.2d 644 (1987).

The canon involved is Canon 5 of the Code of Professional Responsibility, which requires a lawyer to exercise his or her independent professional judgment and to withdraw as counsel when he or she becomes a witness in the case.

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-101(B).

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

DR 5-102(A).

Our review of the record shows that the respondent is an 85-year-old resident of Nebraska City, Nebraska, and has been

a practicing attorney there since 1935. For approximately 30 years, the respondent performed a variety of services for a longtime client and friend, Maude Clevenger Sim. In August 1982, Sim, who was elderly and widowed, was placed in a nursing home. The bills for her care were forwarded to respondent, who handled her affairs under a power of attorney Sim had executed in June 1982.

Sim's relatives filed a petition in county court on September 3, 1982, seeking the appointment of a guardian and conservator over Sim. The respondent entered an appearance on Sim's behalf, and on September 17, 1982, he filed an answer stating Sim's objections to the petition. Thereafter, on October 7, 1982, the respondent assisted Sim in the preparation and execution of various documents including a durable power of attorney in favor of the respondent, a deed to the respondent as trustee of her real estate, and an irrevocable trust, Sim being sole lifetime beneficiary and the respondent, her trustee. Prior to this time, respondent, in 1980, had drawn a will for Sim in which he was a beneficiary of a $5,000 bequest.

A pretrial conference was held in the case on November 12, 1982. Although the pretrial order did not show that the respondent would be a witness at trial, a document entitled "Objector's Memorandum for Pre-Trial Conference" listed the respondent as one of 19 potential witnesses for trial. The memorandum was signed by William Walker, Kent Neumeister, and the respondent, all attorneys for Sim, and was filed with the county court.

At a hearing on December 27, 1982, Sim's attorneys defended against guardianship on the theory that if Sim was now incapacitated and could not effectively manage her estate, her execution of the durable power of attorney and irrevocable trust on October 7, 1982, obviated the need for an appointment of a guardian and conservator because her personal and business affairs were now entrusted to the respondent. Although Sim's attorneys posited this defense, Sim never testified and her attorneys refused to disclose copies of the documents she executed on October 7. Instead, they offered into evidence two affidavits prepared by the respondent. The first affidavit was dated November 3, 1982, and recited selected

provisions of the irrevocable trust agreement. The other affidavit was dated November 20, 1982, and recited the circumstances surrounding Sim's execution of the documents on October 7, 1982, and also recited certain facts concerning Sim's business and financial affairs.

In May 1983, petitioners in the county court case filed a motion for a trial on the issue of Sim's competency and attached to that motion respondent's affidavits prepared on November 3 and 20, 1982. Sim's opposition to the motion and constitutional attack thereon resulted in voluminous litigation generated in the court system over the next 10 months. See *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987), and other *Sim* cases cited therein.

During the course of the litigation, the respondent prepared and offered additional affidavits to the court. In August 1983, the respondent prepared an affidavit to supplement his two affidavits dated November 1982. The three were then offered by Sim's attorneys and received in evidence at a hearing held on September 22 and November 4, 1983. The respondent prepared two more affidavits in March 1984. In his affidavit dated March 9, 1984, the respondent recited in detail his association with Sim and a brief summary of her upbringing and personal character, as well as certain medical attention provided her. The March 9 affidavit also recited the purposes of the trust which respondent contended made the appointment of a guardian or conservator unnecessary.

Finally, a trial on the merits of the case was held March 22, 1984, and the sole issue litigated was whether Sim was competent at the time the petition for guardianship was filed. Sim was not present at trial but was represented by Kent Neumeister, Walker, and the respondent.

At the March 22, 1984, trial, all of the affidavits except for the one dated March 9 were offered by the petitioners and received into evidence. The respondent was also called as a witness by the petitioners' counsel, Robert Hoch. The court questioned the respondent about whether there was a relationship between the filing of the petition for guardianship on September 3, 1982, and Sim's execution of the documents on October 7, 1982, as follows:

[Q.] Just a coincidence?

[A.] No, I don't think just exactly that is true.

She was very fearful, and has been for quite a while, of some of her own people that are sitting in the courtroom — would try to do something to her. That's exactly why she has been more or less of the opinion, and it is her opinion, to stay away from them and not talk to them.

So we hesitated on these things.

Her will is going to take care of all of that anyhow, so we hesitated.

Finally, we thought to clear this thing up, like she said to me and publicly, "I thought I had all these things taken care of." She's alone in the world, you understand. So we executed these things. She knew what she was doing. She had every necessary element of what was going on.

You would be surprised how that lady knows what these things are, but you hear all this other testimony and it sounds different. Not to us.

Respondent was later questioned by Hoch as follows:

Q Why did you have to do it [act for Sim] under a power of attorney, rather than having her do it herself?

A Well, I would say this. . . . A lot of powers of attorneys are given —

Q Is it because she is incompetent and can't do it herself?

A No, no.

Q All right.

A She's not incompetent.

Q Let me ask you this.

A I don't want to say that right now, but she wasn't at that time. No she wasn't incompetent. . . .

I have never been with her — After I would talk a little while with her she always answered me properly. I've got notes to show those kinds of answers.

Respondent also testified that the reason why Sim was not present before the court in the latter part of 1982 was because he "[didn't] think she needed it." When he was subsequently asked about financing the litigation, he testified that he paid some expenses out of his personal check "because I want to be fair

about this thing. I don't want to be cheating. Everybody knows that in this town. I don't cheat."

Sim did not attend a hearing held June 14, 1984, although she continued to be represented by Walker, Kent Neumeister, and the respondent. Again, the respondent was called as a witness by Hoch, and the following testimony was adduced:

> Q. When Maude [Sim] received the petition for the appointment of a guardian or conservator over her, [respondent's wife testified] that she [Sim] was stressed or unhappy about it, and that at that time she was competent and able to handle her own affairs, and there was no need for a guardian or conservator to be appointed. Is that your recollection also?
>
> A. That's exactly right. She was competent to do what she had to do, and she did do certain things that she had to do.
>
> Q. You're of the opinion that was true, that she was competent and able and could, and you were confinced [sic] of that?
>
> A. Certainly. Certainly.

The evidence is uncontroverted that respondent did not take any steps to withdraw from the case either before or after he testified. In fact, the only action taken regarding his conduct was a motion to disqualify filed late in the case by the Attorney General. That motion was overruled on appeal "without prejudice to such disciplinary sanction as may prove to be appropriate . . . ." *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 205, 403 N.W.2d 721, 737 (1987).

At the disciplinary hearing before the referee held beginning January 24, 1989, Hoch testified that he had suggested to respondent that respondent withdraw his representation because he would be called as a witness in the case. Hoch explained that respondent was a prime witness and was called to testify because of his extensive knowledge of Sim's affairs, but he added that it was difficult to attack respondent's credibility because of their professional acquaintance.

Respondent testified at the disciplinary hearing that he was never aware that Sim's interest could be represented by other lawyers and that he did not advise her to seek independent

counsel. Although Walker was the lead attorney at trial, the respondent testified that he did act as "part of the trial attorney" in the case and was surprised to be called as a witness. However, he denied ever having been told by Hoch that he should withdraw from the case. We find that he had been so advised by Hoch. Respondent testified further that Sim placed total trust in him and if he had withdrawn, he believed it would have had an adverse mental effect on Sim. To support this argument, respondent offered the testimony of an expert in geriatric medicine, Dr. Jane Potter. The expert explained that the establishment of guardianships involves losses of personal autonomy and right of choice which can be emotionally and physically devastating for the older person.

With respect to the affidavits, the respondent testified that he prepared them as a substitute for the documents Sim executed on October 7, 1982, which he consistently maintained were confidential in nature. It is apparent from the respondent's testimony that he believes the affidavits pertained only to matters of formality, and, as the referee stated in her report, it is apparent that the respondent believes that he did nothing wrong in the case.

As stated in her report, the referee found that the affidavits of Harvey Neumeister were not intended to relate solely to an uncontested matter or to a matter of formality. The affidavits went to the heart of Sim's defense that a guardianship was unnecessary. That is, the respondent maintained at all times that the documents Sim executed on October 7 were confidential. Since Sim would not testify, the only information available concerning the defense that she was provided for was the information contained in the respondent's affidavits. Thus, the affidavits pertained to a substantive issue of the case, making the respondent's obligation to withdraw evident as early as November 1982, when the first affidavits were prepared. We agree with the referee's findings and find that respondent's affidavits were not intended to relate solely to formal or uncontested matters.

It is uncontroverted that the respondent was simultaneously an attorney of record and a witness who participated in the development of the facts in this case. The record indicates that

the respondent had personal knowledge of Sim's mental abilities because of their close and longstanding friendship. He also had professional knowledge of Sim's affairs because of the conveyances that occurred on October 7, 1982, when he became her trustee, because of the will he had drawn in 1980, and because of his long acquaintance with Sim. When coupling these facts with Sim's defense that a guardianship was unnecessary because Sim was already provided for, and in light of the fact that Sim herself was not going to testify, it is obvious that the respondent should have known that he was going to be called as a witness on this matter. The situation required his immediate withdrawal from the case.

The respondent contends that his testifying should be disregarded because he was not disqualified from the case and because his client was not prejudiced by his testimony. The fact that the trial court did not disqualify respondent, however, will not exonerate him from discipline where it is found that his conduct is in violation of disciplinary rules.

Insofar as respondent contends that there was no prejudice to Sim in respondent's acting as both attorney and witness, the following is pertinent. Sim's relatives sought the appointment of a guardian for Sim. Sim, through respondent, apparently took the position that there was no necessity for a guardian because Sim had executed an irrevocable trust. The viability of Sim's position depended on the competency of Sim at the time she signed what was purportedly an irrevocable trust. The relatives wanted a court answer to that question, and respondent took the firm position that that question need not be answered. Whether Sim was prejudiced or not depended on a court determination of that question.

Furthermore, the rationale for the advocate-witness rule is not solely limited to ensuring the effective representation of a client. An ethical consideration provides guidance as to other rationales for the advocate-witness rule:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If the lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may

> be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-9.

The testimony the respondent provided on March 22, 1984, created some of the difficulties referred to above. The record reveals that the respondent did end up in the unseemly position of arguing his own credibility. By the same token, it is clear from Hoch's testimony that Hoch was placed in an awkward position of attacking the opposing counsel's credibility, which most likely created difficulty for the trier of fact in determining the weight to be given the testimony.

The rationale against the dual role was never more apparent than at the hearing on June 14, 1984. It almost goes without saying that the respondent's testimony at this hearing was material to the issue of the case, that being Sim's competency at the time of the filing of the petition. As an attorney of record, the respondent had the task of arguing his client's defense that a guardianship was unnecessary; as a witness, the respondent had the duty to state the facts objectively regardless of whether what was said helped or hindered his client's position. The facts indicate that the respondent should have left the trial of the case to other counsel. It is against sound principles of professional ethics for one who knows that he is to be called as a material witness in a case to appear as attorney therein. *Sinnett v. Albert*, 188 Neb. 176, 195 N.W.2d 506 (1972); *McCormick v. McCormick*, 150 Neb. 192, 33 N.W.2d 543 (1948).

Contrary to respondent's contention, the exception to the rule that allows an attorney to testify and continue representation where withdrawal would work a substantial hardship is not applicable under the circumstances. Although the expert witness testified generally to the physical and emotional effects a guardianship proceeding can have on an elderly person, the expert neither examined Sim personally, nor did the expert's testimony show how the respondent's

withdrawal would work a substantial hardship on the client. In addition, it is clear that respondent could have remained active in the case in his role of trustee. The alleged intangible value to Sim of respondent's presence would not be lost.

The referee found, and we agree, that the respondent admitted that he does not consider himself a trial lawyer. The referee added that "Kent Neumeister and William Walker were counsel of record along with Harvey Neumeister, and both were acquainted with Mrs. Sim and well versed in the theory of the case." Even though Walker was eventually replaced by J. Patrick Green as one of the attorneys representing Sim, this did not result in a hardship to her because Green admitted that he was fully updated on the case. All of the facts indicate that the respondent could have withdrawn without any hardship to the client.

When an attorney takes an oath of office and receives a license to practice law, he swears that he will observe the established standards of professional ethics and submits to the implied understanding that he will demean himself in a proper manner and abstain from practices that discredit himself, the courts, and the profession. *State ex rel. NSBA v. Hahn*, 218 Neb. 508, 356 N.W.2d 885 (1984). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. See *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* 488 U.S. 802, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988).

In determining what is appropriate discipline, consideration must be given to the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

The question of the attitude of respondent is of serious moment in this case. The referee summed up the problem in her statement in her report, "His [respondent's] insistence that he did nothing wrong and would take all of the same actions again demonstrate [sic] both his sincerity and, unfortunately, his lack of understanding of the seriousness of the disciplinary

violations in which he participated."

The Disciplinary Review Board set out its conclusion in its report recommending the filing of formal charges in this case, in which report it is stated:

> Somewhere in the conduct of this case, Mr. Neumeister lost his capacity to view his actions in the case as being an advocate for his client and he himself became the client. This blurring of roles is one of the problems that can develop when the lawyer seeks to serve both as a witness and as an advocate. Towards the end of the litigation, i.e., just before the trial in March, of 1984, Mrs. Sim was no longer capable of assisting in the preparation of her case as is shown in the Nebraska Supreme Court opinion that was decided after the trial. Therefore Harvey Neumeister was serving in the role of client, attorney-in-fact, trustee and attorney for an incompetent client. There were, simply stated, to [sic] many hats to be worn and the result was a violation of the Code of Professional Responsibility.

The legal problems in this case before the Committee on Inquiry of the First Disciplinary District, the Disciplinary Review Board, the referee, and this court have been magnified by respondent's conduct throughout these disciplinary proceedings, as well as by his conduct during the ongoing battle in the *Sim* cases before the county court for Otoe County, the district court for Otoe County, and this court. The respondent testified before the referee in this case that he had counted the number of times he stayed up all night working on the case and that for 31 nights he, along with Sim's other attorneys, "never even went to bed." Respondent's all-consuming involvement in the *Sim* cases has led to the present position in which he now finds himself. That practice has resulted in an almost incalculable loss of time of many lawyers and judges in attempting to resolve the problems, real and imaginary, presented. Lost in the shuffle are the rights of an innocent, and now incompetent, client of respondent's. The whole legal process has been an effort under this state's laws to have Sim's rights determined in open court. Rightly or wrongly, relatives of Sim's have sought a hearing to have a guardian appointed for her, an elderly relative. Proceedings to bring light to, and to

open discussion of, legal problems possibly present in the close relationship between a lawyer and his client who may be mentally impaired can only lead to public confidence that lawyers do not take advantage of disabled clients. Respondent fought hard to prevent any such open proceedings, to the point where he became attorney advocate, client, and witness in legal proceedings. In the context of this case, respondent's conduct was improper.

We conclude that the appropriate measure of discipline in this case is suspension of respondent from the practice of law for 1 year, beginning January 15, 1990.

JUDGMENT OF SUSPENSION.

---

## IOWA STATE BANK OF HAMBURG, IOWA, APPELLANT, V. ROBERT A. TRAIL AND LORENE TRAIL, APPELLEES.

449 N.W.2d 520

Filed December 22, 1989. No. 87-677.

1. **Judgments: Final Orders: Words and Phrases.** An appealable judgment is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
2. **Judgments: Final Orders: Res Judicata.** The doctrine of res judicata applies only in the case of final judgments; a judgment which is not final and does not adjudicate the rights in litigation in a conclusive and definitive manner cannot be set up in bar of a subsequent action.
3. **Demurrer: Pleadings.** The objection that there is another action pending between the parties for the same cause may be raised by demurrer only when the pendency of the former action is shown on the face of the petition.
4. **Security Interests.** A financing statement does not create a security interest; it merely gives notice to subsequent purchasers or creditors of a possible security interest.
5. _____. Upon lapse of a financing statement a security interest becomes unperfected, but the security agreement is still effective between the parties.
6. **Demurrer: Pleadings.** 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 petition.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Reversed and remanded for further proceedings.

R.J. Stevenson, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Richard H. Hoch, of Hoch & Steinheider, for appellees.

BOSLAUGH, SHANAHAN, and GRANT, JJ., and KNAPP and ROWLANDS, D. JJ.

KNAPP, D.J.

Iowa State Bank filed its petition in replevin seeking recovery of farm equipment, machinery, livestock, and grain from Robert and Lorene Trail, basing its claim to possession upon a security agreement executed by the Trails, three promissory notes (in default), and three Uniform Commercial Code financing statements.

The Trails demurred, alleging that the financing statements were improperly recorded or had lapsed and that continuation statements had not been timely filed. Hearing was had, briefs were ordered, and the court, on April 6, 1987, sustained the demurrer on the grounds asserted by Trails, the order reading in pertinent part, "[T]he defendants' Demurrer be and the same is hereby sustained, the Petition in Replevin to be dismissed with costs taxed to the plaintiff." No separate order of dismissal was issued.

On May 5, the bank filed an amended petition in replevin, essentially identical to its original petition, but omitting all references to the financing statements. The temporary order in replevin and notice of hearing were issued and signed by the court. The Trails filed a special demurrer to the amended petition, setting forth various grounds in support of the demurrer. Hearing was had, and on June 22, the court sustained the special demurrer, adopting and citing the following grounds asserted by the Trails:

> 3. Plaintiff's Petition in Replevin, filed January 16, 1987, was dismissed by the Court on April 6, 1987. No motion for new trial was filed or appeal taken thereon and time for appeal has elapsed.

4. The relief sought by the plaintiff has been determined by the Court and the issues are res judicata.

. . . .

6. Plaintiff has filed an action at law in this Court (Case No. 33-176) requesting judgment upon the note(s) secured by the property attempting to be simultaneously replevined herein.

The court dismissed the bank's amended petition, and the bank appeals. We reverse and remand.

The court's order of April 6 stating that the bank's petition was "to be dismissed" did not purport to perform in praesenti or to be self-executing but, instead, contemplated that the dismissal was to occur at some unspecified time in the future. The clerk of the court did not consider the order as constituting a dismissal and therefore did not send the statutory notice of rendition of judgment, see Neb. Rev. Stat. § 25-1301.01 (Reissue 1985), to the bank or to its counsel. The order of April 6 did not perform in the present, lent itself to speculation and conjecture, and was therefore not an appealable judgment, a " 'final determination of the rights of the parties.' " *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 878, 415 N.W.2d 478, 479 (1987).

The April 6 order not being a final, appealable judgment, the trial court's finding that the issue raised by the amended petition had been determined by the order cannot stand. As noted in 50 C.J.S. *Judgments* § 620 at 44-45 (1947): "The doctrine of res judicata applies only in the case of final judgments; a judgment which is not final and does not adjudicate the rights in litigation in a conclusive and definitive manner cannot be set up in bar of a subsequent action." See, also, *Kash v. McDermott & Miller*, 221 Neb. 297, 376 N.W.2d 558 (1985).

The third ground relied upon by the trial court, that a suit had been filed on the notes, is not a proper ground in this case. The objection that there is another action pending between the parties for the same cause may be raised by demurrer only when the pendency of the former action is shown on the face of the petition. *Johnsen v. Parks*, 189 Neb. 712, 204 N.W.2d 804 (1973). The bank filed suit on the notes against Robert Trail on

May 5, 1987, the same day it filed its amended petition in replevin against both Trails. The suit on the notes is not disclosed by the amended petition for replevin, does not fall within the judicial notice exception noted in *Hubbard v. Loewenstein*, 181 Neb. 96, 147 N.W.2d 164 (1966), and is therefore not available as a ground for demurrer.

The April 6 order sustaining the demurrer did not specify a time within which plaintiff could amend its petition. The bank did file its amended petition on May 5 and advised the court of the filing, and the court issued and signed the temporary order in replevin and the notice of hearing thereon. While the Trails claimed in their special demurrer that the bank had filed the amended petition without leave of court, the court did not adopt this claim as a basis for its sustaining of the special demurrer.

The court's order sustaining the special demurrer refers to its April 6 order as being based upon the belief that the lapsed financing statements resulted in the bank's security interests' being unperfected and that such defect could not be cured by amendment.

Assuming lapse of the financing statements and subsequent "imperfection" of the bank's security interest, it does not follow that the security interest itself lapsed. The purpose of filing the financing statements was merely to give notice to subsequent purchasers or creditors of a possible security interest. 79 C.J.S. *Secured Transactions* § 38 (Supp. 1974). As between the parties, the security agreement and the interests created thereby remain effective, even though they may be subject to the rights of other creditors. 79 C.J.S. *Secured Transactions* § 25 (Supp. 1974).

"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 way of amendment, particularly in the case of an original complaint.' " *Cagle, Inc. v. Sammons*, 198 Neb. 595, 604, 254 N.W.2d 398, 404 (1977).

This was the case with plaintiff's original petition. The defect, if a defect it was, could be and was cured by the proposed amended petition. The trial court should have allowed the amendment, and its failure to do so constituted an

abuse of discretion.

The trial court's order of June 22, 1987, incorporating therein the order of April 6, is reversed, and the cause is remanded with directions to allow plaintiff to proceed upon its amended petition.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

---

RIEDA OURADA, APPELLANT AND CROSS-APPELLEE, V. ROBERT COCHRAN II, M.D., AND NEBRASKA METHODIST HOSPITAL, APPELLEES AND CROSS-APPELLANTS.

449 N.W.2d 211

Filed December 22, 1989. No. 87-973.

1. **Malpractice: Limitations of Actions: Time.** In medical malpractice cases a period of limitations or repose begins to run when the treatment rendered after and relating to the act or omission complained of is completed.
2. **Malpractice: Notice: Jurisdiction.** The provision in Neb. Rev. Stat. § 44-2840(4) (Reissue 1988) that requires, upon waiver of the panel review, service of a copy of a petition or complaint upon the Director of Insurance at the time the action is filed in court is merely a notice requirement and neither confers nor denies jurisdiction of the court.
3. **Malpractice: Negligence: Jury Instructions: Appeal and Error.** In a medical malpractice action where the plaintiff's evidence establishes a prima facie case of negligence against a physician for failure to use methods of procedure in accordance with the standard of care, it is prejudicial error to give the jury an instruction from which the jury may infer that such evidence, standing alone, does not establish that the physician used an improper method of procedure.

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

Ronald J. Palagi, of The Law Offices of Ronald J. Palagi, P.C., and Martin E. Spellman, of Spellman Law Offices, for appellant.

Patrick G. Vipond, of Sodoro, Daly & Sodoro, for appellees.

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

WHITE, J.

Rieda Ourada, the plaintiff below, appeals from a jury verdict in favor of Robert Cochran II, M.D., and Nebraska Methodist Hospital, the defendants below, in her action for medical negligence.

Appellant Ourada assigns as error (1) that the trial court gave several instructions which were prejudicial to the appellant and misleading to the jury and (2) that the verdict is not supported by the evidence. The appellees have cross-appealed, claiming that the trial court erred in failing to find that the action was barred by the statute of limitations and in failing to dismiss for lack of subject matter jurisdiction. We reverse and remand on the basis that instruction No. 13 was prejudicially erroneous.

The record discloses the following facts. Ourada was injured in a sledding accident on December 2, 1983, in which she suffered a fracture of the first lumbar vertebra. She was taken to the emergency room at Nebraska Methodist Hospital and was subsequently admitted there as a patient under the care of Dr. Cochran. On December 9, an operation to decompress and stabilize Ourada's spine was performed by Drs. Cochran, Hacker, and Waters.

Appellant alleges negligent care, diagnosis, and treatment by the appellees from December 2, the time that appellant entered the emergency room, until the morning of December 9, the day on which the operation was performed. There is no allegation of negligence regarding the operation itself, nor regarding any time thereafter. Appellant alleges that as a result of appellees' negligence she developed permanent cauda equina syndrome, which causes her to suffer loss of bladder control, numbness, weakness in her legs, and sexual dysfunction.

We will first examine appellees' cross-appeal. Appellees were both subject to the provisions of the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1988). The act provides that a medical review panel shall review all malpractice claims against those covered by the act in advance of filing such actions. However, § 44-2840(4) allows for waiver of the panel:

> The claimant may affirmatively waive his or her right to a panel review, and in such case the claimant may proceed to

> file his or her action directly in court. If the claimant waives the panel review, the claimant shall serve a copy of the petition or complaint upon the director [of insurance] personally or by registered or certified mail at the time the action is filed in court.

Appellant chose to waive the panel and filed her petition with the court on December 6, 1985. A copy of the petition, postmarked December 10, 1985, was received by the Department of Insurance on December 11.

In medical malpractice cases a period of limitations or repose begins to run when the treatment rendered after and relating to the act or omission complained of is completed. *Barry v. Bohi*, 221 Neb. 651, 380 N.W.2d 249 (1986). Therefore, the statute of limitations began to run on December 9, 1983. Appellees admit this in their brief. Appellant filed her petition 3 days before the 2-year statute ran, thus conferring subject matter jurisdiction on the district court.

Appellees contend that appellant is barred by her failure to serve a copy of the petition on the director of the Department of Insurance by December 9 or at the exact time that the petition was filed. This argument fails because the provision which requires that a copy of the petition be sent to the Department of Insurance neither confers nor denies jurisdiction of the court. The district court gained subject matter jurisdiction of the case upon the filing of appellant's petition.

Furthermore, the provision in question is merely a notice requirement:

> Section 5 is offered at the request of the Department of Insurance. It applies to situations where a claimant decides to waive his or right [sic] to a panel. Review of the amendment would require the claimant to notify the Department of the . . . the Director of the Department of Insurance at the time he or she files a lawsuit. It is necessary that the Department of Insurance is aware of all potential claims which might affect the excess liability fund.

Floor Debate, L.B. 692, Banking Committee, 88th Leg., 2d Sess. 8439-40 (Feb. 29, 1984) (remarks by Sen. John DeCamp, cosponsor of L.B. 692).

We hold that the department's receipt of appellant's petition 5 days after it was filed with the court substantially and sufficiently effectuated the purpose of giving the department notice of a potential claim which might affect the excess liability fund, and therefore jurisdiction of the court will not be denied on the issues presented in appellees' cross-appeal.

We now turn to appellant's assignment of error regarding jury instructions. Appellant claims that the decision in *Watson v. McNamara*, 229 Neb. 1, 424 N.W.2d 611 (1988), is controlling. We agree. Instruction No. 13 in this case is essentially the same as instruction No. 10 given in *Watson*, which was ruled prejudicially erroneous. Instruction No. 13 states:

> A physician who is a specialist is not bound to use any particular method of procedure; and if, among physicians of ordinary skill and learning in that specialty, more than one method of procedure is recognized as proper, it is not negligence for a physician to adopt any of such methods. The fact that some other method of procedure existed, or the fact that some other physician in that specialty testified in this case that he might or would have used or advised another or a different method, does not, standing alone, establish that the specialist used an improper procedure; nor would it be an act of negligence or impropriety for the specialist not to have adopted another method.

In this case, as in *Watson*, the testimony of appellant's experts, if believed, established a prima facie case of negligence. We stated in *Watson* that instruction No. 10 permitted the jury to infer that the plaintiff's experts' testimony, even if believed, did not establish negligence and was not enough to establish the plaintiff's case. We reiterate that statement here as it pertains to instruction No. 13, and hold that the instruction was prejudicial to the appellant and is grounds for reversal. The judgment is therefore reversed and the cause remanded for a new trial. We need not reach appellant's second assignment of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

# ROSIE J. ROSE, APPELLANT, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, APPELLEE.

449 N.W.2d 522

Filed December 22, 1989. No. 88-090.

1. **Eminent Domain: Damages: Time.** The measure of damages for land taken for public use is established at the time of the governmental taking.
2. **Eminent Domain: Time: Pleadings.** Ordinarily, a governmental taking occurs when the condemner files its condemnation petition for proceedings before appraisers appointed to determine whether the condemnee has been damaged by the governmental appropriation or taking.
3. _____: _____: _____. When a government, before a condemnation petition is filed, exercises dominion over, or appropriates an interest in, a person's private property, a taking for a public use occurs and may be the subject of an inverse condemnation proceeding.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. _____: _____: _____. 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.
6. **Jury Instructions: Appeal and Error.** Regarding the claim of prejudice from an instruction given or a court's refusal to give a tendered instruction, the given instructions must be read conjunctively rather than separately in isolation. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning instructions and necessitating a reversal.
7. **Eminent Domain: Juries: Evidence: Verdicts.** In an eminent domain proceeding, when a jury is permitted to view the premises involved in the proceeding, the jury's observation is evidence which a jury may consider with other relevant evidence in arriving at a verdict.
8. **Rules of Evidence: Trial: Appeal and Error.** In a civil case, to constitute reversible error contemplated in Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)), admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.
9. **Trial: Witnesses: Appeal and Error.** Alleged error in excluding a witness' testimony is cured when the initially excluded testimony is later elicited through the same witness.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Hugh I. Abrahamson and, on brief, Frank Meares for appellant.

Dana W. Roper, Chief Assistant City Attorney, for appellee.

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

SHANAHAN, J.

Rosie J. Rose appeals from the judgment on a $3,300 verdict in an eminent domain proceeding. See Neb. Rev. Stat. §§ 76-701 et seq. (Reissue 1986). Rose also appeals from the allowance of fees for the condemnees' expert witness and attorney and from the assessment of interest in a condemnation case.

During pendency of this appeal, George P. Rose died. The appeal was revived in the name of Rosie Rose, the heir of George Rose and, apparently, the personal representative of the estate of George Rose.

As background for the eminent domain proceeding, the city had installed a water main at the east edge of land eventually acquired by George and Rosie Rose in Saunders County. The presence of the city's subterranean water main on the tract in question is somewhat explained by vague references to an unrecorded easement from the Chicago, Burlington and Quincy Railroad Co. to the city in 1931 for construction and maintenance of a municipal waterline. Pursuant to the easement, in 1932 the city installed a cast-iron water main, which was 36 inches in diameter and ran along the east edge of Roses' later-acquired land.

Roses were unaware of the city's easement for the waterline and the existence of the main. Sometime after acquisition of their land in 1979, Roses commenced construction of a waterway to irrigate their sod farm on the acquired parcel and, during such work, discovered the city's main. When the city learned about Roses' construction and excavation, which would affect the water main, the city requested that Roses cease their work. Roses refused, and the city commenced an action, seeking, inter alia, to enjoin Roses from injuring the water main. After a trial in the city's action, the district court, on July 15, 1980, entered judgment by which the city was determined to be the "owner" of the tract occupied by its water main, namely, a 50-foot-wide tract which ran, generally, north and south along

the east side of Roses' land adjacent to U.S. Highway 6 in Saunders County, Nebraska. In its 1980 judgment, the district court also permanently enjoined Roses from trespassing on the tract where the city's water main was located and from damaging the waterline. None appealed from the judgment.

On July 7, 1982, Roses commenced an inverse condemnation proceeding pursuant to § 76-705, which provides:

> If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined.

Roses claimed that the city had appropriated fee title for the tract where the water main was located and, therefore, had caused a "partial taking and damage" of Roses' real estate. The appraisers appointed by the county judge awarded Roses $1,453.70. After Roses' appeal to and trial in the district court, the verdict in Roses' first trial was set aside. See *Rose v. City of Lincoln*, 223 Neb. 148, 388 N.W.2d 127 (1986).

Trial of Roses' condemnation case was transferred to Lancaster County. George Rose testified that as the result of the permanent injunction granted to the city in 1980, Roses' real estate adjoining the site of the city's waterline had "zero" value, since the intended sod farm was a virtual impossibility. Rose also testified that access to the sod farm was so restricted by the location of the city's water main that use of Roses' land as a sod farm became impractical. During direct examination of George Rose, the court refused to allow Rose to testify about loss of access to Roses' sod farm. In an offer of proof, Rose related the substance of his excluded testimony: The city's water main site prevented reasonable access to Roses' property, was an inconvenience regarding the remainder of Roses' land, and had caused a diminution in the value of the remainder. However, in his rebuttal testimony, Rose described the restricted or lost access resulting from the city's acquisition of the water main site. Further, according to Rose, the "per acre" value of Roses' property in 1980 was the same as the value for the land in 1982, or, as George Rose expressed:

> [Roses' lawyer] Now, Mr. Rose, have you an opinion, as the owner of this land, as to the value of your land in 1980 and 1982?
>
> [George Rose] Would you repeat that?
>
> [Lawyer] Yes. What is the value of your land in '80 and '82?
>
> [George Rose] Two thousand dollars an acre.

Expert witnesses for the city testified that the city had acquired 1.9 acres of Roses' real estate and that on account of the acquisition, Roses had sustained damages which ranged from $1,425 to $1,900. Over Roses' objection, the court instructed the jury that the date of the city's appropriation or taking was July 7, 1982, when Roses filed their petition and alleged an inverse condemnation. Roses requested that the jury be instructed:

> If you find from a proponderence [sic] of the evidence that the Plaintiff has been deprived of reasonable ingress to and egress from its [sic] property under all the circumstances, you should take this fact into consideration in determining the Plaintiffs' damage under other instructions herein. It is not however to be considered as a separate element of damage. If you do not so find, then you should not take it into consideration in determining the Plaintiffs' damages.

The court rejected Roses' tendered instruction on access, but did instruct the jury that in determining the value of the land taken or damaged, the jury was entitled to consider all the land's uses and purposes which existed at the date of the city's acquisition, including "uses which are reasonably probable and likely to occur in the near future and which affect the market value of the property." Also, the court informed the jury that "[j]ust compensation means the difference as of [the date of taking] between the fair and reasonable market value of the property before the taking and the fair and reasonable market value of the property thereafter." Regarding the remainder of Roses' real estate after the city's acquisition, the court instructed:

> In arriving at the reduction in the fair and reasonable market value of the property, you must consider its value

> for any purpose for which it might reasonably be used, taking into account all of the uses and purposes to which it could have been put and every fact and circumstance shown in the evidence bearing upon its value as of [the date of taking], which are not speculative. . . .
>
> You may also consider every non-speculative element of inconvenience, annoyance, and disadvantage which the taking has caused to plaintiffs and which would influence a purchaser's decision to buy the property or pay a certain amount for it.

The jury was allowed to view the premises and was instructed by the court: "You may consider your viewing of the property in connection with all the other evidence in arriving at your verdict."

After viewing the premises, the jury awarded Roses $3,300 as damages for the city's appropriation or taking. The court also awarded Roses $1,500 as a fee for their lawyer and $475 as a fee for Roses' expert witness but made no express provision for interest.

Rosie Rose complains that the trial court erred in (1) instructing the jury that the date of the city's taking was July 7, 1982, when Roses' condemnation petition was filed, rather than July 15, 1980, when the city obtained the judgment against Roses; (2) refusing to allow George Rose to testify on direct examination concerning the claimed loss of access to Roses' real estate; and (3) providing no express allowance of interest and in the amounts allowed as fees for Roses' expert witness and lawyer.

Both Rose and the city contend that this appeal involves an eminent domain proceeding attributable to the 1980 judgment against Roses. "The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried." *Holden v. Urban*, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987). See, also, *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

## INSTRUCTIONS

Rose contends that the trial court erred by its instructions which stated that the date of taking was July 7, 1982, the date

on which Roses commenced their inverse condemnation proceeding. Rose maintains that the date of taking was actually July 15, 1980, when the city obtained the judgment in which the court determined that the city was the "owner" of the tract in question and permanently enjoined Roses from trespassing on the tract and damaging the city's water main.

The measure of damages for land taken for public use is established at the time of the governmental taking. *Chaloupka v. State*, 176 Neb. 746, 127 N.W.2d 291 (1964).

Ordinarily, a governmental taking occurs when the condemner files its condemnation petition for proceedings before appraisers appointed to determine whether the condemnee has been damaged by the governmental appropriation or taking. See, *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978); *Chaloupka v. State, supra*; *Schmailzl v. State*, 176 Neb. 617, 126 N.W.2d 821 (1964).

However, in an inverse condemnation, the rule varies in many jurisdictions concerning determination of a date for the governmental taking. Some courts hold that the taking occurs and, therefore, the date for taking is established when the petition for an eminent domain proceeding is filed, whether the proceeding is commenced by a condemner or a condemnee. See, *Hayden v. Board of County Comm'rs*, 41 Colo. App. 102, 580 P.2d 830 (1978); *State et al. v. Blackiston Land Co., Inc.*, 158 Ind. App. 93, 301 N.E.2d 663 (1973). Other courts hold that in an inverse condemnation, the taking occurs when a government appropriates a person's private property to a public use. See, *Evans v. Hope*, 12 Ohio St. 3d 119, 465 N.E.2d 869 (1984) (date of taking is determined by the government's actual physical appropriation); *State Highway Com. v. Stumbo et al*, 222 Or. 62, 73, 352 P.2d 478, 483 (1960) (taking occurs "at the time of the physical invasion, for the landowner is by this process ousted from any further use of his property except the right to claim a reasonable value for its occupation . . ."); *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970); *City of Los Angeles v. Tilam*, 142 Cal. App. 3d 694, 191 Cal. Rptr. 229 (1983); *Brasher v. Childersburg Waterworks Etc. Bd.*, 428 So. 2d 71 (Ala. Civ. App. 1983); *Department of Transportation v. Shaw*, 36 Ill. App. 3d 972, 345 N.E.2d 153 (1976). See, also,

Annot., 2 A.L.R.3d 1038 (1965).

As the court noted in *Department of Transportation v. Shaw, supra* at 982-83, 345 N.E.2d at 161:

> Because the date of the injury in inverse condemnation situations is not necessarily the date the condemnation petition was filed, valuation at the date of filing might have the effect of unjustly enriching the property owner for the condemning authority's unauthorized acts, if . . . the value of the property rights were appreciating, or of unfairly penalizing him, if property rights were depreciating, since regardless of type of market or inverse condemnation situation, the date of filing of a proper and complete condemnation petition would necessarily follow the date of the purportedly unauthorized or incomplete taking. Consequently, we believe that valuation of the defendants' property rights at the date of the filing of the condemnation petition works an injustice in situations where . . . the property owner must bring action to force the State to compensate him for the taking of his property rights.

We believe that the observation in *Department of Transportation v. Shaw* is consistent with the constitutional requirement that government must pay just compensation for its public appropriation of private property, that is, "The property of no person shall be taken or damaged for public use without just compensation therefor." Neb. Const. art. I, § 21. Consequently, we hold that when a government, before a condemnation petition is filed, exercises dominion over, or appropriates an interest in, a person's private property, a taking for a public use occurs and may be the subject of an inverse condemnation proceeding.

In Roses' case, the city obtained a judgment against Roses on July 15, 1980, and thereby achieved ownership of, or at least dominion over, Roses' real estate through the municipal assertion of a property right in derogation of Roses' title to their real estate. Also, as a governmental authority, the city obtained a permanent injunction to exclude Roses from using their real estate. Therefore, under the circumstances, we conclude that July 15, 1980, is the date when the city acquired

part of Roses' real estate for a public purpose—transmission of water through the subterranean main on Roses' property.

However, our conclusion concerning the date of taking in Roses' case does not require reversal. In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. See, *Plambeck v. Union Pacific RR. Co.*, 232 Neb. 590, 441 N.W.2d 614 (1989); *Bishop v. Farm Bureau Life Ins. Co.*, 228 Neb. 74, 421 N.W.2d 423 (1988).

> In a condemnation action there are two elements of damage: (1) market value of the land taken or appropriated; and (2) diminution in value of the land remaining, less special benefits. . . .
>
> . . . [A] condemnee is entitled to recover compensation for all damages caused by the taking. Damages recoverable in a condemnation case are determined by the extent of the taking and a condemner's rights actually acquired, not by a condemner's use resulting from less than full exercise of a right acquired by eminent domain. . . . In considering just compensation and the amount of damages to be paid a condemnee, a jury may consider factors which would influence a well-informed buyer in determining a price payable for the property at the time of the government's taking.

*Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 193-94, 376 N.W.2d 539, 549 (1985).

Even if the jury had been correctly instructed that the date of the city's taking was July 15, 1980, Rose has made no showing that prejudice resulted from the instruction that the date of taking was July 7, 1982. George Rose testified that there was no difference in the value of his property in 1980, when the city obtained its judgment against Roses, and 1982, when Roses filed their inverse condemnation petition. On the basis of Roses' evidence on value, the jury would have arrived at the same verdict regarding damages notwithstanding the discrepancy in the date for the city's taking. Thus, there is no merit in Rose's contention that prejudice resulted from the court's erroneous instruction regarding the date of the city's

taking.

Next, Rose contends that the trial court erred in refusing to give an instruction on the loss of access as an element of damage caused by the city's taking.

> 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).

Regarding the claim of prejudice from an instruction given or a court's refusal to give a tendered instruction, the given instructions must be read conjunctively rather than separately in isolation. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning instructions and necessitating a reversal. *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989); *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989); *State v. Dondlinger*, 222 Neb. 741, 386 N.W.2d 866 (1986). See, also, *State v. Pierce*, 231 Neb. 966, 975, 439 N.W.2d 435, 443 (1989): "All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury."

In Roses' trial, the jury viewed the subject property after George Rose had testified about the limited access and its effect on Roses' real estate, that is, the restricted access rendered Roses' real estate virtually worthless or with little value in the eyes of the prospective purchaser. In an eminent domain proceeding, when a jury is permitted to view the premises involved in the proceeding, the jury's observation is evidence which a jury may consider with other relevant evidence in arriving at a verdict. *Zwygart v. State*, 230 Neb. 128, 430 N.W.2d 301 (1988); *Bentz v. Nebraska P.P. Dist.*, 211 Neb. 844, 320 N.W.2d 763 (1982). Although the court's instruction did not specifically refer to loss of access as a factor in Roses' damages, the jury was told to determine damages on the basis of an award

which would "justly compensate" Roses in view of every "non-speculative element of inconvenience, annoyance, and disadvantage" which would "influence a purchaser's decision to buy [Roses'] property or pay a certain amount for it."

Under the circumstances, when the instructions given by the trial court are read conjunctively, especially in the light of the jury's viewing of Roses' real estate and the city's water main site, we find no prejudicial error in the trial court's refusal to give Roses' tendered instruction regarding loss of access as a factor affecting damages recoverable by Roses in their inverse condemnation proceeding.

## EXCLUSION OF TESTIMONY ON DIRECT EXAMINATION

Rose asserts that the trial court erred in refusing to allow George Rose's testimony, on direct examination, regarding loss of access to Roses' real estate. However, on rebuttal George Rose did testify about restricted access to the remainder after the city's acquisition of the site for its water main. Rose does not contend or demonstrate that George Rose's testimony on rebuttal was different from the testimony which the court excluded during his direct examination. In a civil case, to constitute reversible error contemplated in Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)), admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded. See *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 414, 390 N.W.2d 487, 494 (1986). In *Lautenschlager v. Lautenschlager,* 134 Neb. 577, 581-82, 279 N.W. 200, 202 (1938), this court stated:

> It is but the statement of a truism to say that in a trial to the court where evidence is excluded erroneously, but where the same evidence is elicited from the same witness and admitted later on in the trial of the case and is fully and completely presented, error cannot be predicated on such erroneous rejection. The principle controlling this situation has been before this court on a number of occasions and the following pronouncements have been made: Error in excluding evidence is cured by its

subsequent admission.

See, also, *Gugelman v. Kansas City Life Ins. Co.*, 137 Neb. 411, 413, 289 N.W. 842, 843 (1940): " 'Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness.' " (Quoting from *Union P. R. Co. v. Evans*, 52 Neb. 50, 71 N.W. 1062 (1897).) Consequently, alleged error in excluding a witness' testimony is cured when the initially excluded testimony is later elicited through the same witness. Rose has not shown prejudicial error in the trial court's refusing to allow George Rose's testimony during direct examination on the subject of restricted access for the remainder of Roses' real estate.

## INTEREST AND FEES

Finally, Rose contends the trial court erred in the amounts awarded as fees for Roses' attorney and expert witness and, further, that the court erred regarding interest on Roses' recovery through the eminent domain proceedings. However, nowhere in Rose's brief is there any discussion regarding the alleged errors concerning fees and interest. Neb. Ct. R. of Prac. 9D(1)(d) (rev. 1989) provides, "[C]onsideration of the case will be limited to errors assigned *and discussed*." (Emphasis supplied.) "To be considered by this court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred." *Fee v. Fee*, 223 Neb. 128, 134, 388 N.W.2d 122, 126 (1986). See, also, *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985) (argument is an effort to establish belief by a course of reasoning). Because Rose has failed to discuss the errors regarding fees and interest, we will not consider these errors alleged by Rose but not argued in Rose's appellate brief.

Therefore, the judgment of the district court is affirmed in all respects.

AFFIRMED.

## ERNEST A. MOSSMAN AND ELAINE MOSSMAN, HUSBAND AND WIFE, APPELLANTS, V. CITY OF COLUMBUS, NEBRASKA, APPELLEE.

449 N.W.2d 214

Filed December 22, 1989. No. 88-099.

1. **Zoning: Appeal and Error.** A zoning board of adjustment is vested with discretion to dispose of matters within its province, but its acts are judicial in nature and are subject to review and reversal when they constitute an abuse of discretion and are arbitrary.
2. **Ordinances: Words and Phrases.** The complete replacement of a structure constitutes a "structural alteration" under an ordinance which defines such as "any change in the supporting members of a building, such as bearing walls, columns, beams or girders."
3. _____: _____. A mobile home attached to a septic tank and well is a structure under an ordinance which defines "structure" as "anything constructed or erected, the use of which requires more or less permanent location on the ground or attached to something having a permanent location on the ground."
4. **Ordinances: Zoning.** The interpretation of terms within a zoning ordinance is a question of law for the court.
5. _____: _____. Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
6. _____: _____. Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
7. _____: _____. In interpreting the language of an ordinance to determine the extent of the restriction upon use of the property, the language must be interpreted, where doubt exists as to the intention of the legislative body, in favor of the property owner and against any implied extension of the restriction.
8. _____: _____. While zoning ordinances may not operate retroactively so as to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the ordinance, zoning ordinances which limit and plan for the elimination of nonconforming uses are generally considered a proper exercise of a municipality's power.
9. **Estoppel.** Where one gives a reason for his or her decision and conduct touching a matter involved in controversy, he or she is estopped from changing his or her ground and putting the conduct upon another and different consideration.

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

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellants.

Stan A. Emerson, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellee.

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

CAPORALE, J.

Plaintiffs-appellants Ernest A. and Elaine Mossman, husband and wife, challenge the district court's affirmance of defendant-appellee City of Columbus' refusal to permit the replacement of a mobile home. The issue raised by the Mossmans' six assignments of error is whether by removing the original mobile home from their property they lost their right to continue the nonconforming use of their property as a mobile home site. We affirm.

The Mossmans purchased the property and original mobile home on May 21, 1977. This mobile home unit had existed on the property since the Mossmans' predecessor in title placed it there in 1961. The property was then, in November 1979, annexed by the City of Columbus, a city of the first class. Since its annexation, the property has been zoned within a two-family-residence district.

In May 1986, the Mossmans removed the original mobile home, the outside of which had become "shabby," from their property with the intention of replacing it with a newer, much "nicer looking" unit and leasing it to tenants, as they had the original unit. After removing the original mobile home, the Mossmans poured a concrete foundation for the replacement unit at the place where the original unit had sat. The city's building inspector then, on June 27, 1986, left a notice on the Mossmans' property, stating: "WARNING! This Installation DOES NOT meet the requirements of the Columbus Building Code. Further use or construction is PROHIBITED." Thereafter, the Mossmans received a letter from the building inspector, which stated:

> In regard to the mobile home you parked west of your home at 4710 11th Street, I have noticed that it has been

> removed and a new pad was poured. By removing the existing mobile home, you broke the nonconforming use and any further use on this property shall be in conformity with the City Code.
>
> This is to notify you that if you move another mobile home on to this property, you will be in violation of the City Code.
>
> I am enclosing a copy of Sec. 7 of the Mobile Home Code.

In the meantime, the Mossmans had, at a different location, repaneled the inside of the replacement unit, replaced most of the plumbing, and rewired the bathroom. The replacement unit was approximately 15 feet longer and 4 feet wider than the original mobile home, and although the Mossmans planned to continue using the septic tank and well they had installed to service the original unit, the replacement unit was capable of being attached to the city water supply and waste disposal utilities. It was the Mossmans' further intention to anchor the replacement mobile home to the new concrete foundation and to skirt the unit with concrete blocks so as to give it the appearance of having a foundation.

The Mossmans appealed from the building inspector's action to the city's board of zoning adjustment, which affirmed the inspector's action. The Mossmans then appealed to the district court. Their position is that because a mobile home had been situated on their property before the property became subject to the city's zoning ordinances, they can continue such nonconforming use pursuant to Columbus Zoning Ordinance, ch. 13, § 11-13-7 (1981). The city, on the other hand, argues that if the Mossmans are permitted to replace the original mobile home, the nonconforming use will be permitted to run indefinitely, in violation of the city's ordinances.

We begin our analysis by recalling that a zoning board of adjustment is vested with discretion to dispose of matters within its province, but its acts are judicial in nature and are subject to review and reversal when they constitute an abuse of discretion and are arbitrary. *McClelland v. Zoning Bd. of Appeals*, 232 Neb. 711, 441 N.W.2d 893 (1989).

From the evidence it is clear that as the Mossmans claim, the

original unit existed on the Mossmans' property before the property was annexed by the city and thereby became subject to the zoning ordinances. It is also clear that the zoning ordinances prohibit the placement of a mobile home on their property which is now zoned for use by two-family residences and that the Mossmans' use of the original mobile home was a nonconforming use, which is defined by Columbus Zoning Ordinance, ch. 1, § 11-1-1 (1981), as "a building or land occupied by use that does not conform with the regulations of the district in which it is situated." See *County of Saunders v. Moore*, 182 Neb. 377, 155 N.W.2d 317 (1967) (a "nonconforming use" is an existing use which is contrary to the zoning regulations).

The Mossmans' continued use of the property for a mobile home is governed by the general nonconforming use provision found in § 11-13-7, which reads in relevant part:

> The lawful use of a building or lot existing at the time of the passage of this Title may be continued, although such use does not conform with the provisions hereof, and such use may be extended throughout the building; provided no structural alterations, except those required by law or provisions of this Code are made therein.

That portion of § 11-13-7 is in conformity with Neb. Rev. Stat. § 19-904.01 (Reissue 1987), which empowers cities of the first class, see chapter 19, article 9, to provide by zoning regulation "for the restoration, reconstruction, extension, or substitution of nonconforming uses upon such terms and conditions as may be set forth in the zoning regulations."

"Structural alterations" is defined in § 11-1-1 as "any change in the supporting members of a building, such as bearing walls, columns, beams or girders." Section 11-1-1 defines "building" as

> a structure having a roof supported by columns or walls and when separated by a division wall without openings, each portion of such building shall be deemed a separate building, except as may be provided in a possible section of this Title on exceptions. The word "Building" includes the word "Structure."

"Structure" is defined in § 11-1-1 as "anything constructed or

erected, the use of which requires more or less permanent location on the ground or attached to something having a permanent location on the ground."

The interpretation of terms within a zoning ordinance is a question of law for the court. Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole. *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985); *City of Beatrice v. Goodenkauf*, 219 Neb. 756, 366 N.W.2d 411 (1985). Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. *Id.* In interpreting the language of an ordinance to determine the extent of the restriction upon use of the property, the language must be interpreted, where doubt exists as to the intention of the legislative body, in favor of the property owner and against any implied extension of the restriction. *Beckman v. City of Grand Island*, 182 Neb. 840, 157 N.W.2d 769 (1968).

Thus, we must first determine whether a mobile home is a building or structure within the meaning of the words as used in § 11-13-7. In arguing that it is not, the Mossmans cite to a number of cases arising in a variety of contexts which hold that for the purposes involved in those cases, a mobile home was not a building or structure. At least one case, *Bixler v. Pierson*, 188 So. 2d 681 (Fla. App. 1966), holds that a mobile home placed on land for use as a dwelling was a structure as the term "structure" was used in a nonconforming use ordinance.

More important than what other cases have held is the language of the ordinance before us. According to § 11-1-1, a structure includes any constructed thing which requires for its use attachment to something having a permanent location on the ground. The original unit was connected to a septic tank and well, things which have a permanent location on the ground. Thus, the original unit was indeed a structure.

The remaining, and dispositive, question is whether the replacement of the original unit with another mobile home would constitute a "structural alteration" within the contemplation of § 11-13-7. In arguing that it would not, the Mossmans rely upon *Kensmoe v. City of Missoula*, 156 Mont. 401, 480 P.2d 835 (1971). Therein, a landowner replaced a dilapidated and untenantable mobile home which had existed on her property as a nonconforming use with a newer mobile home. The applicable ordinance, like that before us, permitted nonconforming uses to continue provided no structural alterations except those required by ordinance were made. However, the decision of the *Missoula* court that the replacement did not constitute a structural alteration hinged upon a provision not present in the ordinance before us. The *Missoula* ordinance did not " 'apply to existing structures, nor to the existing use of any building, but shall apply to any alterations of a building to provide for its use for a purpose . . . different from the use to which it was put before alteration . . . .' " *Id.* at 404, 480 P.2d at 837. The *Missoula* court thus held that the ordinance prohibited only structural alterations made to change the use and not those made for the purpose of continuing the same use. Therefore, the *Missoula* ordinance did not prevent the landowner from replacing her mobile home for the purpose of continuing the use of the mobile home as a residence.

In the ordinance before us, whether a structural alteration occurs turns not on the use to which the structure is put, but on changes made to the structure itself. Consequently, *Missoula* is inapposite.

Applicable is *Bixler v. Pierson, supra,* which held that the removal of an old trailer and replacement with a newer trailer constituted an alteration, extension, and enlargement of a nonconforming structure. The court reasoned that if one replacement is proper, subsequent replacements would also be proper, and the life of the nonconforming structure would be indefinitely prolonged, defeating the whole purpose of the zoning ordinance. Also, *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 288 N.W.2d 129 (1980), held that a landowner, by removing an existing mobile home protected as a

nonconforming use from his property which was zoned in a " 'recreation district' " and substituting a new mobile home, violated a county zoning ordinance which prohibited buildings in recreational districts from being " 'erected, moved or structurally altered' " in excess of 50 percent of the building's assessed value and thereby lost protection of the nonconforming use doctrine. *Id.* at 168, 288 N.W.2d at 137. But see *Johnston v. Orange County*, 342 So. 2d 1031 (Fla. App. 1977) (replacement of single mobile homes with "double wide" mobile homes within mobile home park did not constitute "extension or enlargement" of nonconforming use in violation of nonconforming use ordinance).

The language of § 11-1-1 provides that any change in the supporting members of a structure constitutes a structural alteration. There can be no greater change in the supporting members of a structure than that which occurs when the entire structure is removed and replaced with another, no matter how similar the two structures may be. Therefore, the inescapable conclusion is that replacement of the original mobile home with a new unit would constitute a structural change within the contemplation of § 11-1-1.

However, the Mossmans, in reliance upon *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed* 339 U.S. 960, 70 S. Ct. 1002, 94 L. Ed. 1370 (1950), argue that even if that is so, a zoning ordinance may not operate retroactively so as to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the ordinance. Although that is a correct statement of the law as far as it goes, *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985), recognized that ordinances which limit and plan for the elimination of nonconforming uses are generally considered a proper exercise of a municipality's power. The *Bruce* court thus approved an ordinance providing that the discontinuance of a nonconforming use for a period of 2 years forfeited the right to reestablish such a nonconforming use thereafter. See, also, *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964), which approved an ordinance requiring the termination of a nonconforming use after a period of 7 years 15 days from the

ordinance's enactment.

The relevant ordinances planned for the gradual elimination of the Mossmans' nonconforming use by permitting them to keep the original mobile home on their property until they decided to replace it. Therefore, the Mossmans lost their investment not as a direct result of the city's zoning ordinance but, rather, because the original mobile home had become shabby. See *Service Oil v. Rhodus*, 179 Colo. 335, 500 P.2d 807 (1972), *overruled on other grounds, Hartley v. City of Colorado Springs*, 764 P.2d 1216 (Colo. 1988). There has been no impermissible retroactive application of the city's zoning ordinances.

Lastly, citing us to *State v. Board of County Commissioners of Cass County*, 60 Neb. 566, 83 N.W. 733 (1900), the Mossmans complain that the city now rests its action upon ordinances other than those upon which it initially based its action and upon which this action was tried, all in violation of the precept that where one gives a reason for his or her decision and conduct touching a matter involved in controversy, he or she is estopped from changing his or her ground and putting the conduct upon another and different consideration. Although the rule survives to the present day, *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987), it has no application to the case before us, for the record does not support the Mossmans' claims. As the earlier recitation of the relevant facts establishes, the building inspector's initial notice refers to the building code, and his later letter states that by removing the original mobile home, the Mossmans "broke" their nonconforming use and that further uses would thus need to be in "conformity with the City Code." Moreover, the Mossmans' operative petition refers to the nonconforming use provisions of § 11-13-7 and alleges that they had not abandoned their earlier nonconforming use. That allegation was denied by the city's answer. The application of § 11-13-7 was thus an issue in the trial court.

The judgment of the district court is correct and is therefore affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

While I agree generally with the majority opinion and the judgment in this case, I believe it is important to understand that zoning ordinances may operate retroactively to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the ordinance.

In *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964), we held such an ordinance of the City of Omaha to be valid. The ordinance allowed a dog kennel which was in nonconforming use on February 1, 1955, to remain in such use only until February 16, 1962. In that case, we quoted from *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954), in which the court said, " 'Every zoning ordinance effects some impairment of vested rights either by restricting prospective uses or by prohibiting the continuation of existing uses, because it affects property already owned by individuals at the time of its enactment.' " 177 Neb. at 566, 129 N.W.2d at 513.

Whether the mandatory discontinuance of a particular nonconforming use after a fixed period is a reasonable exercise of the police power must be determined from the facts and circumstances in each case. The important point is that the right to maintain a nonconforming use of property indefinitely is not absolute, and it may be limited or destroyed by subsequent zoning legislation.

---

## IN RE CONSERVATORSHIP OF RANDY D. MOSEL, A PROTECTED PERSON.

## RANDY D. MOSEL, A PROTECTED PERSON, APPELLEE, V. LEONARD DUNKER, CONSERVATOR, APPELLANT.

449 N.W.2d 220

Filed December 22, 1989. No. 88-305.

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.

Leonard Dunker, conservator.

Roger C. Lott for appellee.

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

PER CURIAM.

On March 26, 1987, the county court for Lancaster County entered an order refusing to terminate the conservatorship of Randy D. Mosel. In the order the county court specifically refused to find the conservator unfit, but did find that

> the evidence does show that over the course of the last five years, the relationship between this conservator and Mr. Mosel has run its course and has taken on such a character that it is of mutual benefit to both and in the best interests of Mr. Mosel that it [the relationship] be terminated.

The county court ordered that "the letters of conservatorship be terminated."

The conservator timely appealed from this order to the district court for Lancaster County. On January 15, 1988, the district court, after hearing, entered the following order: "Upon a review of the entire record this court cannot conclude that the decision of the County Court was erroneous. Therefore, it is ordered that the appeal be dismissed at appellant's costs."

On January 25, 1988, the conservator filed a "Motion For New Trial" in the district court. On March 15, the district court overruled the motion for new trial. On April 5, the conservator filed a notice of appeal to this court.

After the briefing in this case was concluded, this court held, in *Collection Bureau of Lincoln v. Loos*, 233 Neb. 30, 31, 443 N.W.2d 605, 606 (1989): "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." In the *Loos* case, we held that a notice of appeal filed in this court 76 days after the district court had affirmed the judgment of the county court was not filed in time to give this court jurisdiction, although Loos had filed a motion for

new trial in the district court within 10 days of the district court's order affirming the order of the county court. That determination was reaffirmed in *In re Guardianship and Conservatorship of Sim,* 233 Neb. 825, 448 N.W.2d 406 (1989).

Similarly, in this case the notice of appeal was not timely filed to give this court jurisdiction. The appeal must be dismissed.

APPEAL DISMISSED.

---

MICHAEL M. CROWLEY AND JOYCE CROWLEY, HUSBAND AND WIFE, APPELLEES, V. NEWELL L. MCCOY ET AL., APPELLANTS.

449 N.W.2d 221

Filed December 22, 1989. No. 88-319.

1. **Contracts: Damages: Penalties and Forfeitures.** Ordinarily, a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages.
2. **Contracts: Real Estate: Sales: Damages.** A contract for the transfer of land is the type of agreement open to a stipulation for liquidated damages.
3. **Real Estate: Sales: Breach of Contract: Damages.** Actual damages arising from the breach of a contract for the purchase of real estate are of such an uncertain and unascertainable nature as to warrant the construction that a sum paid on breach is liquidated damages and not a penalty.
4. **Contracts.** A contract must be construed as a whole and, if possible, effect must be given to every part thereof.
5. _____. In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous.
6. **Appeal and Error.** Regarding a question of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
7. **Contracts: Words and Phrases.** An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **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.
9. **Contracts: Intent.** If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract.

10. **Contracts: Real Estate: Sales: Penalties and Forfeitures: Words and Phrases.** In the context of a land sale contract, forfeiture means that if a purchaser defaults on the payments, any sums paid by the purchaser on the contract of sale are not reimbursed to him or her.
11. **Contracts.** The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.

Appeal from the District Court for Keya Paha County: EDWARD E. HANNON, Judge. Affirmed.

Bill Quigley, of Quigley, Dill & Quigley, for appellants.

David A. Domina, of Domina, Gerrard, Copple & Stratton, P.C., for appellees.

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

FAHRNBRUCH, J.

The installment contract sellers of 4,477.9 acres of Keya Paha County ranchland appeal a declaratory judgment which held that the buyer avoided any deficiency judgment by the forfeiture of his and his wife's interest in the land and of the payments the buyer made under the contract. The sellers also appeal dismissal of their cross-petition. We affirm.

On November 17, 1981, after several weeks of negotiations, the defendant sellers, Newell L. and Sue A. McCoy, then husband and wife, and Blanche M. McCoy, Newell's mother, under written contract sold the ranchland to the plaintiff Michael M. Crowley.

Under the terms of the agreement, the purchase price was $1,600,000. By the time of closing on March 15, 1982, Crowley had paid principal in the sum of $320,000 on the contract. During the first 3 years of the contract, only interest at the rate of 10 percent on the unpaid principal balance of $1,280,000 was to be paid. During the next 17 years, the annual principal payments were to vary according to a predetermined schedule. On March 15, 2003, a balloon principal payment of $550,400 would be due. Each annual principal payment was to be accompanied by interest computed at 10 percent on the unpaid principal balance remaining unpaid from time to time. Crowley, upon completing his part of the agreement, was to

receive a warranty deed which was placed in escrow. The agreement made no provision for the acceleration of principal payments in the event Crowley defaulted on any installment.

On March 15, 1982, Crowley took possession of the land. He paid the $128,000 annual installments of interest on March 15 of 1983, 1984, and 1985. On March 15, 1986, Crowley also timely made a payment of $12,800 principal and $128,000 in interest. After the March 1986 payment, the total amount of principal and interest paid by Crowley to the McCoys was $844,800.

On January 27, 1987, Crowley, through his attorney, notified Newell McCoy by letter that he was unconditionally exercising his election to forfeit all payments made to date and conveying back the real estate. The letter was accompanied by a quitclaim deed wherein Crowley and his wife tendered their interest in the real estate back to Newell, Sue, and Blanche McCoy "as their interests may appear." By letter of January 29, 1987, acceptance of the quitclaim deed was refused and the deed returned to Crowley.

Crowley did not make the $139,520 principal and interest payment due on March 15, 1987. Instead, Crowley and his wife brought suit in the district court for Keya Paha County to determine the parties' rights under the contract. They asked the trial court to declare that forfeiture of all payments made by Crowley on the land contract and return of the land to the McCoys extinguished any claim the McCoys might have against the Crowleys for a deficiency judgment by reason of the land contract. In their answer, the McCoys denied the Crowleys' right to the relief they sought in their declaratory judgment petition. In a cross-petition, the McCoys asked judgment for the entire unpaid principal balance of the contract, together with interest, or, in the alternative, the principal payment and interest due on March 15, 1987.

In this appeal, the McCoys claim the trial court erred (1) in finding that the buyer as a defaulting party had a right to elect forfeiture, (2) in construing the default provisions of the contract as a limitation of remedies to forfeiture only in favor of the buyer, and (3) in determining that the McCoys were not entitled to payment of the delinquent installment. Resolution of

these issues turns on interpretation of the contract between the parties.

The dispute in this case centers around the following contract provisions:

> [I]n the event that either of the parties . . . shall fail to keep and perform the agreements herein contained . . . the same shall constitute a default . . . and if such default continues for a period of 15 days then the aggrieved party may take appropriate action . . . including the right of specific performance. *Buyer shall assume the responsibility of the contract and in case of forfeiture shall be willing to lose all monies paid upon the property but Sellers shall not have the right of recourse other than the return of the property conveyed hereunder.*

(Emphasis supplied.)

In regard to real estate contracts, this court has held: "Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages." *Bando v. Cole*, 197 Neb. 722, 726, 250 N.W.2d 651, 653 (1977). We have also held that it is well settled that a contract for the transfer of land is the type of agreement open to a stipulation for liquidated damages. *Edgar v. Anthes*, 109 Neb. 546, 191 N.W. 682 (1922). In *Edgar v. Anthes, supra*, we also stated that courts have frequently held that the actual damages arising from the breach of a contract for the purchase of real estate have been frequently held to be of such an uncertain and unascertainable nature as to warrant the construction that a sum named to be paid on breach is liquidated damages and not a penalty. Here, the Crowleys are the only parties who could claim that forfeiture of the money paid to the McCoys constitutes a penalty. They have made no such claim, but, in fact, insist they have a right to forfeit the money paid under the contract. Therefore, there will be no further discussion on the point.

A contract must be construed as a whole and, if possible, effect must be given to every part thereof. *Mills v. Aetna Ins. Co.*, 168 Neb. 612, 96 N.W.2d 721 (1959). The McCoys construe the first sentence of the provisions under

consideration as providing any appropriate remedy to the nonbreaching party, including specific performance. They also assert that the second sentence applies only in those limited circumstances when forfeiture is selected by the party not in default as the means of enforcing his or her rights. Since they are not in default and have not selected forfeiture, the McCoys maintain that the first sentence permits them to pursue specific performance.

In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous. *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). Regarding a question of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. *Id.*

An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Knox, supra*. "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." *Id.* at 391, 446 N.W.2d at 4. If a contract is unambiguous, the intent of the parties must be determined from the contents of the contract. *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 446 N.W.2d 729 (1989).

Under the terms of the contract, Crowley agreed, among other things, to maintain an adequate fence around the property. If, for instance, he had failed to maintain the fence as agreed, the first sentence of the provision at issue would have permitted the McCoys, the aggrieved party, the right to specific performance of the fence maintenance agreement.

The second provision of the language in dispute relates to forfeitures. In the context of a land sale contract, forfeiture means that if a purchaser defaults on the payments, any sums paid by the purchaser on the contract of sale are not reimbursed to him or her. See *Ryan v. Kolterman*, 215 Neb. 355, 338 N.W.2d 747 (1983). In this case, the disputed sentence merely explains the effects of a forfeiture. That is, the buyer, upon forfeiture, loses all moneys paid and the seller does not have a right of recourse *other* than the return of the property. There is

no conflict between the two sentences, and effect may be given to both provisions. The second provision applies solely to forfeiture, while the first sentence covers all other breaches. The forfeiture provision clearly limits the McCoys' remedy to retention of the payments received and recovery of the property. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Graphic Resources, Inc. v. Thiebauth*, 233 Neb. 592, 447 N.W.2d 28 (1989). The forfeiture provision is susceptible of only one reasonable interpretation. It unambiguously restricts the sellers' relief and supports the declaratory judgment entered by the trial court in favor of the Crowleys. The trial court was correct in dismissing the McCoys' cross-petition.

AFFIRMED.

---

## STATE OF NEBRASKA, APPELLEE, V. THOMAS CHARLES VON DORN, APPELLANT.

449 N.W.2d 530

Filed December 22, 1989. No. 88-990.

1. **Postconviction.** In a proceeding under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), the movant must allege facts which, if proved, constitute a denial or violation of the defendant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
2. _____. A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.
3. **Postconviction: Proof: Appeal and Error.** One seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.

4. **Statutes: Legislature: Intent.** A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
5. **Sentences.** The granting of presentence jail time credit is within the trial court's discretion except where the statutory maximums are exceeded.
6. **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.
7. **Pleas.** A judge is not required to inform a defendant of his or her right to appeal in order to assure that a plea of guilty or no contest is entered freely, intelligently, voluntarily, and understandingly.

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

Thomas Charles Von Dorn, pro se.

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

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

CAPORALE, J.

Defendant-appellant, Thomas Charles Von Dorn, challenges the denial without an evidential hearing of his motion for postconviction relief. He asserts the postconviction court erred in failing to (1) find that the equal protection clause of the 14th amendment requires that he be granted credit for time served prior to sentencing, (2) find that he was deprived of his 6th amendment right to the effective assistance of counsel, and (3) grant him credit for time served. We affirm.

Von Dorn was arrested on November 9, 1987, and a subsequent information charged him with two counts of burglary. The record shows that Von Dorn stole items from at least two separate farms and sold them through auction houses.

His bail was apparently set at 10 percent of $250,000, although the record shows differing amounts for a "bail bond" and an "appearance bond." At any rate, Von Dorn was not able to post any bond, and he remained incarcerated from the time

of his arrest through the time of sentencing on February 29, 1988. Pursuant to a plea bargain, Von Dorn pled no contest to one count of burglary. In return for this plea the State dismissed the second burglary charge and recommended incarceration for 3 to 5 years.

The trial judge sentenced Von Dorn to imprisonment for a period of not less than 3 nor more than 5 years. In refusing to credit Von Dorn for the 113 days he had spent in jail prior to sentencing, the trial judge stated that he had already taken into account the fact that Von Dorn had spent 113 days in jail during the pendency of the action.

In an effort to receive credit for the time served prior to sentencing, Von Dorn, on November 8, 1988, filed the pro se "post conviction motion coram nobis" which is the subject of this appeal and which we, as did the postconviction court, treat as a motion under the provisions of the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). We begin our analysis by recalling certain well-established rules which control the disposition of such motions.

In a proceeding under the act, the movant must allege facts which, if proved, constitute a denial or violation of the defendant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable. *State v. Nearhood,* 233 Neb. 767, 448 N.W.2d 399 (1989); *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988). A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable. *State v. Nearhood, supra*; *State v. Start, supra.* Moreover, one seeking postconviction relief has the burden of

establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Nearhood, supra*; *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989); *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989); *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

With those basic rules in mind, we move on to a consideration of Von Dorn's first assignment of error, that the postconviction court erred in failing to find that the equal protection clause of the 14th amendment to the U.S. Constitution requires that he be granted credit for time served prior to sentencing.

This court addressed similar contentions in *Eutzy v. State*, 199 Neb. 384, 258 N.W.2d 829 (1977), and *State v. Nelson*, 189 Neb. 580, 203 N.W.2d 785 (1973). In *Nelson*, the defendant pled guilty to embezzlement of more than $100, a crime punishable by 1 to 7 years' imprisonment. The district court sentenced Nelson to 1 to 3 years' imprisonment and did not allow credit for time served. Nelson later filed a motion seeking credit for time served. When the district court overruled the motion, Nelson appealed the decision to this court, arguing that the ruling violated constitutional guarantees of due process and equal protection. In upholding the district court's decision, this court stated:

> The judge who heard the motion was the judge who pronounced sentence. He found that in the sentencing of defendant he had considered the prior time spent in custody. . . .
>
> Had the judge resentenced defendant, he clearly would have imposed a sentence with the same net time for defendant to serve. In doing so, he would not have penalized a defendant for attacking the sentence. Cf. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The resentence furthermore would not have discriminated against an indigent unable to tender a monetary bond.
>
> A criminal sentence in which the court considered prior time spent in custody may be consistent with state and federal constitutional guarantees of due process and with

> the federal constitutional guarantee of equal protection, although the record at the sentencing hearing is silent on the subject.

*Nelson* at 580-81, 203 N.W.2d at 786-87.

In *Eutzy*, the defendant spent 135 days in confinement prior to sentencing because he was unable to post bail. In sentencing the defendant to 3 to 5 years' imprisonment for forgery, the sentencing court stated that it had considered the time the defendant had spent in custody prior to confinement and ruled that the defendant would not be credited for time served prior to sentencing. The commitment order also noted that the court had considered the time the defendant had served while awaiting trial.

In seeking credit for time served, Eutzy challenged the constitutionality of Neb. Rev. Stat. § 83-1,106 (Reissue 1987), which left the granting of credit for time served to the discretion of the district court. In addressing Eutzy's challenge on appeal, this court stated:

> This case is similar to State v. Nelson, 189 Neb. 580, 203 N.W.2d 785, in which the defendant was sentenced to imprisonment for 1 to 3 years for embezzlement. In that case the record was silent and a verbatim record of the sentencing hearing was not before this court. However, the trial court found that the time spent in custody had been considered in fixing the sentence. We held that a criminal sentence in which the court considered prior time spent in custody might be consistent with the federal constitutional guarantee of equal protection even though the record at the sentencing hearing was silent on the subject.
>
> The sentence which was imposed here was much less than the statutory maximum of 20 years imprisonment authorized by section 28-601, R.R.S. 1943. Since the 135 days that Eutzy spent in confinement between the time of his arrest and the time that he was sentenced was considered by the trial court in fixing the sentence imposed, the result is the same as if the sentence had been 3 years and 4 1/2 months to 5 years and 4 1/2 months imprisonment, with credit then being given for the 135

days confinement. Such a sentence would have been valid. *Eutzy v. State, supra* at 385-86, 258 N.W.2d at 829-30.

With the holdings in *Nelson* and *Eutzy* in mind, we examine the sentence which the trial judge imposed upon Von Dorn.

Von Dorn pled no contest to a charge of burglary, a Class III felony, Neb. Rev. Stat. § 28-507 (Reissue 1985), punishable by 1 to 20 years' imprisonment or a fine of up to $25,000, or both, Neb. Rev. Stat. § 28-105 (Reissue 1985). Pursuant to a plea bargain, the State recommended a 3- to 5-year sentence. Neither the plea bargain nor the State's recommendation concerned itself with whether Von Dorn was to receive credit for the time he had already served. In any event, the trial court was not bound by the State's recommendation. *State v. Griger*, 190 Neb. 405, 208 N.W.2d 672 (1973) (sentencing court is not bound by prosecutor's recommendation arising from a plea bargain). See, also, *State v. Miles*, 194 Neb. 128, 230 N.W.2d 227 (1975). Thus, the trial judge could have imposed an indeterminate sentence of 6 2/3 years to 20 years and then credited Von Dorn for the 113 days he had been confined prior to sentencing. See Neb. Rev. Stat. § 83-1,105 (Reissue 1987).

Instead, the trial judge sentenced Von Dorn to 3 to 5 years' imprisonment, stating that he had already taken into consideration the 113 days Von Dorn had spent in jail prior to sentencing. The trial judge would have accomplished the same result by sentencing Von Dorn to 3 years 3 2/3 months to 5 years 3 2/3 months and granting him credit for time served prior to sentencing. Such a sentence would have been well within the 6 2/3- to 20-year sentence which was permissible in this case. Thus, as in *Eutzy*, the sentence imposed upon Von Dorn does not violate his right to equal protection and is valid.

Although it is not assigned as error, Von Dorn also argues in his pro se brief that he is entitled to credit for time served, due to the Legislature's passage of 1988 Neb. Laws, L.B. 1054. L.B. 1054 amended § 83-1,106 (Reissue 1987) to require courts to grant credit for time served under certain circumstances. See § 83-1,106 (Cum. Supp. 1988). The granting of such credit had previously been left to the discretion of the courts. See § 83-1,106 (Reissue 1987). Von Dorn argues that the passage of L.B. 1054 indicates that it is the policy of the State of Nebraska

to allow credit for time served prior to sentencing.

The portion of § 83-1,106 which is at issue in this case is § 83-1,106(1) (Reissue 1987), which states:

> Credit against the maximum term and any minimum term *may be given* to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.

(Emphasis supplied.) L.B. 1054 changed the above-emphasized language from "may be given" to "shall be given." See § 83-1,106(1) (Cum. Supp. 1988). The flaw in Von Dorn's argument is that the amendment to § 83-1,106(1) did not become effective until July 9, 1988, more than 4 months after Von Dorn was sentenced.

In *Housand v. Sigler*, 186 Neb. 414, 183 N.W.2d 493 (1971), this court addressed a similar argument with respect to § 83-1,106, the very statute at issue here. The court stated:

> Section 83-1,106, R.S. Supp., 1969, which became effective August 25, 1969, authorizes the Director of Corrections to allow credit of presentence time in custody on a sentence. It is not by its term retrospective. Legislation operates prospectively only unless it clearly indicates retrospective operation. [Citation omitted.] We must assume that the district court in petitioner's case considered any time spent in custody when it pronounced sentence.

*Housand* at 415-16, 183 N.W.2d at 494. See, also, *Larson v. Jensen*, 228 Neb. 799, 424 N.W.2d 352 (1988) (statutes in noncriminal matters are not to be given retroactive effect unless the Legislature has clearly expressed a contrary intention); *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984) (a legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed).

Nothing in § 83-1,106 (Cum. Supp. 1988) indicates that the

changes effected by L.B. 1054 should have retrospective effect. Consequently, § 83-1,106 (Cum. Supp. 1988) does not require that Von Dorn be granted credit for the time he had served prior to sentencing.

Furthermore, the trial judge did not abuse his discretion under § 83-1,106 (Reissue 1987) by refusing to grant Von Dorn credit for time served prior to sentencing. "The granting of presentence jail time credit is within the trial court's discretion except where the statutory maximums are exceeded." *State v. Ross*, 220 Neb. 843, 846, 374 N.W.2d 228, 230 (1985).

In his second assignment of error, Von Dorn contends that the district court erred in failing to find that Von Dorn was deprived of his sixth amendment right to effective assistance of counsel by virtue of counsel's failure to pursue the equal protection claim by failing to appeal the trial judge's failure to grant credit for the time Von Dorn spent in jail prior to sentencing. 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. *State v. Nearhood,* 233 Neb. 767, 448 N.W.2d 399 (1989); *State v. Grell*, 233 Neb. 314, 444 N.W.2d 911 (1989); *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989); *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989); *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989); *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

There being no merit to the equal protection claim set forth in Von Dorn's first assignment of error, it is clear that Von Dorn's counsel was not ineffective in failing to appeal Von Dorn's conviction on equal protection grounds.

Finally, Von Dorn argues in connection with his second assignment of error that he is entitled to credit for time served because the judge did not advise him of his right to appeal. *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), details the steps which a judge must follow to ensure that a defendant's no

contest plea is rendered freely, intelligently, voluntarily, and understandingly. These steps are restated in *State v. Rhodes*, 233 Neb. 373, 445 N.W.2d 622 (1989), and do not include a requirement that the judge inform a defendant of his right to appeal.

This court addressed a similar contention in *State v. Sagaser*, 181 Neb. 329, 148 N.W.2d 206 (1967), a case in which the defendant sought postconviction relief after being convicted of arson. The court stated:

> Defendant's . . . assignment of error is predicated upon the allegation that after the pronouncement of the sentence he was not informed by the court of his right to appeal the conviction and sentence. We do not understand that our law placed this burden on the trial judge. This point, however, is immaterial because the defendant on cross-examination stated that he was aware of his right to appeal.

*Id.* at 331, 148 N.W.2d at 207. The trial judge had no obligation to inform Von Dorn of his right to appeal, and the judge's failure to so inform Von Dorn provides no constitutional grounds for disturbing his conviction and sentence.

There being no merit to Von Dorn's assignments of error, the judgment of the postconviction court is affirmed.

AFFIRMED.

---

STATE OF NEBRASKA, APPELLANT, V. STEVEN R. SCHALL, APPELLEE.

449 N.W.2d 225

Filed December 22, 1989. No. 89-063.

1. **Criminal Law: Courts: Judgments: Appeal and Error.** An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the cause for imposition of sentence may be reviewed under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1988).
2. **Criminal Law: Courts: Double Jeopardy: Appeal and Error.** Under Neb. Rev. Stat. § 29-2316 (Reissue 1985), the Nebraska Supreme Court may reverse an appellate ruling of a district court in a criminal case where the defendant has not been placed legally in jeopardy.

3. **Constitutional Law: Criminal Law: Double Jeopardy: Appeal and Error.** The double jeopardy clause of the fifth amendment to the U.S. Constitution is not a complete barrier to an appeal by the prosecution in a criminal case.
4. **Constitutional Law: Criminal Law: Double Jeopardy: Sentences: Appeal and Error.** The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence.
5. **Criminal Law: Sentences: Appeal and Error.** A defendant is charged with knowledge of a statute and its appeal provisions and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.
6. **Courts: Words and Phrases.** In Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1988), "trial court" is merely a synonym for "district court."
7. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or abuse of discretion.
8. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be set aside absent an abuse of discretion on the part of the sentencing court.
9. **Sentences: Probation and Parole: Appeal and Error.** A denial of probation will not be disturbed in the absence of an abuse of discretion.
10. **Trial: Words and Phrases.** Judicial abuse of discretion results when reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
11. **Sentences.** In considering a proper sentence, the trial court is not limited in its discretion by a mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all circumstances surrounding the life of the defendant.

Appeal from the District Court for Colfax County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Colfax County, GERALD E. ROUSE, Judge. Exception sustained, and cause remanded with directions.

Larry J. Karel, Colfax County Attorney, and Richard T. Seckman for appellant.

Robert D. Westadt, of Otradovsky, Bieber & Westadt, for appellee.

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

FAHRNBRUCH, J.

The State takes exception to a district court ruling that the Colfax County Court erred in not granting probation to the

defendant, Steven R. Schall, on a June 8, 1988, charge of third offense operation of a motor vehicle while under the influence of alcoholic liquor.

We sustain the State's exception and remand the cause to the district court for Colfax County with direction to reinstate and affirm the sentence imposed by the county court.

After Schall's conviction for third offense drunk driving, the county court denied his request for probation and sentenced him to the maximum penalty of 6 months in jail plus a $500 fine and revoked his Nebraska driving privileges and his driver's license for 15 years.

Upon appeal by the defendant, the district court for Colfax County, without elucidation, found that the trial court had abused its discretion in sentencing Schall. The district court ordered the trial court to place Schall on probation.

Pursuant to Neb. Rev. Stat. §§ 29-2315.01 et seq. (Reissue 1985 & Cum. Supp. 1988), the State appealed the district court's ruling to this court. An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the cause for imposition of sentence may be reviewed under § 29-2315.01 (Cum. Supp. 1988). See *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984).

Under § 29-2316 (Reissue 1985), the Nebraska Supreme Court may reverse an appellate ruling of a district court in a criminal case where the defendant has not been placed legally in jeopardy. In *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986), where a district court, acting as an intermediate appellate court, erred in failing to affirm the conviction and sentence of the county court in a drunk driving case, this court remanded the cause to the district court with direction to reinstate and affirm the county court's judgment of conviction. See, also, *State v. Schaf*, 218 Neb. 437, 355 N.W.2d 793 (1984) (a second offense drunk driving case); *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989) (a willful reckless driving case). As in *State v. Schaf, supra*, the appeal to this court in Schall's case only involves the failure of the district court to affirm the sentence imposed by the county court.

We must first determine whether Schall was placed in jeopardy by the district court's action in vacating the county

court's sentence. Stated another way, would reinstating the sentence imposed by the county court after it was vacated by the district court for Colfax County constitute placing the defendant in double jeopardy? We hold that it does not.

"The Double Jeopardy Clause is *not* a complete barrier to an appeal by the prosecution in a criminal case. . . . The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence." *United States v. DiFrancesco*, 449 U.S. 117, 132, 136, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). A defendant is charged with knowledge of a statute and its appeal provisions and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. *DiFrancesco, supra.*

On July 15, 1988, before one county judge, Schall entered a plea of no contest to a charge of driving while under the influence of alcoholic liquor on May 23, 1988, in violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987). At an enhancement hearing on August 30, 1988, a second county judge determined that the offense to which Schall entered a plea of no contest was the defendant's third violation of § 39-669.07. Before being sentenced, Schall requested probation. The defendant informed the court that he had completed alcohol inpatient treatment and that he wished to enter an alcohol treatment halfway house. In continuing sentencing for 60 days, the second county judge declared:

> THE COURT: Looking at the record in this case . . . I don't think the Court would be justified in entering another probation order. On the other hand, I do hate to cut off the possibility certainly. . . . What I would suggest doing is continue it for 60 days and see if Mr. Schall is able to follow-up on good intentions. . . . I think Mr. Schall, that would put you in a position of asking for probation anyway at that point. At the present time, I wouldn't be prepared to give it to you. . . .
>
> . . . .
>
> [STATE'S ATTORNEY]: I just liked it to be known that there's no guarantee about what the Court's [going to] do. . . .
>
> THE COURT: That's . . . correct. The . . . guarantee

> right now is just for the statutory penalty, but . . . I don't want to completely preclude the possibility of probation . . . .

On October 18, 1988, at time of sentencing before a third county judge, the trial court had before it Schall's presentence investigation. It reflects that the June 8, 1988, charge was Schall's sixth offense for driving while under the influence of alcohol. The defendant had his driving privileges reinstated only a short time before his last arrest. He previously had been placed on probation four times for driving while intoxicated and one time for an alcohol-related third degree assault.

Schall contends that the comments made by the second county judge on August 30, 1988, amounted to an implied promise that the trial court would sentence him to probation if he would have a successful visit at The Link halfway house. It is clear that the second trial judge made no promise or guarantee that Schall would receive probation. The judge simply stated that probation would not even be considered unless Schall carried out his intention with regard to further alcohol rehabilitation. Then, probation would only be considered, the judge said.

Before proceeding further, an analysis of statutes involving criminal appeals from county courts is in order. As used in § 29-2315.01, "trial court" is merely a synonym for "district court." Historically, there never has been a direct appeal in a criminal case to the Nebraska Supreme Court from a court inferior to the district court. Until 1972, all criminal appeals from a county or municipal court were to the district court, where they were tried de novo. See Neb. Rev. Stat. § 29-613 (Reissue 1964). Beginning in 1973, appeals to the district court were tried de novo on the record. See § 29-613 (Cum. Supp. 1972). In January 1973, police magistrate and justice of the peace courts were merged into the county court system. It was not until July 1985 that municipal courts were also merged into the county court system. Since 1985, criminal appeals from inferior courts have been prosecuted in the district courts as error proceedings. See Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1984). Thus, the district court acts as an intermediate court of appeals rather than as a trial court. It is to be noted that

there is a specific statute, § 29-2317 (Cum. Supp. 1988), whereby a prosecutor may, in a criminal case, take exceptions to rulings of a county court for determination by a district court. There is still no procedure whereby a party in a criminal case may appeal a county court ruling directly to the Nebraska Supreme Court.

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987). This court has consistently held that a sentence imposed within the statutory limits will not be set aside absent an abuse of discretion on the part of the sentencing court. *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989). It is equally clear that a denial of probation will not be disturbed in the absence of an abuse of discretion. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

Judicial abuse of discretion results when reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988).

The law is well established that in considering a proper sentence, the trial court is not limited in its discretion by a mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all circumstances surrounding the life of the defendant. *State v. Sorbello*, 232 Neb. 486, 440 N.W.2d 696 (1989). In this case, it is obvious that the county court considered these factors: the presentence investigation; the alcohol treatment discharge summary pertaining to Schall's inpatient treatment, as well as a report from The Link halfway house in Norfolk, Nebraska, concerning Schall's activity there through October 7, 1988; the testimony of the defendant; and the report, recommendation, and testimony of the probation officer, Barbara Olson. She recommended against probation. It was Olson's opinion that Schall was not motivated toward change, but was simply trying to avoid a 15-year suspension of his motor vehicle operator's

license.

A third offense of driving while under the influence of alcoholic liquor is a Class W misdemeanor, "and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of fifteen years . . . and shall order that the operator's license of such person be revoked for a like period." § 39-669.07(c). Conviction for a Class W misdemeanor also carries a maximum penalty of 6 months' imprisonment and a $500 fine. Neb. Rev. Stat. § 28-106 (Cum. Supp. 1988). The county court's sentence was within the statutory limits.

There was no abuse of discretion or error on the part of the county court in sentencing Schall. The district court erred in not affirming the county court's sentence. The State's exception is sustained, and the cause is remanded to the district court for Colfax County with directions to reinstate and affirm the sentence imposed upon Schall by the Colfax County Court.

EXCEPTION SUSTAINED, AND CAUSE REMANDED WITH DIRECTIONS.

---

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. FRAZIER, APPELLANT.

449 N.W.2d 230

Filed December 22, 1989. No. 89-067.

1. **Verdicts: Evidence: Appeal and Error.** On appeal, this court will reverse a verdict of guilty when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

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

Robert M. Spire, Attorney General, and Delores Coe-Barbee for appellee.

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

HASTINGS, C.J.

Defendant, Richard L. Frazier, appeals a conviction of first degree forcible sexual assault following a trial by jury. He was sentenced to imprisonment for a term of 5 to 10 years and has appealed to this court. He assigns as error the insufficiency of the evidence to support a guilty verdict. We affirm.

The facts are rather straightforward, although the evidence of the victim and the defendant differs.

According to the victim, a 17-year-old female, on July 26, 1988, she had engaged in consensual sexual intercourse with a friend of her stepbrother's in the basement of her great-grandparents' house. Afterward, the victim began walking home alone, taking a route through Fontenelle Park. It was approximately 9 p.m., and although it was still light out, it was beginning to get dark. She passed a man who said "hi" to her. She had not met this man, but testified that she had seen him in the neighborhood. The man approached her from behind; said, "Excuse me, Missy"; and hit her on the back of the head with a beer bottle in a paper sack. He then pushed her to the ground, raised her skirt, and forced her to have sexual intercourse with him. The man then rifled the victim's purse and dumped everything out onto the ground, looking for money.

The victim ran to the house of her hairdresser, who lived nearby, and told her that she had been assaulted, but did not mention sexual assault. That woman took the victim home, and later the police interviewed the victim. She told the police about the sexual assault at that time. The police took her to the hospital, she was examined, and the hospital authorities gathered evidence using a sexual assault kit.

She then took the police to the spot where the assault happened, and a broken Schaefer beer bottle was found in a

paper sack on the ground, as were some of the contents of her purse, including some change and a pair of yellow earrings.

A detailed description of the assailant was given to the police by the victim, and a composite drawing was done which closely resembled the defendant.

Several days later, the defendant was seen by the victim in the neighborhood, and she called the police. Eventually, the defendant was arrested, interviewed, and charged with the crime.

The defendant at first denied any contact with the victim. He gave an alibi which was not completely supported by the witnesses whom he named. He later admitted having intercourse with the victim on that day, but insisted that it was consensual. When first confronted with the fact that the victim had identified him as her assailant, and when told the victim had been struck with a bottle, but not that it had been a Schaefer beer bottle, defendant jumped out of his chair and said, "I don't drink." Although not told that the victim claimed to have been hit on the head, he stated, "I didn't hit her in the head. That would put her out." Later in the interview, defendant admitted that he does drink beer, that he will drink any kind of beer, but that he prefers to drink Schaefer beer, which is less harmful to his stomach ulcer.

As previously stated, there is a conflict in the stories told by the victim and the defendant. However, if the evidence of the victim is believed, the facts fully support a verdict of guilty.

On appeal, this court will reverse a verdict of guilty when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. *State v. Auman*, 232 Neb. 341, 440 N.W.2d 254 (1989). See, also, *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989). Such was not the case here.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the

State, there is sufficient evidence to support it. *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Wokoma*, 233 Neb. 351, 445 N.W.2d 608 (1989). See, also, *State v. Swigart, supra*.

The judgment of the district court is affirmed.

AFFIRMED.

---

STATE OF NEBRASKA, APPELLEE, V. GARY W. JOHNSON, APPELLANT.
449 N.W.2d 232

Filed December 22, 1989. No. 89-169.

1. **Criminal Law: Due Process.** There is no due process violation when a defendant is openly presented with the unpleasant alternatives of forgoing trial or facing charges on which he is plainly subject to prosecution.
2. **Criminal Law: Prosecuting Attorneys.** Vindictiveness is not shown by evidence that a pretrial decision to modify charges was influenced by the prosecutor's hope to obtain a guilty plea.
3. _____: _____. 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.
4. **Pleas: Waiver: Indictments and Informations.** A plea of no contest is equivalent to a plea of guilty for convicting and sentencing a defendant and waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defense that the information or complaint is insufficient to charge an offense.
5. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.

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

John Franklin Aman and Susan R. Tast for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

BOSLAUGH, J.

Following a plea of no contest, the defendant, Gary W. Johnson, was found guilty of second degree false imprisonment and was sentenced to 1 year's imprisonment in the county jail. He has appealed, claiming that he was denied due process of law when the county court allowed the county attorney to dismiss a misdemeanor charge and refile a felony charge arising from the same incident, when he and his witnesses were present and ready to proceed for trial on the misdemeanor complaint. The defendant further contends that the district court abused its discretion in denying him probation and in imposing an excessive sentence.

The defendant originally was charged with third degree assault, a Class I misdemeanor. He entered a plea of not guilty to this charge, and the case was set for trial in the county court for September 6, 1988.

On the morning of September 6, the State dismissed the complaint for third degree assault and filed an amended complaint for child abuse, a Class IV felony. At the hearing in the county court on September 6, the defendant objected to the dismissal of the misdemeanor charge, as he was ready for trial. This objection was overruled. The defendant waived preliminary hearing on the amended complaint and was bound over to district court for trial.

Pursuant to a plea agreement, an amended information was filed in district court, charging the defendant with second degree false imprisonment, a Class I misdemeanor, and on January 10, 1989, the defendant entered a plea of no contest to the amended information.

The defendant first contends that he was denied due process of law when the county attorney was allowed to dismiss the original misdemeanor charge and file a felony complaint. He argues that the action of the county attorney in dismissing the original misdemeanor charge and refiling a felony charge prior to trial was prompted solely by the defendant's exercising his right to a trial and demonstrated a reasonable likelihood of prosecutorial vindictiveness. The defendant claims that he was entitled to a presumption of prosecutorial vindictiveness under *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L.

Ed. 2d 74 (1982), and that his conviction and sentence should be vacated.

Questions of alleged prosecutorial vindictiveness in the pretrial setting were addressed by the U.S. Supreme Court in *United States v. Goodwin, supra*, and *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

The question presented in *Goodwin* was whether a presumption of vindictiveness should be applied to evaluate a prosecutor's pretrial response to the defendant's demand for a jury trial. In *Goodwin*, the defendant was charged with several misdemeanor and petty offenses, which were scheduled for trial before a federal magistrate. Goodwin fled the jurisdiction, was recaptured, and exercised his right to have the misdemeanor offenses tried by jury in district court. The case was transferred to another prosecutor, who reviewed the case and obtained a felony indictment. In reversing Goodwin's felony conviction, the U.S. Court of Appeals for the Fourth Circuit adopted a legal presumption that the prosecutor acted vindictively in seeking the felony indictment and held that the felony charge was barred, even absent proof of actual vindictiveness. The U.S. Supreme Court reversed, stating that the timing of the prosecutor's action "suggest[ed] that a presumption of vindictiveness is not warranted." 457 U.S. at 381.

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is

completed is much more likely to be improperly motivated than is a pretrial decision.

In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

Thus, the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted. A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in [*Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)], the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

The nature of the right asserted by the respondent confirms that a presumption of vindictiveness is not warranted in this case. After initially expressing an interest in plea negotiation, respondent decided not to plead guilty and requested a trial by jury in District Court. In doing so, he forced the Government to bear the burdens and uncertainty of a trial. This Court in *Bordenkircher* made clear that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified.

457 U.S. at 381-83.

In *Bordenkircher v. Hayes, supra*, the Court held that the due process clause of the 14th amendment did not prohibit a prosecutor from carrying out a threat, made during plea

negotiations, to bring habitual criminal charges against an accused who refused to plead guilty to the original charge of forgery. The defendant, Hayes, pled not guilty and was then charged and convicted as a habitual criminal. The Court held that the defendant's right to due process had not been violated by the use of the habitual criminal charge in an attempt to induce a guilty plea, so long as the defendant was free to accept or reject the prosecution's offer. *Id.*

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." . . . But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.
>
> . . . .
>
> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." . . . It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.
>
> . . . In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was

> [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U. S. 448, 456. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard" which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself.

(Citations omitted.) 434 U.S. at 363-65. See, also, *Luna v. Black*, 772 F.2d 448, 449-50 (8th Cir. 1985):

> There is no due process violation when a defendant is openly presented with the "unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution. . . ." *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978). Vindictiveness is not shown by evidence that a pretrial decision to modify charges was influenced by the prosecutor's hope to obtain a guilty plea. *See United States v. Goodwin*, 457 U.S. 368, 380 n. 12, 102 S.Ct. 2485, 2492 n. 12, 73 L.Ed.2d 74 (1982).

In *State v. Willett*, 233 Neb. 243, 247, 444 N.W.2d 672, 675 (1989), we said, "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."

The facts in this case do not give rise to a presumption of prosecutorial vindictiveness, and the defendant has not proven actual vindictiveness. See *Luna v. Black, supra*. In any event, the defendant entered a plea of no contest to the amended information and does not contest the validity of his plea. A plea of no contest is equivalent to a plea of guilty for convicting and sentencing a defendant and waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defense that the information or complaint is insufficient to charge an offense. *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989). His assignment of error is without merit.

The defendant further contends that the district court abused its discretion in denying him probation and in imposing an excessive sentence. An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989).

At the arraignment, the factual basis for the plea was supplied by the deputy county attorney as follows:

> MR. COLBORN: The State's evidence would be that on July 12, 1988, Tommy Cunningham-Cook reports that while at 5230 Ervin here in Lincoln, Lancaster County, Nebraska, which is where he resided with his mother, Joanne Cook, and the defendant, Gary Johnson, that he had gotten into trouble for going through the defendant's personal effects, apparently looking at some magazine that he wasn't to be looking at; that the defendant did discipline him and did strike Tommy Cook on the buttocks very hard, believed to be with a fist, leaving bruising on the child's buttocks. The child also reported that defendant picked him up by the hair and had also picked him up under the arms and shaken him and thrown him against the wall. All these events occurring in Lancaster County, Nebraska. There was — in addition to the bruising on the buttocks, there was a scratch mark on the child's underneath his arms or armpit area.
>
> THE COURT: Ms. Tast, is there any challenge to the sufficiency of the factual basis?
>
> MS. TAST: No, Your Honor.

The presentence report shows that at the time of the offense, the victim, who was 10 years of age, and his mother were living in the defendant's home. According to the victim's mother, the defendant "lured" the victim into going downstairs with him, where the assault then occurred. According to her, she "started hearing hitting on my son, you could hear my son being thrown against the wall" and the defendant "telling my son not to cry or make any noises, be quiet." The victim reported that in addition to his being struck on the buttocks with a closed hand, the defendant struck him on the side of the face, held him off

the ground by his hair, shook him, and threw him against the wall.

The mother stated that she was afraid to intervene because she thought the defendant "would take it out on my son more." She reported that in the past the defendant had held her down on the floor and hit her upper arms with his fist. She also reported that the defendant's ex-wife had told her that she had been beaten by the defendant more than once.

The victim's mother reported the assault to the police on the following day.

The police report states that the victim's buttocks showed "rather extensive bruising, certainly bruising that would not occur with a normal simple spanking."

In sentencing the defendant to 1 year's imprisonment, the maximum sentence for a Class I misdemeanor, the trial court noted that the defendant had a lengthy traffic record, as well as convictions for assault and disturbing the peace, and that "[t]his very unfortunate incident involved a six-foot, 210-pound, 44-year-old man striking a little boy and causing not only physical injury to him, but emotional trauma." The court concluded that a lesser sentence would depreciate the seriousness of the offense and promote disrespect for the law.

The presentence report shows that the defendant was convicted of 18 traffic offenses between 1960 and 1986. In 1986, the defendant was charged with third degree assault as a result of an incident involving his ex-wife. This matter was dismissed to pretrial diversion, but the diversion program was terminated when the defendant was arrested on July 4, 1987. Pursuant to a plea agreement, the assault charge was not refiled, and the defendant was convicted of disturbing the peace in connection with the July 4 incident. In 1988, the defendant was convicted of assaulting the victim's mother.

The record shows that the trial court considered the nature and circumstances of the offense and the history, character, and condition of the defendant. The trial court did not abuse its discretion in denying the defendant probation and imposing the maximum sentence.

The judgment of the district court is affirmed.

AFFIRMED.

TERRI L. SUTTER, APPELLEE, V. LAWRENCE J. SUTTER, APPELLANT.
449 N.W.2d 236

Filed December 22, 1989. No. 89-439.

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

James Michael Edgar, of Edgar & Wilson Law Offices, for appellant.

Roberta S. Stick, of Legal Services of Southeast Nebraska, for appellee.

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

PER CURIAM.

The sole issue on appeal in this dissolution of marriage action is the custody of the three minor children of the parties. The trial court found that both parties were fit and proper parents and that it was in the best interests of the children that their custody be awarded to the appellee mother, and granted custody of the children, approximately 3, 2, and 1 years old at the time of trial in March 1989, to the mother, subject to visitation in the appellant father.

We have held that determinations as to the custody of and visitation with minor children in a dissolution of marriage case are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Dilsaver v. Dilsaver*, 232 Neb. 236, 439 N.W.2d 796 (1989); *Shaffer v. Shaffer*, 231 Neb. 910, 438 N.W.2d 507 (1989).

We have so reviewed this case. We determine that the trial judge did not abuse his discretion. The judgment is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. PAUL J. VON BUSCH, APPELLANT.

449 N.W.2d 237

Filed December 22, 1989. No. 89-693.

1. **Right to Counsel.** It is not necessary to tell one who is represented by counsel that he or she has the right to such representation.
2. **Sentences: Appeal and Error.** A sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
3. **Sentences.** When a defendant is sentenced to an indefinite term up to the maximum prison term possible, credit must be given for any previously served jail time.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Brian C. Bennett, of Dunlap & Bennett, P.C., for appellant.

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

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

PER CURIAM.

As the result of a plea bargain whereunder the plaintiff-appellee State dismissed other charges, defendant-appellant Paul J. Von Busch pled guilty to theft by unlawful taking of movable property having a value of more than $300 but less than $1,000, in violation of Neb. Rev. Stat. § 28-511 (Cum. Supp. 1988). He was thereafter adjudged guilty and sentenced to imprisonment for a period of not less than 20 months nor more than 5 years. Von Busch assigns as error the district court's (1) finding that his plea was voluntarily and intelligently entered, (2) imposition of an excessive sentence, and (3) failure to give credit for time Von Busch served prior to sentencing. We affirm the conviction, but vacate and remand for resentencing.

Von Busch's first assignment of error is predicated on the fact that the district court failed to advise him of his right to counsel. However, the record demonstrates that at the time the district court accepted the plea, Von Busch was represented by counsel.

It is not necessary to tell one who is represented by counsel that he or she has the right to such representation. *State v. Rhodes*, 233 Neb. 373, 445 N.W.2d 622 (1989); *State v. Neal*, 216 Neb. 709, 346 N.W.2d 218 (1984), *cert. denied* 469 U.S. 1110, 105 S. Ct. 788, 83 L. Ed. 2d 782 (1985).

The second assignment of error is equally without merit. The crime for which Von Busch stands convicted is a Class IV felony, Neb. Rev. Stat. § 28-518(2) (Reissue 1985), punishable by imprisonment for a period of 0 to 5 years, a fine of up to $10,000, or both such imprisonment and fine, Neb. Rev. Stat. § 28-105 (Reissue 1985). The controlling rule is that a sentence within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Von Dorn, ante* p. 93, 449 N.W.2d 530 (1989); *State v. Rhodes, supra.* Although the prison sentence imposed is the maximum authorized by statute, there is nothing in the record which establishes that it constitutes an abuse of discretion.

However, as the State concedes, the third assignment of error has merit. The State admits that Von Busch spent 1 day in jail prior to being released on bond. When a defendant is sentenced to an indefinite term up to the maximum prison term possible, credit must be given for any previously served jail time. *State v. Von Dorn, supra*; *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988); Neb. Rev. Stat. § 83-1,106 (Cum. Supp. 1988).

Accordingly, we affirm the conviction, but vacate the sentence imposed by the district court and remand for resentencing in accordance with this opinion.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLANT, V. CURTIS J. TAMERIUS, APPELLEE.
449 N.W.2d 535

Filed December 22, 1989. No. 89-1282.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Daniel L. Werner, Thayer County Attorney, for appellant.

Wayne L. Garrison, of Garrison & Garrison, for appellee.

BOSLAUGH, J.

This is an interlocutory appeal by the State under Neb. Rev. Stat. § 29-116 (Reissue 1985) to review the order of the district court sustaining the defendant's motion to suppress a confession made by him to a law enforcement officer on May 4, 1989.

The record shows that on May 4, 1989, Thayer County Chief Deputy Sheriff William R. McPherson was investigating a reported sexual assault of the defendant's 4-year-old son. On a previous occasion, McPherson had investigated a report of a sexual assault on the defendant's infant daughter. During the earlier investigation, the defendant spoke with McPherson at the law enforcement center in Hebron, but denied any sexual involvement with his daughter.

After McPherson interviewed the boy and the boy's babysitter, he went to the place where the defendant was working. McPherson asked the defendant whether he would come outside and talk to him. The defendant replied, "Sure." They then went to McPherson's patrol car, which was parked near the building, and both got in. The defendant went willingly to the patrol car; was not under the influence of alcohol or drugs; spoke freely with McPherson; did not appear to be afraid; was not threatened, intimidated, or pressured; and gave rational responses to McPherson's questions.

McPherson testified that he started the conversation by telling the defendant that he was not under arrest and was not going to be arrested at that time. McPherson's written report states, "I told Curtis he was not under arrest, and was not going

to be arrested." McPherson testified that he did not give the defendant any *Miranda* warnings because the defendant was not under arrest and because "if I had Mirandaized [sic] him, I didn't think that he would talk to me."

McPherson then told the defendant that he wanted to speak to him about a sexual assault involving the defendant's son, that the report came from the babysitter, and that the child indicated he had been sexually assaulted by the defendant and had shown McPherson what occurred by the use of anatomical dolls. The defendant denied any involvement of this sort.

After 30 or 35 minutes, McPherson told the defendant, "I think you were lying when you talked to me before about [your daughter], and I think you're lying now." The defendant then said, "I'll admit, I did lie to you about [my daughter]." The defendant then admitted sexually assaulting his daughter one time in January 1989 and provided a written statement to that effect.

The defendant subsequently was charged with sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1985), and moved to suppress the confession given to McPherson on May 4, 1989. After the suppression hearing, the district court found that the defendant's statement was untrustworthy and should be suppressed.

The issue presented is whether the defendant's confession was illegally induced by reason of McPherson's telling the defendant that he would not be arrested. To be admissible, a confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. *State v. Nash*, 228 Neb. 69, 421 N.W.2d 41 (1988); *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979).

The State bears the burden in a suppression hearing to show by a preponderance of the evidence that the defendant's statements were voluntary and, therefore, admissible. To be admissible the statements must have been given freely, voluntarily, and without promises or inducements on the part of the State. Voluntariness is tested by the totality of the circumstances, and the finding of the trial court will not be set aside unless clearly wrong. *State v. Haywood*, 232 Neb. 97, 439

N.W.2d 511 (1989); *State v. Dickson*, 224 Neb. 136, 395 N.W.2d 770 (1986).

In *State v. Burr*, 126 Ariz. 338, 615 P.2d 635 (1980), the Supreme Court of Arizona held that a telephone statement made by the defendant Burr to a law enforcement officer was involuntary as a matter of law. In the course of investigating possible securities law violations by the defendant's employer, the officer attempted to contact Burr, who was working in Alaska. Burr then telephoned the officer. During the telephone conversation, Burr described his activities on behalf of his employer in some detail. As a result of the investigation, Burr was convicted of five counts of securities fraud. He contended on appeal that his telephone statement should have been suppressed as involuntary.

> The issue, in essence is whether this statement by Detective Kidd constituted a promise to Burr that he would not be prosecuted if he gave Kidd information concerning the frauds which Kidd was investigating:
>
> " 'Okay, Monte. That's, this phone call is costing you money and there is no point in running it up any further than it is, so let me explain a couple of things to you and then I'll, I would just like to know what you have to say about it. First of all, before we go any further, I've got to tell you, I'm not trying, I'm not going to arrest you or put you in jail or anything, but before I ask you anymore I've got to tell you what your rights are and your rights are that you don't have to tell me anything. You don't have to answer any of my questions.' " . . .
>
> Detective Kidd's statement—"I'm not trying, I'm not going to arrest you or put you in jail or anything * * *"—carried with it the clear implication that Burr would not be arrested if he disclosed the details of what occurred in the land sales. The statement implied a benefit to Burr in exchange for information. This made Burr's statement legally involuntary. . . . The telephone conversation should have been suppressed.

*Id.* at 340, 615 P.2d at 637.

In the present case, McPherson told the defendant that he was not under arrest *and was not going to be arrested.*

McPherson did not advise the defendant as to his constitutional rights because he believed the defendant would not talk to him if given the *Miranda* warnings. Under these circumstances, McPherson's statement could be construed to imply a benefit to the defendant in exchange for information. The finding of the trial court to this effect was not clearly wrong.

The order sustaining the motion to suppress is affirmed.

AFFIRMED.

---

## TRI-COUNTY BANK AND TRUST COMPANY, APPELLANT, V. NORMA L. WATTS, APPELLEE.

449 N.W.2d 537

Filed December 29, 1989. No. 88-190.

1. **Evidence: Appeal and Error.** Where the parties stipulate to all the facts at trial, the Supreme Court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
2. **Mortgages: Foreclosure: Liability.** If the holder of both a junior and senior mortgage forecloses the junior and buys at the foreclosure sale, in the absence of an agreement to the contrary, the mortgagor's personal liability for the debt secured by the first mortgage is extinguished.
3. **Mortgages: Sales.** Whenever land is purchased subject to a mortgage, the only thing that can be sold, and the thing that is sold and purchased, is an equity of redemption.
4. _____: _____. A purchaser who is willing to pay money for the equity of redemption will not be heard to say, as against the persons liable on the prior encumbrance, that the land which is the primary fund for the discharge of the prior encumbrance is not worth the amount thereof.

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

Gerald P. Laughlin, Michael G. Lessmann, and Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Terry M. Anderson, of Hauptman, O'Brien, Wolf & Hadley, P.C., for appellee.

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

BOSLAUGH, J.

The plaintiff, Tri-County Bank and Trust Company, formerly known as Southroads Bank (Bank), brought this action in the district court to recover the principal amount of $157,117 plus interest due on a promissory note executed by the defendant, Norma L. Watts, on November 21, 1980.

In its petition filed September 20, 1985, the Bank alleged that for value received, Watts executed a note payable to the order of the Bank in the original principal sum of $160,000; that there remained outstanding on the note the principal sum of $157,117 plus accrued interest of $40,631.93; that the note was payable in monthly installments of $2,250, with all remaining principal and interest due on or before November 21, 1985; that in the event of Watts' failure to make payments when due, the entire balance of principal and interest would become due and payable immediately; that the Bank was the owner and holder of the note; and that the Bank made demand upon the defendant to pay all principal and interest due under the note, but Watts refused and neglected to make any payments. The note, a copy of which was attached to the petition, provided: "This Note is secured by a certain Mortgage . . . ."

In her answer, Watts generally denied the Bank's allegations and raised the following affirmative defenses:

> 2. For her further answer, and by way of affirmative defense, Defendant states that the Note and Mortgage became merged with the Defendant [sic] at the time of its foreclosure of property located at 11th and Jackson Streets in the City of Omaha, Douglas County, Nebraska, which property served as security for the alleged note.
>
> 3. For her further answer and by way of affirmative defense, Defendant states that the real estate which functions as security for the purported note has a value more than sufficient to satisfy the alleged indebtedness represented by said note and that the Defendant [sic] is now in possession of said real estate and would be unjustly enriched by proceeding with attempted recoveries on the note.
>
> 4. For her further answer, and by way of affirmative defense, Defendant states that if the allegations contained

> in the Plaintiff's Petition concerning the note are approved, Defendant operates as a surety upon said obligations and becomes subrogated to the rights of the mortgagee to the underlying collateral represented by the mortgaged real estate and that such value of that interest is more than sufficient to offset any alleged indebtedness claimed by the Plaintiff.

The case was submitted to the court on a joint stipulation of facts with exhibits. Where the parties stipulate to all the facts at trial, the Supreme Court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 420 N.W.2d 273 (1988).

The record shows that on November 21, 1980, Watts and the Bank entered into a term loan agreement wherein the Bank agreed to lend Watts $160,000 for a period of 5 years or to the date of default. The loan was evidenced by the promissory note at issue here. To secure the indebtedness, Watts also executed a mortgage on the following-described real estate:

> Lots 1 and 2 in Block 175 in the Original City of Omaha, as surveyed and lithographed, subject to an easement granted to the Union Pacific Railroad recorded on January 10, 1918, in Book 411 at Page 532 in the office of the Register of Deeds of Douglas County,
>
> and
>
> Lot 8 in Block 166 in Original City of Omaha, as surveyed and lithographed.

On December 29, 1981, Watts sold the "North 121 Feet of Lots 1 and 2, Block 175, City of Omaha, (also known as 1101 Jackson Street, Omaha, Nebraska)" to Jay B. Smiley for $249,312. This sale was made subject to the Bank's first mortgage on the property, and Smiley agreed to pay for the property as follows:

> a) Approximately $159,812 by taking title to the property subject to a first mortgage in that amount held by Southroads Bank, Bellevue, Nebraska.
>
> b) Approximately $20,000 by taking title to such property subject to a second mortgage held by James A. Morrison.

> c) The balance of $69,500 by executing and delivering to [Watts] at the closing a Promissory Note . . . .

Smiley was a director of the Bank at the time of the sale, but this transfer was to Smiley individually. The Bank did not orally or in writing expressly authorize the sale, nor did it expressly agree to substitute Smiley for Watts as the debtor on Watts' note. Watts believed, however, that the Bank knew of and had no objection to the sale.

The Bank made Smiley a loan of $200,000 on May 20, 1982, taking a second mortgage on the real estate as security for the loan. Smiley's "Single Payment Note and Security Agreement" provided:

> To secure payment of all Debtor's present and future indebtedness and liabilities of whatever nature to [Bank] and all renewals and extensions thereof, the covenants in this agreement, and such advances as shall be made by Secured Party under this agreement for the protection of the collateral, the Debtor for value received grants to the [Bank] a security interest in the following property and any and all additions, accessions, and substitutions thereto or therefore, hereinafter called the Collateral, and any proceeds of such Collateral: *Second Mortgage - Lots 1 and 2 in Block 175 In the Original City of Omaha, as surveyed and lithographed, subject to an easement granted to the Union Pacific Railraod [sic] recorded January 10, 1918, in book 411 at Page 532 in the office of the Register of Deeds of Douglas County.*

(Emphasis supplied.) Smiley executed the mortgage on June 4, 1982.

Smiley subsequently defaulted on his note. The Bank brought a foreclosure action against him in the district court for Douglas County on January 21, 1983, and received a judgment on November 26, 1984, in the amount of $283,096.31 plus interest. The decree provided that the mortgage held by the Bank, as recorded, constituted a lien on the following real estate:

> *The North 121 feet* of Lots 1 and 2 in Block 175 in the original City of Omaha, as surveyed and lithographed, in Douglas County, Nebraska, subject to an easement

> granted to the Union Pacific Railroad recorded on January 10, 1918, in Book 411 at Page 532 in the office of the Register of Deeds of Douglas County, Nebraska, *and subject to any prior, valid mortgages or encumbrances of record.*

(Emphasis supplied.)

The property was sold to the Bank at a public sheriff's sale on June 25, 1985, for $189,000. The sale was confirmed by the district court on July 31, 1985. Watts was not a party to the foreclosure action and had no knowledge of the action, no notice of the sheriff's sale, and no notice of any hearing to confirm the sale. The Bank's records did not reflect that Watts was given written notice of the foreclosure action or the sheriff's sale.

Appraisals attached as exhibits to the joint stipulation estimate the market value of the property foreclosed to have been $200,000 as of November 15, 1980; $490,000 as of June 1, 1982; $375,800 as of June 6, 1984; $370,000 as of December 10, 1985; and $370,000 as of February 2, 1987.

The district court entered judgment for Watts, denying the Bank recovery on Watts' note, finding:

> The Defendant cannot be held liable for the full balance of the note plus interest. Plaintiff must bear responsibility for taking as security from Jay Smiley property which was already fully encumbered by a prior mortgage to the Plaintiff.
>
> By foreclosing on the property, the Plaintiff in effect sold Defendant's collateral for the note in question without notice to the Defendant.
>
> Although, the Plaintiff argues mightily that Defendant does not have a surety's interest in the foreclosed property, the Court can see it no other way.
>
> The Plaintiff [sic] is discharged of her debt . . . to the extent of the land's value at the time of the foreclosure sale, June 25, 1985.

The Bank has appealed, contending the district court erred (1) in determining that the mortgage securing Watts' note merged with the fee title to the real estate obtained by the Bank in connection with the foreclosure of Smiley's second mortgage

on the property; (2) in finding that Watts had a surety's interest in the real estate foreclosed by the Bank; (3) in determining that Watts was discharged from her debt because the appraised value of the real estate at the time of the foreclosure sale exceeded the total amount of the Bank's successful foreclosure bid and the debt evidenced by Watts' note; (4) in finding that the Bank could not recover on Watts' note because it foreclosed on Smiley's second mortgage on the real estate at a time when the property was fully encumbered by Watts' first mortgage; and (5) in finding that the Bank could not separately foreclose the second mortgage and purchase the real estate at a sheriff's sale, subject to Watts' first mortgage, without having given notice to Watts.

The question presented in this appeal may be stated as follows: Where a mortgagee holds both first and second mortgages, what is the effect of the mortgagee's purchase of the property at the foreclosure sale of the junior mortgage on its rights as to the debt secured by the senior mortgage?

The general rule is that if the holder of both a junior and senior mortgage forecloses the junior and buys at the foreclosure sale, in the absence of an agreement to the contrary, the mortgagor's personal liability for the debt secured by the first mortgage is extinguished. The reason given is that upon a foreclosure sale under a junior mortgage the purchase is subject to the payment of the prior lien with the result that the mortgagor has an equitable right to have the land pay the mortgage before his personal liability is called upon, and the purchaser, if he owns or acquires the mortgage, will not be permitted to enforce it against the mortgagor personally. The second mortgagee purchaser is presumed to have made allowance for the prior lien in making his bid. The following cases illustrate the application of the rule.

In *Wright v. Anderson*, 62 S.D. 444, 253 N.W. 484 (1934), the defendant Anderson borrowed $17,000 from Mitchell Trust Company and with his wife executed seventeen $1,000 promissory notes secured by a first mortgage on several parcels of real estate. J.H. Wright subsequently loaned Anderson $23,000 and received a promissory note secured by a second mortgage on the land previously mortgaged and 640 acres of

other real estate. The second mortgage provided that it was subject to the $17,000 mortgage given to Mitchell Trust Company. Mitchell Trust Company then sold and assigned to J.H. Wright the seventeen $1,000 notes and the mortgage securing the notes.

At the time of his death, J.H. Wright was the owner of the seventeen $1,000 notes, the $23,000 note, and the two mortgages securing the notes. His executrix, Rosa Wright, brought an action to foreclose the $23,000 second mortgage, secured a judgment, and purchased the property at a sheriff's sale for $36,190 (the amount then due on the $23,000 mortgage).

Rosa Wright then sought a personal judgment on the seventeen $1,000 notes. The defendants claimed, and the trial court found, that Rosa Wright's acquisition of the property upon foreclosure of the second mortgage satisfied the indebtedness secured by the first mortgage and that the defendants were no longer liable thereon.

On appeal, the Supreme Court of South Dakota determined that the defendants' personal liability on the notes had been extinguished as a result of the foreclosure of the second mortgage.

> When a purchaser buys land subject to a mortgage (without assuming it), he does not become personally liable thereon, but nevertheless an equitable relation arises between himself and the original mortgagor. By virtue of having purchased subject to the [first] mortgage, *the land becomes the primary fund for the payment of the mortgage debt*. . . . In theory, as between the purchaser and the original mortgagor, the mortgagor has already advanced to the purchaser the amount of the mortgage debt by receiving that much less than the market value of his land at the time of the sale. In other words, it is presumed that the purchaser of land subject to a mortgage deducted the amount of the incumbrance from the market value of the land when he bought. The mortgagor therefore has an equitable right to have the land pay the mortgage before his personal liability is called upon and the purchaser will not be permitted to retain the land, go

> out and acquire the mortgage, and enforce the same against the mortgagor personally. The doctrine has application *whenever land is purchased subject to a mortgage*, whether the purchase be by private treaty or at foreclosure or execution sale. In any such case *the only thing that can be sold, and the thing that is sold and purchased, is an equity of redemption*; and *a purchaser who was willing to pay money for the equity of redemption will not be heard to say, as against the persons liable on the prior incumbrance, that the land (the primary fund for the discharge of the prior incumbrance) is not worth the amount thereof.* It follows therefore that when the purchaser, retaining the land, acquires the prior debt, although he is not personally liable thereon, he is the owner of the res which ought to discharge the debt as between himself and the mortgagor and he will not be permitted to retain the res and at the same time to say it is insufficient to satisfy the debt. Consequently there is, in essence, a coincidence of the capacities of debtor and creditor and, as between the purchaser and the original mortgagor, the debt is extinguished, notwithstanding the fact that there may be no merger and notwithstanding the fact that the purchaser may maintain the validity of the lien upon the land as between himself and an intervening subsequent incumbrancer who was a stranger to his purchase.

(Emphasis supplied.) *Wright v. Anderson, supra* at 449-50, 253 N.W. at 487.

Although Wright argued that in making her bid she did not, in fact, take into consideration or allow for the amount of the first mortgage, the court stated:

> To that we believe the answer must be that she should have done so and unless she can make a showing of fraud, excusable mistake, or something of that sort, sufficient to justify vacating the sale, she must be deemed to have done so. She knew of the existence of the first mortgage for she owned it herself. She must be charged with knowing, as a matter of law, that the only thing that could be offered for sale in foreclosure of the second mortgage was the equity

of redemption from the first mortgage.

*Id.* at 452, 253 N.W. at 488.

In *Retirement Bd v Ren-Cen Club*, 145 Mich. App. 318, 377 N.W.2d 432 (1985), *leave to appeal denied* 425 Mich. 875, 388 N.W.2d 680 (1986), the plaintiff, board of trustees of the general retirement system of the city of Detroit, loaned the defendant $1.1 million in June 1978 and received a promissory note for that amount secured by a first mortgage on real estate located in Detroit. In August 1980, the plaintiff loaned the defendant $500,000, receiving a promissory note for that amount secured by a second mortgage on the same property. The defendant defaulted on both loans. The plaintiff foreclosed its second mortgage, purchased the property at the foreclosure sale for the amount owed on the second note, took possession of the property, and commenced an action to recover the amount owed on the first note. The fair market value of the property was more than $3 million on the date of the foreclosure sale.

The trial court granted the plaintiff's motion for summary judgment, and the defendant appealed. In reversing the judgment of the trial court, the Michigan Court of Appeals held that the debt secured by the first mortgage was discharged when the plaintiff acquired the mortgaged property at the foreclosure sale on the second mortgage:

> Michigan follows the general rule about mergers mentioned in *Belleville Savings Bank v Reis* [136 Ill. 242, 26 N.E.646 (1891)]. At law, whenever a greater and lesser estate or a legal and equitable estate coincide in the same person, the lesser or equitable estate is destroyed by merger. Equity, however, will generally prevent a merger if the parties did not intend a merger, and an intent to avoid a merger will ordinarily be inferred where it is in the interest of the person holding the various estates to keep them separate. [Citation omitted.] Plaintiff must look to equity here to prevent the merger which would be automatic at law. As *Belleville Savings Bank v Reis*, *Wright v Anderson*, and similar cases show, equity is of no assistance to plaintiff under the circumstances presented here, because plaintiff seeks to avoid a merger to enable it

to obtain, in effect, a double recovery.

The price at a foreclosure sale on a second mortgage is depressed to reflect the outstanding first mortgage. A third party who purchases the property at the foreclosure sale on the second mortgage would have to satisfy the debt secured by the first mortgage in order to prevent the mortgagee of the first mortgage from asserting a superior claim to the property. Because plaintiff itself is the mortgagee of the first mortgage, plaintiff need not concern itself with the possibility that the mortgagee of the first mortgage would assert a superior claim. Plaintiff wants to obtain the price advantage of purchasing at a second mortgage sale without the disadvantage of having to satisfy the debt secured by the first mortgage in order to obtain uninterrupted enjoyment of the property. Equity will not assist plaintiff to achieve such a result.

*Retirement Bd v Ren-Cen Club, supra* at 325-26, 377 N.W.2d at 436. See, also, *Zastrow v. Knight*, 56 S.D. 554, 229 N.W. 925 (1930); *Weir & Russell Lbr. Co. v. Kempf*, 234 Iowa 450, 12 N.W.2d 857 (1944); *McDonald v. Magirl*, 97 Iowa 677, 66 N.W. 904 (1896); *Belleville Savings Bank v. Reis et al.*, 136 Ill. 242, 26 N.E. 646 (1891); *Maulding v. Sims*, 213 Ill. App. 473 (1919); *Ruther v. Thomas*, 43 Colo. App. 435, 604 P.2d 703 (1979); *Baxter v. Redevco, Inc.*, 279 Or. 117, 566 P.2d 501 (1977).

In the present case, Smiley purchased from Watts a portion of the mortgaged property, subject to the Bank's first mortgage, and did not assume responsibility for the payment of Watts' debt. The terms of the sale to Smiley reflected the outstanding first mortgage on the property.

The Bank subsequently purchased the property at a foreclosure sale on June 25, 1985, for $189,000. The Bank itself was the holder of the first mortgage and, under *Wright v. Anderson*, 62 S.D. 444, 253 N.W. 484 (1934), is presumed to have bid the value of the property less the amount of the prior encumbrance. Furthermore, as the trial court noted, "The appraisal of June 7 [sic], 1984 . . . valued the land at $375,000. The appraisal of December 10, 1985 . . . placed the value of the land at $370,000. The Plaintiff's reduced payment for the land obviously reflects the Defendant's interest of at least

$157,117.00." The foreclosure decree itself specifically stated that the second mortgage held by the Bank constituted a lien on the real estate subject to any prior, valid mortgages or encumbrances of record.

The land, therefore, was the primary fund for the payment of Watts' mortgage debt, and Watts had the right to require that the land be exhausted in the payment of her debt. The trial court found that the value of the land at the time of the foreclosure sale was in excess of Watts' debt to the bank, and Watts' personal liability on her note has been extinguished.

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

---

## RICKY SHIBATA, PERSONAL REPRESENTATIVE OF THE ESTATE OF HELEN M. SHIBATA, DECEASED, APPELLEE, V. COLLEGE VIEW PROPERTIES, A GENERAL PARTNERSHIP, APPELLANT.

449 N.W.2d 544

Filed December 29, 1989. No. 88-387.

1. **Motions to Dismiss.** In ruling on a motion to dismiss, the trial court resolves the controversy as a matter of law and may sustain such motion only when the facts are such that reasonable minds can draw but one conclusion.
2. _____. 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.
3. **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.
4. _____. In considering the evidence for the purpose of ruling on a motion for a directed verdict or for judgment notwithstanding the verdict, 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.

5. **Proximate Cause: Words and Phrases.** Proximate cause is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred; a defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct; a defendant's conduct is not a proximate cause of an event if the event would have occurred without that conduct.
6. **Trial: Evidence: Proof.** The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with direction to dismiss.

Alan L. Plessman for appellant.

Richard L. Boucher for appellee.

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

CAPORALE, J.

Pursuant to verdicts, Ricky Shibata, the plaintiff-appellee personal representative of the estate of Helen M. Shibata, recovered judgment against the defendant-appellant, College View Properties, a general partnership, on behalf of decedent's next of kin for decedent's claimed wrongful death and on behalf of the estate for other damages occasioned by decedent's injuries and the expenses of her funeral. There being merit to College View's assignment that the trial court erred in overruling its motion for dismissal at the close of all the evidence, we reverse and remand with the direction that the cause be dismissed.

The personal representative alleges that College View's negligence caused the 59-year-old decedent to fall down a flight of stairs at a building College View owns and that she died as a consequence. More specifically, the personal representative alleges that College View was negligent in failing to keep the basement stairway lighted, failing to equip the stairway with a

handrail, failing to keep the stairway free of debris, failing to repair or replace the defective latch on the basement door, failing to correct the difference in the stairway floor levels, and failing to post a warning at the entrance to the stairway, and that such negligence proximately caused decedent's injuries and death.

We begin our analysis by recalling that in ruling on a motion to dismiss, the trial court resolves the controversy as a matter of law and may sustain such motion only when the facts are such that reasonable minds can draw but one conclusion. *Goodlett v. Blue Cross, ante* p. 5, 449 N.W.2d 9 (1989); *Lemke v. Northwestern Public Serv. Co.*, 233 Neb. 223, 444 N.W.2d 326 (1989). 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. *Id.*

Similarly, 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. *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989). In considering the evidence for the purpose of ruling on a motion for a directed verdict or for judgment notwithstanding the verdict, 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. *Id.*

The record establishes that College View owns a commercial building in Lincoln, Nebraska, that it leases a portion thereof to Elizabeth Meyer, and that Meyer operates a retail lingerie shop from the demised premises. Meyer employed decedent as a salesclerk for the shop operation.

Meyer's showroom is roughly rectangular in shape and has a front entrance from the street and a back exit through a solid,

windowless door which swings into a small, straight hallway. This hallway connects the showroom with a larger, L-shaped hallway which provides access to other businesses within the building and to a parking lot behind the building. A door between the two hallways, which has a window covered with plastic, swings into the larger one and can be opened without a key when passing from the smaller hallway into the larger one, but must be unlocked with a key when passing from the other direction. Along the left wall of the smaller hallway as one proceeds from the showroom to the larger hallway, and at a point between the showroom and the door leading into the larger hallway, is a third door which swings into and over the stairway to the basement.

The smaller hallway has no wall windows, but is equipped with a fluorescent light fixture which is activated by a light switch located near the door leading into the showroom. This fixture is usually off during daylight hours because artificial light shines through the window on the door connecting the two hallways. According to a Lincoln Police Department detective, if the light fixtures in the two hallways are off and the doors are shut, the smaller hallway is "fairly dark."

According to Meyer, the door to the basement is supposed to be kept closed during regular business hours but was never locked, although there are two or three locks on the door. There are no warnings or other notices posted on the basement door.

The 1/4- or 1/2-inch-thick wooden surface of the smaller hallway floor extends under the basement doorway but ends some 3 or 4 inches short of the edge of the concrete subfloor leading to the top step of the stairway. The stairway itself consists of eight steps, a concrete top step and seven other wooden steps. Each step has an 8 1/2-inch rise and a 9 3/4-inch tread. According to an engineer who surveyed the premises, "[The stairway] might be a little bit steeper than some you've seen but it's about average." Along one side of the stairway is a wall, but the other side is open and has no handrail. At the bottom of the stairway is a 2 1/2- by 4-foot platform which stands 4 1/2 inches high. The basement floor at the bottom of the stairs is concrete, but at some point the concrete runs out and the rest of the floor is dirt.

There is no light fixture directly over the stairway itself, but a switch along the stairway wall activates a basement light fixture. To reach that switch, it is necessary to lean over or step onto the landing at the top of the stairway. Either the basement light fixture or the smaller hallway light fixture sufficiently illuminates the stairway.

Meyer and College View disagree as to the boundaries of the premises leased to her. Meyer testified that the lease covered only the showroom and not the smaller hallway. However, a College View general partner testified that the premises leased to Meyer included the smaller hallway but not the basement. Neither the lease document nor anything else in the record resolves this conflict. In any event, Meyer had access to the smaller hallway and permitted her employees to use it in order to get from her showroom to the back parking lot. College View did not lease the basement of the building, but did consent to Meyer's use of the basement for storage. However, Meyer told her employees that "they would never need to go down there." There was evidence that one of College View's other lessees also stored materials in the basement.

Meyer planned to keep the shop open until 6 p.m. on the day she last saw decedent alive, March 23, 1987. Decedent arrived for work at 3 p.m. and was to remain until 6 p.m. in order to close the shop; Meyer left the shop at 3:40. Meyer testified that decedent understood the procedure for closing, which involved turning off the cash register and light fixtures and locking the doors. Meyer also stated that she gave decedent instructions for leaving through the back hallways. According to Meyer, normal procedure involved going out the back door of the store, turning on the light fixture in the smaller hallway, shutting the door to the store, going through the door between the two hallways, turning on the light fixtures in the larger hallway if they were not already on, coming back into the smaller hallway to turn off the light fixture in that hallway, and finally exiting out of and closing the door between the two hallways.

Meyer arrived at the shop the following morning at around 9:48 and noticed decedent's automobile parked in the back parking lot in the same position as it had been when Meyer left

the shop the previous day. Meyer unlocked the front door and entered the shop, where she found the shop's overhead light fixtures off, the cash register undamaged, and nothing missing. According to Meyer, there was no evidence of a struggle.

Meyer then went out the back door of her shop and through the two hallways to visit one of the neighboring businesses. The light fixture in the smaller hallway was off, and she did not turn it on. The neighboring shopkeeper testified that when she arrived at the building shortly before 10 a.m. that day, the light fixtures in the larger hallway were off. On Meyer's way back through the smaller hallway, she noticed that the basement door was almost fully open, and she reached in the stairwell to turn on the basement light fixture. Meyer then saw two matching shoes which belonged to decedent and which, according to another witness, had 1/2- to 3/4-inch wedge heels. The shoes were lying on adjacent steps approximately halfway down the stairway. A purse Meyer recognized as decedent's was lying on the floor at the bottom of the stairs.

Decedent's body was found 20 to 24 feet from the bottom of the basement stairway. The body was clothed with an outer jacket, which was unzipped; a pair of slacks, which had been partially or completely unzipped; and a blouse, which was completely unbuttoned in front except for one button near the top. The body was without shoes, but did have on nylon stockings. Neither alcohol nor other drugs were detected in decedent's blood, nor was any spermatozoa discovered on the body.

The soles of decedent's stockings were covered with dirt so that "[i]t appeared as though . . . someone [was] walking without their shoes." The back and knees of her slacks and the elbows of her jacket were also covered with dirt. Police discovered blood markings which descended downward on some basement wall paneling close to where decedent was found. According to a Lincoln Police Department detective sergeant, the markings gave "an indication that a person was up right [sic] when that blood was placed there." The blood was found to be "similar" to that of decedent. The keys to decedent's automobile were found about 5 feet from her body, out of her reach.

No identifiable fingerprints were discovered on the basement door or doorknob. Several detectives noticed that the basement stairway was covered with dirt, sawdust, and other debris.

As part of the police investigation of the death, the detective sergeant inspected the basement door and determined that the latching mechanism was not working properly, stating that

> when you pulled [the door] shut by use of the handle, you had to hold on to the handle to cause the bolt to engage on the strike plate. If you would push on it from behind, there was a slight pressure from either the frame around the door or from in that small hallway that caused the door not to fully engage with the bolt going into the strike plate.

A Lincoln Police Department detective also inspected the basement door and opined that the door latch was not functioning properly and that if the door were shut without the latch engaging, the door could be pushed open without turning the knob.

Another Lincoln Police Department detective confirmed the foregoing testimony, stating:

> I would just pull [the basement door] shut just like you would normally pull a door shut and I would hear a little click and I think it would be latched and I would take my fingertips and I would just push against the door with my hand and it would just push open.
>
> . . . .
>
> . . . It would push open just by touching the middle of the door without touching the knob or anything. It would just push open. It wouldn't be latched securely.

A locksmith, who examined the locks on the basement door, determined that the skeleton key lock on the knob had a "slight catching problem." He explained, "When you turn the knob, it wouldn't catch too much but it would catch only a few times that I tried it at first. After I kept messing with it, it wouldn't stick quite as much." When the knob did catch, the latch would not engage. In his view, the lock should have been replaced on the basement door "because it's an interior-type fire door is what it really is."

College View did not follow any fixed maintenance schedule for the subject building. Specifically, it did not inspect the lock

and latch on the basement door prior to March 23, 1987, to determine whether they were in good repair. Maintenance basically consisted of responding to the tenants' complaints.

The Lancaster County Attorney testified that in his opinion decedent's death was the result of accident. In his words:

> It was pretty clear that [decedent] fell down the stairs and that in that process she injured her head and I believe she fractured one of her legs and there were other injuries. There was an injury to the lungs, I believe, but clearly she fell down the stairs. That would have been the precipitating event that led to her death.

A pathologist testified that in his opinion, based on the autopsy he performed and the investigation his assistant conducted at the scene of the incident, death was caused by "massive head injury sustained in a fall down some stairs" and that the manner of death was accidental. Explaining how he arrived at the conclusion that the death was accidental, the pathologist stated:

> I mean that it's a term of exclusion. I felt that I could confidently exclude that it was not naturally caused and, therefore, it was an unnatural cause and of the unnatural causes, I felt confident based on the information at hand that it was not homicide, it was not suicide and, therefore, it was accidental.

Relying on police suggestions that decedent sustained her injuries at approximately 6 p.m., the pathologist opined that decedent died "at approximately midnight on March the 23rd of 1987." He further testified that in addition to the massive head injuries, decedent also suffered a fracture of her left hip. Finally, the pathologist testified that one of decedent's coronary arteries was narrowed, and, as a result, she might have suffered chest pain which would not be "enough to kill her or give her a heart attack as you ordinarily think of it. But it is enough to give her some chest pain and she may have leaned up against a door and the door went and she stumbled down." The pathologist made clear, however, that he was not saying that such occurred, but only that in concluding the death was not the result of a homicide, he could not "exclude the possibility" that the narrowed artery contributed to the happening.

A neurologist testified that one sustaining massive traumatic head injuries could experience an increase in body temperature. In such a circumstance, one would be expected, during the period of consciousness, to do whatever one could to cool off. This generally involves trying to remove whatever clothing one is wearing.

According to several witnesses, including decedent's gynecologist who saw her on a regular basis, decedent appeared very healthy during the months preceding her death. Meyer did state, however, that decedent had missed 2 weeks from work in January because "her nerves were bad" and that she worked fewer hours after that because of her health, but that when decedent returned to work in January, she appeared rested and healthy. Meyer further testified that decedent did not appear out of the ordinary on the day of her death. One of decedent's friends testified that decedent never mentioned any health problems or that her nerves were bad, but did suffer from the flu sometime in January and a bad cold in early March.

A customer of the lingerie shop, who was assisted by decedent at about 5:10 or 5:15 p.m. on March 23, testified that decedent did not appear confused, distracted, preoccupied, drowsy, or intoxicated.

Much of the foregoing opinion evidence was admitted over College View's objections, and College View urges that its admission was prejudicially erroneous. We do not concern ourselves with that claim, for even if all the questioned evidence was properly admitted, which we do not decide to be the case but for the purposes of our analysis so assume, the personal representative nonetheless failed to establish a prima facie case. This is so irrespective of the boundaries of the premises leased to Meyer and therefore regardless of whether decedent was at any given moment College View's licensee, as the trial court assumed in its instructions, or was College View's invitee.

It is fundamental that in a negligence action the plaintiff must establish that the defendant's negligence was the proximate cause of the damage sued upon. *Hahn v. Weber & Sons Co.*, 223 Neb. 426, 390 N.W.2d 503 (1986). Proximate cause is that cause which, in a natural and continuous sequence, unaccompanied by any efficient intervening cause, produces

the injury, and without which the result would not have occurred. In other words, a defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct; a defendant's conduct is not a proximate cause of an event if the event would have occurred without that conduct. See, *Worth v. Schillereff*, 233 Neb. 628, 477 N.W.2d 480 (1989); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). The record in this case fails to directly or inferentially establish that any act of claimed negligence on College View's part was a proximate cause of decedent's death. Under the state of this record, the pathologist's speculation that one of the many possible explanations of the incident is that decedent suffered a pain in her chest, leaned against the stairway door, and tumbled down the stairs is, notwithstanding the fact it was stated by a pathologist, pure and simple conjecture. For example, it is just as possible, notwithstanding Meyer's testimony that she told her employees they need never go to the basement, that decedent was in fact going to the basement to retrieve stored materials and, for reasons entirely independent of any one of College View's alleged acts of negligence, lost her balance and fell down the stairs.

The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another. See, *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978); *Wees v. Creighton Memorial St. Joseph's Hospital*, 194 Neb. 295, 231 N.W.2d 570 (1975); *Raff v. Farm Bureau Ins. Co.*, 181 Neb. 444, 149 N.W.2d 52 (1967); *Popken v. Farmers Mutual Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966).

Accordingly, the trial court erred by failing to sustain College View's motion for dismissal made at the close of all the evidence. We therefore reverse the trial court's judgment and remand the cause with the direction that it be dismissed.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

# STATE OF NEBRASKA, APPELLEE, V. VICTOR SCHAAF, APPELLANT.

449 N.W.2d 762

Filed December 29, 1989. No. 88-852.

1. **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.
2. _____: _____. Where an indictment, information, or complaint alleges commission of a crime, using the language of the statute defining that crime or terms equivalent to such statutory definition, a formal charge against an accused is sufficient.
3. **Criminal Law: Theft: Intent.** Under Neb. Rev. Stat. § 28-511(2) (Reissue 1985) of the Nebraska Criminal Code, the elements of theft by unlawful disposition are (1) a person's unauthorized transfer of another's immovable property or unauthorized transfer of any interest in another's immovable property (2) with the intent to benefit himself, herself, or another not entitled to the property or any interest in the property.
4. **Criminal Law: Theft.** Neither the time of the criminal appropriation nor the value of the property criminally appropriated is substantive and, therefore, an element of the crime of theft prohibited by Neb. Rev. Stat. § 28-511 (Reissue 1985).
5. **Criminal Law: Jurisdiction.** When some requisite elements of a crime are committed outside Nebraska, but an essential element of the crime is committed or occurs in Nebraska, a Nebraska court has subject matter jurisdiction for prosecution of a defendant charged with the crime.
6. **Criminal Law: Statutes.** Whether several acts in series constitute a continuing offense or separate offenses depends on construction of the statute defining the crime.
7. **Criminal Law.** There are no common-law crimes in Nebraska.
8. **Criminal Law: Statutes.** In construing a penal statute, a court cannot supply language which is absent from the statutory definition for a criminal offense.
9. **Criminal Law: Theft.** A series of separate acts, each of which is a theft proscribed by Neb. Rev. Stat. § 28-511(2) (Reissue 1985), does not constitute one criminal act or a continuing offense of theft.
10. **Rules of Evidence: Other Acts: Limitations of Actions.** Subject to the balancing test contained in Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1985), evidence of prior crimes, wrongs, or acts which cannot be criminally prosecuted on account of the statute of limitations may be admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
11. **Rules of Evidence: Other Acts: Time.** Remoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence under Neb. Evid. R. 404(2) and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible.

12. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts, otherwise admissible under Neb. Evid. R. 404(2), may be discretionarily excluded pursuant to the balancing test contained in Neb. Evid. R. 403.

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

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

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

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

SHANAHAN, J.

After its complaint was filed on October 16, 1987, the State, in its amended information filed on January 12, 1988, charged that Victor Schaaf, in violation of Neb. Rev. Stat. § 28-511(2) (Reissue 1985), committed a theft of property, "valued at more than $1,000.00," which belonged to Lenhart Land and Livestock Company, that is, theft which occurred "on or about April, 1980 to January 7, 1985," in Scotts Bluff County, Nebraska.

A jury in the district court for Scotts Bluff County convicted Schaaf of felonious theft of property with a value of $404,504. Section 28-511(2) provides: "A person is guilty of theft if he or she transfers immovable property of another or any interest therein with the intent to benefit himself or herself or another not entitled thereto." Under Neb. Rev. Stat. § 28-518(1) (Reissue 1985), "[t]heft constitutes a Class III felony when the value of the thing involved is over one thousand dollars," and is punishable by imprisonment for a maximum term of 20 years, a fine of up to $25,000, or both such imprisonment and fine. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985). The district court sentenced Schaaf to imprisonment for not less than 4 nor more than 8 years.

In his appeal, Schaaf contends that (1) the information by which he was charged is legally deficient; (2) the trial court lacked jurisdiction because no criminal act charged against Schaaf occurred in the State of Nebraska; (3) criminal

prosecution of Schaaf was barred by the 3-year statute of limitations prescribed by Neb. Rev. Stat. § 29-110 (Reissue 1985); (4) the evidence is insufficient for Schaaf's conviction; and (5) the sentence imposed is excessive.

## BACKGROUND FOR CHARGE

Gladyce Lenhart Heye owned shares of capital stock in Lenhart Land and Livestock Company (Lenhart Company), a Wyoming corporation which owned land and maintained bank accounts in both Wyoming and Nebraska. Schaaf was the accountant for Lenhart Company. By her last will and testament, Heye created a trust (Heye Trust) which included capital stock of the Lenhart Company; appointed Schaaf as trustee; and designated her brother, Robert Lenhart, and Robert's two children, Connie Lenhart Graybill and Pat Lenhart, as beneficiaries of the trust. The Heye Trust commenced after Heye's death in 1976. Schaaf accepted trusteeship of the Heye Trust in 1977, was elected to the board of directors for Lenhart Company, and became president, as well as treasurer and manager, of Lenhart Company, which paid him a monthly salary of $835 and reimbursed him for his expenses incurred in connection with corporate business. In his role as manager of Lenhart Company, Schaaf kept the corporation's books, exercised absolute control over corporate assets, and was the only person authorized to write corporate checks and manage corporate property. Schaaf, throughout his activities as an officer of the Lenhart Company, lived in Wyoming and from his Wyoming residence conducted business for the corporation.

In December 1977, Schaaf began to use Lenhart Company's funds as "loans" to himself, although he never signed a promissory note to the corporation for the funds "borrowed." The corporation's board of directors had not authorized any corporate loan to Schaaf, and Schaaf never informed the corporation's directors or shareholders that he was borrowing from the corporation. In the corporation's balance sheets and ledgers, corporate funds transferred by Schaaf were listed under "Savings and Time Certificates" rather than under "Accounts Receivable."

As a result of the U.S. grain embargo, Schaaf felt that the commodities market offered investment opportunities. Sometime in mid-1979, Schaaf formed a Wyoming partnership, "4-S Investments," which consisted of Schaaf, his wife, and their two children. The partnership had a checking account at the First National Bank in Mitchell, Nebraska, in Scotts Bluff County, the same bank in which Lenhart Company maintained its Nebraska checking account. In several transactions, Schaaf transferred funds of Lenhart Company through unauthorized checks which Schaaf made payable to himself, endorsed, and deposited in the checking account of 4-S Investments or by direct disbursement from the corporation's account to brokerages which maintained a commodities account for 4-S Investments, for example, Bache & Co. Apparently, all the transactions in question, which involved the bank accounts of Lenhart Company and 4-S Investments, were conducted without Schaaf's physical presence in Nebraska. Lenhart Company's funds transferred by Schaaf to 4-S Investments' account were then disbursed to the various brokerage houses which had handled commodities transactions for the Schaaf partnership. The partnership lost $379,430.90 in the commodities market. Between April 9, 1980, and January 7, 1985, Schaaf wrote 25 unauthorized checks on Lenhart Company's account for a total of $404,504, which was disposed as follows:

| Date | Amount | Disposition |
|---|---|---|
| 4/9/80 | $ 56,484 | Deposit—4-S Investments Account |
| 4/17/80 | 50,000 | Deposit—4-S Investments Account |
| 5/1/80 | 6,000 | Deposit—4-S Investments Account |
| 5/9/80 | 20,000 | Deposit—4-S Investments Account |
| 5/29/80 | 10,000 | Deposit—4-S Investments Account |
| 6/4/80 | 6,000 | Deposit—4-S Investments Account |
| 6/12/80 | 10,000 | Deposit—4-S Investments Account |
| 11/10/80 | 12,000 | Deposit—4-S Investments Account |
| 11/21/80 | 14,000 | Deposit—4-S Investments Account |
| 12/1/80 | 12,000 | Deposit—4-S Investments Account |
| 2/3/81 | 8,500 | Deposit—4-S Investments Account |
| 3/20/81 | 7,500 | Deposit—4-S Investments Account |

| | | |
|---|---|---|
| 4/6/81 | 3,200 | Deposit—4-S Investments Account |
| 4/13/81 | 3,500 | Deposit—4-S Investments Account |
| 5/7/81 | 11,520 | Money wire to Bache & Co. |
| 6/12/81 | 3,500 | Deposit—4-S Investments Account |
| 6/24/81 | 17,800 | Deposit—4-S Investments Account |
| 8/23/82 | 6,000 | Deposit—Schaaf Personal Account |
| 9/17/82 | 10,000 | Deposit—4-S Investments Account |
| 11/24/82 | 20,000 | Deposit—4-S Investments Account |
| 2/23/83 | 2,000 | Deposit—4-S Investments Account |
| 6/2/83 | 100,000 | Deposit—4-S Investments Account |
| 9/3/83 | 5,000 | Deposit—4-S Investments Account |
| 2/23/84 | 6,000 | Deposit—Schaaf Personal Account |
| 1/7/85 | 3,500 | Deposit—4-S Investments Account. |

In 1986, Pat Lenhart, who had become suspicious of Schaaf's activities and management of Lenhart Company, contacted an attorney, who, on examination of the corporation's records and the bank accounts of Schaaf and 4-S Investments, discovered Schaaf's unauthorized use of Lenhart Company's funds. Schaaf resigned as a director and officer of Lenhart Company.

## ADEQUACY OF THE INFORMATION'S ALLEGATIONS

Schaaf asserts that "[f]or the purpose of this case, at least, the elements of the crime charged were, then, the elements of theft as proscribed by Neb. Rev. Stat. Section 28-511(2) (Reissue 1985)," and then contends that the information failed to state "the date of the alleged offense [or] the value of that which was alleged to have been unlawfully transferred . . . ." Brief for appellant at 14. The State does not dispute Schaaf's characterization of the alleged theft by unlawful disposition of property in violation of § 28-511(2), which provides: "A person is guilty of theft if he or she transfers immovable property of another or any interest therein with the intent to benefit himself or herself or another not entitled thereto."

Neb. Rev. Stat. § 29-1501 (Reissue 1985) provides:

> No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected . . . (3) . . . for omitting to state the time at which the offense was committed in any case where

> time is not of the essence of the offense . . . nor for want of a statement of the value or price of any matter or thing . . . where the value or price . . . is not of the essence of the offense . . . .

In *State v. Willett*, 233 Neb. 243, 246, 444 N.W.2d 672, 675 (1989), we stated:

> 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.

See, also, *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). Nebraska criminal procedure does not require a comprehensive and particularized factual description of elements for the offense charged in the information or complaint against a defendant. "[W]here an indictment, information, or complaint alleges commission of a crime, using the language of the statute defining that crime or terms equivalent to such statutory definition, a formal charge against an accused is sufficient." *State v. Wehrle*, 223 Neb. 928, 930-31, 395 N.W.2d 142, 145 (1986).

Under § 28-511(2) of the Nebraska Criminal Code, the elements of theft by unlawful disposition are (1) a person's unauthorized transfer of another's immovable property or unauthorized transfer of any interest in another's immovable property (2) with the intent to benefit himself, herself, or another not entitled to the property or any interest in the property. Cf. *State v. Hilpert*, 213 Neb. 564, 330 N.W.2d 729 (1983) (theft by deception, Neb. Rev. Stat. § 28-512 (Reissue 1985)).

Although this court has not expressly stated that time is not an essential element of theft, other courts, construing theft statutes substantially similar to § 28-511, have held that time is not an essential element of theft. See, *State v. Hatch*, 346 N.W.2d 268 (N.D. 1984) (exact time of the commission of theft is not a substantive element requiring proof to establish commission of the crime); *State v. Jamison*, 767 P.2d 134 (Utah App. 1989) (time at which a theft was committed generally is

not an element which must be established in proving commission of the criminal offense).

In *State v. Culver*, 233 Neb. 228, 231, 444 N.W.2d 662, 665 (1989), we stated: "The value of the property stolen is no longer an element of the crime [of theft] and is important only in determining the penalty." Cf. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989) (value of property is not an element in the crime of criminal mischief, Neb. Rev. Stat. § 28-519 (Reissue 1985)). Therefore, we hold that neither the time of the criminal appropriation nor the value of the property criminally appropriated is substantive and, therefore, an element of the crime of theft prohibited by § 28-511.

Consequently, Schaaf's assignments of error that the information is insufficient on account of a failure to state the exact date of the criminal appropriation and the value of the property criminally appropriated are without merit.

## JURISDICTION OF A NEBRASKA COURT

Schaaf asserts that the trial court was without jurisdiction inasmuch as no crime of theft occurred in Nebraska, since Lenhart Company is a Wyoming corporation and Nebraska was not "impacted" by transfer of Lenhart Company's funds. Brief for appellant at 15. When some requisite elements of a crime are committed outside Nebraska, but an essential element of the crime is committed or occurs in Nebraska, a Nebraska court has subject matter jurisdiction for prosecution of a defendant charged with the crime. *State v. Hilpert, supra*; *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983). See, also, *State v. Roderick*, 9 Ariz. App. 19, 21, 448 P.2d 891, 893 (1968): "[I]f the requisite elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction."

In Schaaf's case, Lenhart Company's funds, or, more technically, credit from deposits in the checking account of Lenhart Company, existed at the First National Bank of Mitchell in Scotts Bluff County, Nebraska. Schaaf, without authorization, appropriated those funds or credits to his benefit, or to the benefit of one not entitled to such funds or credits, when Schaaf transferred the funds or credits from

Lenhart Company's account to his personal checking account or to the account of 4-S Investments for later disbursement to brokers who had handled commodities transactions for 4-S Investments. Thus, one of the essential elements of theft by disposition, that is, unauthorized transfer of another's property or interest in property, was accomplished by Schaaf's drawing checks on the Lenhart Company's checking account in a Nebraska bank and, by such unauthorized checks, transferring Nebraska funds of Lenhart Company, or the "interest" of Lenhart Company in such funds, to himself or 4-S Investments. Since such transfers of property occurred in Nebraska, a Nebraska court had jurisdiction for the prosecution of Schaaf on the charge of theft by disposition, a violation of § 28-511(2).

## STATUTE OF LIMITATIONS

Section 29-110 provides: "No person . . . shall be prosecuted for any felony . . . unless a complaint for the same shall be filed . . . within three years next after the offense shall have been done or committed . . . ."

The complaint filed against Schaaf on October 16, 1987, alleged that the theft occurred between April 1980 and January 7, 1985. Consequently, to timely prosecute Schaaf, the felony theft charged against Schaaf must have occurred not earlier than October 16, 1984. Yet, with the exception of Schaaf's appropriation of $3,500 from Lenhart Company's account on January 7, 1985, which was the last in a series of 25 misappropriations, all of Schaaf's 24 other misappropriations involving Lenhart Company occurred more than 3 years before the State filed its complaint against Schaaf.

The State contends that although only the 25th and last transaction was within the 3-year statute of limitations, the other transactions were not 24 separate thefts, but, rather, were a series of acts which constituted a "continuing offense" eventually completed on January 7, 1985. For that reason, the State argues, the statute of limitations for the collective and combined misappropriations began to run from January 7, 1985. Thus, if Schaaf's several acts constituted a continuing offense, as the State contends, the statute of limitations began to run from January 7, 1985, the date when the last act

occurred. Therefore, the real statute of limitations question presented in Schaaf's appeal is whether Schaaf's serial acts constituted one continuing offense of theft or 25 separate theft offenses.

Whether several acts in series constitute a continuing offense or separate offenses depends on construction of the statute defining the crime. *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982).

> A continuing offense is defined as a "continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy; an offense which continues day by day; a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences."

*State v. Williams, supra* at 655, 319 N.W.2d at 751 (quoting from 22 C.J.S. *Criminal Law* § 1 (1961)).

The U.S. Supreme Court, in discussing the doctrine of continuing offenses, has stated:

> [T]he doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, "[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term." 410 F. 2d, at 1158. These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

*Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970).

There are no common-law crimes in Nebraska. *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

Immediately before legislative adoption of the Nebraska

Criminal Code in 1977, there existed Neb. Rev. Stat. § 28-538 (Reissue 1975), which described the nature of the criminal offense "embezzlement" and the various bases for conviction of that crime. Generally, § 28-538 pertained to persons in a fiduciary relationship, such as administrators of estates, agents, attorneys, corporate officers, executors for estates, factors, and guardians, who intentionally and without authorization converted to the fiduciary's use any money or property entrusted as the result of the fiduciary relationship. Noteworthy regarding the former crime of embezzlement is the provision in § 28-538:

> If money or property is so embezzled or converted by a series of acts during the same employment [i.e., during existence of a particular fiduciary relationship], the total amount of money and the total value of the property so embezzled or converted shall be considered as embezzled or converted in one act, and [the embezzler] shall be punished accordingly.

In Schaaf's case, the State suggests a "person in the position of trust is assumed to be carrying the duties of his position until at some point the person fails to properly account for the funds entrusted to him." Brief for appellee at 16. As support for its suggestion, the State points to *Bolln v. State*, 51 Neb. 581, 71 N.W. 444 (1897), *Chamberlain v. State*, 80 Neb. 812, 115 N.W. 555 (1908), and *Gorton v. State*, 117 Neb. 556, 221 N.W. 689 (1928). In *Bolln v. State, supra*, this court construed Comp. Stat. § 124 (1895), a criminal statute which proscribed embezzlement of public money and which was substantially similar to § 28-538. In affirming the conviction of Bolln, a public official convicted of misappropriating public funds, this court remarked: "The evidence shows that the embezzlement in the case at bar consisted of a continuous series of acts, committed at different times, but with a common purpose, and hence constitute a single offense." 51 Neb. at 594, 71 N.W. at 448.

Later, in *Chamberlain v. State, supra*, which involved a conviction of a bank employee for embezzlement, in violation of a statute similar to § 28-538, the court made the following observation:

> The crime, as in the case at bar, may consist of many acts done in a series of years, and the fact at last be discovered that the bank's funds have been embezzled, and yet it may be impossible for the prosecution to prove the exact time and manner of each or any separate act of conversion. In such a case, if the state should be compelled to rely for conviction upon a single act, the accused, although he might be guilty of embezzling large sums of money in the aggregate, would probably escape conviction. The law should not afford exemption from just and merited punishment on mere technical grounds which do not in any way affect the guilt or innocence of the defendant or the merits of the case.

80 Neb. at 820, 115 N.W. at 558. A conclusion similar to that in *Chamberlain* was reached in *Gorton v. State, supra*, where the court affirmed the conviction of Gorton, who had embezzled funds of a corporation for which he was an officer. In light of an embezzlement statute much like § 28-538, the *Gorton* court concluded: "Under a charge of embezzlement on a day named, evidence of a continuous series of accused's previous conversions in different amounts may support a verdict for the aggregate sum as a single embezzlement." 117 Neb. at 559-60, 221 N.W. at 690.

In a rush to rely on *Bolln*, *Chamberlain*, and *Gorton*, the State overlooks Neb. Rev. Stat. § 28-510 (Reissue 1985) of the Nebraska Criminal Code, which provides: "Conduct denominated theft in sections 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like." Also, the State disregards the unequivocal language of § 28-511(2), which makes no mention of a fiduciary relationship as an element for the offense defined in § 28-511(2) (theft by disposition) and which contains no express provision for a continuing offense, such as the former crime of embezzlement, prohibited by § 28-538, which might involve the "total" of the property or money misappropriated during a fiduciary relationship and thereby constitute "one act" subject to criminal prosecution.

In *State v. Gainer*, 227 Kan. 670, 608 P.2d 968 (1980), the Supreme Court of Kansas affirmed dismissal of a theft charge because the Kansas 2-year statute of limitations barred prosecution for the offense, which was defined by Kan. Stat. Ann. § 21-3701 (1974): "Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property: (*a*) Obtaining or exerting unauthorized control over property . . . ." Gainer stole a firearm in January 1977 and hid the weapon in his attic. On April 30, 1979, a citizen reported that she had seen Gainer with the weapon. The theft charge was filed against Gainer in April 1979. The State contended that the theft was a "continuing offense" and was not completed so long as Gainer retained possession of the stolen firearm. The *Gainer* court noted that "[t]he State's position is that the statutory prohibition against '[o]btaining or exerting unauthorized control over property' includes within its proscription the continued unauthorized possession of the property after the initial theft," and commented:

> The concept of continuing offenses is essentially a legal fiction. Fictions are usually avoided in the criminal law. Perkins on Criminal Law, p. 263 (2nd ed. 1969). The courts have taken a very limited view of those crimes which constitute continuing offenses. Conspiracy is the most frequent example of a continuing offense. See Perkins on Criminal Law, p. 635. The continuing offense doctrine is usually advanced by the prosecution to avoid the running of the statute of limitations.

227 Kan. at 672, 608 P.2d at 970. After referring to *Toussie v. United States*, 397 U.S. 112, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970), the Kansas court concluded:

> All criminal offenses, except those considered continuing offenses, are committed when every act which is an element of the offense has occurred. Continuing offenses are committed when the course of prohibited conduct, or the accused's complicity therein, has terminated. To constitute a continuing offense it must plainly appear in the statute defining such offense that there is a clear legislative purpose to make the prohibited course of

> conduct a continuing offense.
>
> . . . .
>
> We do not agree that a continuing offense was intended by the legislature when it defined the crime of theft. The use of the words "[o]btains or exerts control" was for the purpose of consolidating what were formerly the crimes of larceny and embezzlement into a single crime of theft. . . .
>
> . . . .
>
> . . . [W]e hold the crime of theft by obtaining or exerting unauthorized control over property with intent to deprive the owner permanently of the possession, use or benefit of his property as proscribed in K.S.A. 21-3701(*a*) is not a continuing offense.

227 Kan. at 673-74, 608 P.2d at 970-71. See, also, *People v. Steinmann*, 57 Ill. App. 3d 887, 373 N.E.2d 757 (1978).

We, also, recall the judicial admonition in *Toussie v. United States, supra* at 115, namely, the conclusion that a particular crime is a continuing offense "should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that [the Legislature] must assuredly have intended that it be treated as a continuing one."

With the former "embezzlement" statute, § 28-538, at hand, including that statute's express provision for a "series of acts" constituting "one act" or a continuing offense, the Legislature repealed § 28-538 in 1977 and immediately enacted the present Nebraska Criminal Code. When it enacted § 28-511 as a part of the Nebraska Criminal Code, the Legislature, through § 28-510, emphatically pointed out that theft, as an offense proscribed by the Nebraska Criminal Code, included certain former offenses defined in criminal statutes repealed by the Nebraska Criminal Code, for example, the former crimes of larceny, receiving stolen property, and embezzlement, which was defined by § 28-538. Wielding a legislative pen, the Legislature rewrote the criminal code for Nebraska and, consequently, redefined specific criminal offenses in Nebraska. Nevertheless, by overlooking the unequivocal language presently in the Nebraska Criminal Code defining theft by disposition and as a result of apparent indifference to historical

perspective for decisions of this court, which construed previous criminal statutes antedating Nebraska's current criminal code, the State misses the clear legislative intent reflected by § 28-511(2) (theft by disposition).

Nothing in the explicit language of § 28-511(2) compels the conclusion that theft by disposition is a continuing offense. If the Legislature had intended that a series of misappropriations be considered in the aggregate as one offense, such as in the provision which previously existed in the criminal statute defining the former crime of embezzlement in Nebraska (§ 28-538), the Legislature, through the rather simple process of explicit statutory language, could have inserted the "one act," or continuing offense, provision into § 28-511(2) of the Nebraska Criminal Code. In construing a penal statute, a court cannot supply language which is absent from the statutory definition for a criminal offense. *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986). In the absence of language constituting a "continuing offense" provision in § 28-511(2), we must conclude that the Legislature did not intend that a series of separate acts, each of which is a theft proscribed by § 28-511(2), constitutes one criminal act or a continuing offense of theft. Consequently, the offense of theft by disposition, prohibited by § 28-511(2), was committed each time that Schaaf, without authorization, transferred Lenhart Company's funds, or the corporation's interest in the funds, to himself or 4-S Investments with the intent to benefit himself or 4-S Investments, when neither was entitled to the property transferred. Inasmuch as Schaaf might have been prosecuted for each of the 25 transactions involving a misappropriation or unauthorized transfer of Lenhart Company's funds, the 3-year statute of limitations prescribed by § 29-110, barred prosecution of Schaaf for each transaction in question which occurred before October 16, 1984. Therefore, the only offense of theft by disposition which was subject to timely prosecution was the transaction of January 7, 1985—Schaaf's unauthorized transfer of $3,500 from the funds and checking account of Lenhart Company and deposit of those funds in the checking account of 4-S Investments.

## MISAPPROPRIATIONS OUTSIDE THE STATUTE OF LIMITATIONS

As an aspect of the statute of limitations question, Schaaf claims that "any 'theft' which occurred more than three years prior to October 16, 1987, was inadmissible for purposes of proof of a crime, and that it was, in fact, prejudicial error for the court to admit" evidence of transactions which occurred more than 3 years before the complaint was filed against Schaaf. Brief for appellant at 19.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1985).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1985).

Neb. Evid. R. 404(2), 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.

In *State v. Craig*, 219 Neb. 70, 77-78, 361 N.W.2d 206, 212-13 (1985), we stated:

> Rule 404(2) of the Nebraska Evidence Rules, as well as its pattern-counterpart, Rule 404(b) of the Federal Rules of Evidence, is an "inclusionary rule," permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. . . .
>
> Thus, under Rule 404(2) as an inclusionary rule, evidence of other acts may be admissible if such acts are relevant for any purpose other than to show a defendant's

> propensity or disposition to commit the crime charged. However, Rule 404(2) is subject to the overriding protection of rule 403 of the Nebraska Evidence Rules (exclusion, if probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury, causing undue delay, wasting time, or needlessly presenting cumulative evidence). . . .
>
> The "purposes" set forth in Rule 404(2) are illustrative only and not intended to be exhaustive or mutually exclusive. For instance, McCormick notes categories of permissible purposes beyond those designated in Rule 404(2) such as proof of passion, malice, or perspective
>
> . . . .
>
> . . . .
>
> Consequently, if there is a distinctive pattern or procedure utilized in separate crimes, the separate act or acts may have probative value in determining the guilt of the defendant.

Subject to the balancing test contained in Rule 403, evidence of prior crimes, wrongs, or acts which cannot be criminally prosecuted on account of the statute of limitations may be admissible under Rule 404(2). See, *United States v. Anzalone*, 783 F.2d 10 (1st Cir. 1986) (evidence of prior acts is not rendered inadmissible simply because it relates to a period when prosecution is barred by a statute of limitations); *United States v. Means*, 695 F.2d 811 (5th Cir. 1983) (the statute of limitations is not implicated insofar as the admissibility of other acts is concerned); *United States v. Garvin*, 565 F.2d 519 (8th Cir. 1977); *Adrian v. People*, 770 P.2d 1243 (Colo. 1989) (evidence of prior acts is not limited to incidents within the statute of limitations); *People v. Thoms*, 30 Ill. App. 3d 229, 332 N.E.2d 538 (1975). As the court correctly expressed in *United States v. Ashdown*, 509 F.2d 793, 798 (5th Cir. 1975):

> The statute of limitations is a defense to prosecution, not a rule of evidence. Therefore, once prosecution is timely instituted, the statute of limitations has no bearing on the admissibility of evidence. It would be a bizarre result indeed if a crime properly prosecuted within the limitations period could not be proven because an

essential element, such as intent, could only be established by proof of incidents occurring outside the period.

The "other acts" involving Schaaf and Lenhart Company's checking account were not offered to show Schaaf's character or his propensity or disposition to commit the crime charged, theft by disposition. Rather, the several pre-1985 transactions whereby Schaaf misappropriated Lenhart Company's funds were relevant to prove the charge against Schaaf because those transactions showed a pattern of deliberate acts in Schaaf's protracted and executed plan for obtaining Lenhart Company's funds to benefit Schaaf and 4-S Investments in covering losses sustained in the commodities market.

Some of Schaaf's misappropriations of Lenhart Company's funds occurred almost 5 years before the last misappropriation in 1985. However, remoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence under Rule 404(2) and a fact to be determined in a present proceeding, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible. *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986); *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984).

Evidence of other crimes, wrongs, or acts, otherwise admissible under Rule 404(2), may be discretionarily excluded pursuant to the balancing test contained in Rule 403. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985); *United States v. Anzalone, supra*.

We find no abuse of discretion in the trial court's admitting evidence of Schaaf's misappropriations which occurred before October 16, 1984, as "other acts" in reference to the charge of theft by disposition, § 28-511(2).

## SUFFICIENCY OF EVIDENCE

In his penultimate assignment of error, Schaaf claims that the evidence is insufficient to sustain his conviction of felonious theft by disposition because it is "clear that, while, for the sake of argument, the transactions the defendant [Schaaf] entered into have been called 'thefts', they were not really thefts. [Schaaf] always considered them to be loans to himself. There

was no proof entered of record in that regard." Brief for appellant at 19.

> 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). See, also, *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989); *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989).

> 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). See, also, *State v. Swigart, supra*; *State v. Willett, supra*.

Evidence supports the jury's finding that Schaaf was guilty of theft by disposition, in violation of § 28-511(2). Neb. Rev. Stat. § 29-2026.01 (Reissue 1985) requires a jury to "ascertain and declare in its verdict the value of the property stolen, embezzled, or falsely obtained." Therefore, to sustain Schaaf's conviction of theft as a Class III felony pursuant to the grade of theft designated in § 28-518(1), the State was required to prove, beyond a reasonable doubt, that the property which was the subject of the theft had a value in excess of $1,000. 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). See, also, *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

By its verdict, the jury found that Schaaf was guilty of theft of Lenhart Company's property with a value of $404,504. In finding that Schaaf had stolen $404,504 from Lenhart Company, the jury necessarily included the $3,500 misappropriated by Schaaf from Lenhart Company's checking

account on January 7, 1985. Schaaf's assertion that the transactions in question were "loans" is an argument which the jury did not accept in its role as fact finder. Schaaf's theft of Lenhart Company's property valued at $3,500 satisfies the requirement for felonious theft punishable as a Class III felony. See §§ 28-511(2) and 28-518(1).

Consequently, there is no merit to Schaaf's claim that his conviction for felonious theft by disposition is not sustained by sufficient evidence.

## EXCESSIVE SENTENCE

In his final assignment of error, Schaaf contends that his sentence to imprisonment for a term of 4 to 8 years is an abuse of discretion. "A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." *State v. Kitt*, 232 Neb. 237, 240, 440 N.W.2d 234, 236 (1989). See, also, *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). Schaaf asserts: "While if validly proven, the theft of over $400,000.00 should be considered a crime of great magnitude, perhaps, in Nebraska, it is not the type of crime that requires a long sentence of incarceration." Brief for appellant at 20. To dispel Schaaf's misconception about permissible punishment for felonious theft in Nebraska, suffice it to say that there is no abuse of discretion in the sentence imposed.

## CONCLUSION

Schaaf's conviction and sentence are affirmed.

AFFIRMED.

CAPORALE, J., dissenting in part.

I agree with the majority's conclusion that Victor Schaaf is guilty of theft, but that the value of the property stolen and for which he stands convicted is only $3,500, not $404,504 as found by the trial court.

My difficulty is that I cannot help but also conclude, notwithstanding the fact that any theft of over $1,000 is a Class III felony, Neb. Rev. Stat. § 28-518(1) (Reissue 1985), that reducing the amount of the theft by $401,004 significantly alters one of the bases the trial court presumably considered in imposing its sentence. See *State v. Richter*, 220 Neb. 551, 371

N.W.2d 125 (1985) (nature of the offense one of factors to be considered in determining appropriate sentence).

I am not unmindful that notwithstanding the fact the additional $401,004 cannot be considered in resolving the issue of Schaaf's guilt, it could nonetheless be considered in determining an appropriate sentence. *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988). It therefore may well be that the trial court would impose the same sentence even in the face of the altered basis of Schaaf's conviction. The problem is that we do not know that such would have been the case; it therefore seems to me that Schaaf ought to have the opportunity to address that issue with the court which has the initial responsibility of exercising its discretion in determining an appropriate sentence.

Accordingly, I would affirm the conviction but remand the cause to the district court for resentencing.

---

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD LESIAK, APPELLANT.
449 N.W.2d 550

Filed December 29, 1989. No. 88-1034.

1. **Trial: Expert Witnesses.** The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court.
2. **Criminal Law: Mental Competency.** The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
3. _____: _____. The fact that the defendant suffers from some form of mental illness or defect will not alone establish lack of responsibility.
4. **Criminal Law: Intent: Intoxication.** Voluntary intoxication is not a defense to a crime, unless an accused is intoxicated to such an extent that he is incapable of forming the requisite element of criminal intent.
5. **Criminal Law: Evidence: Intent: Alcoholic Liquors.** In procuring liquor for a minor, the general criminal intent is supplied by the performance of the proscribed act. The offense of procuring liquor for a minor does not involve a specific criminal intent.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court

for Platte County, LYLE WINKLE, Judge. Judgment of District Court affirmed.

Frank J. Skorupa for appellant.

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

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

PER CURIAM.

The defendant was convicted by a jury of procuring alcoholic liquor for a minor, in violation of Neb. Rev. Stat. § 53-180 (Reissue 1988), and was sentenced to 60 days in the county jail. Prior to trial, the defendant filed a motion for an alcohol evaluation at The Mid-East Nebraska Mental Health Clinic at the State's expense. After an evidential hearing, the motion was overruled.

Upon appeal to the district court, the judgment was affirmed. The defendant has now appealed to this court and contends that the trial court erred in denying his motion for an alcohol evaluation at the State's expense in order to prepare his defense, and as a result, the defendant was denied effective assistance of counsel. The defendant's indigency was not an issue in the trial court.

The evidence at the hearing on the defendant's motion for an alcohol evaluation consisted of the testimony of Carrol Barnes, an alcohol and drug abuse counselor employed by the Mid-East mental health clinic in Columbus, Nebraska. Barnes testified that he had a master's degree in psychology and counseling and had worked in that field for approximately 6 1/2 years. He had previously worked at the Valley Hope organization since 1982, specializing in alcoholic counseling and psychological testing. He had been at the Mid-East clinic for a little over a month.

At the hearing on the motion, the only evidence relating to the defendant's history consisted of court files concerning previous convictions for driving while intoxicated. Although the trial court took judicial notice of these court files, they do not appear in the record filed in this court.

Barnes testified that a person who had been convicted three

times for driving while intoxicated and had been involved in inpatient treatment for alcohol abuse at a veterans' hospital and Valley Hope would be an alcoholic. Barnes further testified that a person can be an alcoholic to such an extent that although he can function normally, he may be unaware of what he is doing. He stated that an alcoholic can suffer a "blackout," which is an inability to recall what he did while he was under the influence of alcohol. Depending on the degree of chronic alcoholism, an alcoholic suffering from blackouts may or may not know at the time of the act whether it is wrong.

In Barnes' opinion, an alcohol evaluation would determine whether a person is a severe type of alcoholic. The greater the degree of alcoholism, the more likely one is to suffer blackouts.

At the hearing on the motion, there was no evidence that the defendant had been drinking at the time of the offense, or what quantity of alcoholic liquor he may have consumed.

The defendant argues that an alcohol evaluation was necessary to determine whether the defendant was the type of alcoholic who could not distinguish right from wrong. He claims this was necessary to prepare his defense, and by denying him access to an expert to determine the extent of his alcoholism, he was denied equal protection under the law.

At the trial, the defendant's 16-year-old son, Harlan Thomas Lesiak, testified that he went to the Double T Bar and asked the defendant to buy him some beer. The defendant bought the beer with money supplied by his son and delivered it to his son and three other teenagers who were waiting in Joe and Al's parking lot.

The son testified that the defendant was "real drunk" when he bought the beer for him and that he asked the defendant to buy the beer because he knew his father was drunk and he could take advantage of him. The son further testified that his father would not buy beer for him if his father was sober. There was no evidence as to how long the defendant had been drinking or what quantity of alcoholic liquor he may have consumed at that time.

In Nebraska, "[t]he right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court." *State v. Suggett*, 200

Neb. 693, 697, 264 N.W.2d 876, 879 (1978). See, also, *Vassar v. Solem*, 763 F.2d 975 (8th Cir. 1985).

Apparently, defense counsel hoped to obtain testimony from Barnes, after he had made an evaluation of the defendant, that the defendant was an alcoholic of such severity that he was incapable of distinguishing right from wrong while under the influence of alcoholic liquor, and he would have used that as his defense.

From the record made in this case, it is very doubtful that Barnes, who had no psychiatric training, could have qualified as an expert to give such testimony.

Nebraska follows the *M'Naghten* rule as to the defense of insanity. " ' "The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act." ' " *State v. Lamb*, 213 Neb. 498, 508-09, 330 N.W.2d 462, 469 (1983) (quoting *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, *reh'g denied* 434 U.S. 961, 98 S. Ct. 496, 54 L. Ed. 2d 322). The insanity must be in existence at the time of the alleged criminal act. *Lamb, supra.* The fact that the defendant suffers from some form of mental illness or defect will not alone establish lack of responsibility. *Id.*

Voluntary intoxication is not a defense to a crime, unless an accused is intoxicated to such an extent that he is incapable of forming the requisite element of criminal intent. *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). This doctrine would not provide a defense for the defendant in this case because in procuring liquor for a minor, the general criminal intent is supplied by the performance of the proscribed act. See *State v. Smith*, 221 Neb. 406, 377 N.W.2d 527 (1985). The offense does not involve a specific criminal intent, and under the circumstances of this case, voluntary intoxication did not provide a defense.

For the reasons stated, the ruling by the trial court on the defendant's motion was not erroneous.

The judgment is affirmed.

AFFIRMED.

KEVIN C. PARKER, APPELLEE, V. TRACY L. PARKER, NOW KNOWN AS TRACY L. RALEIGH, APPELLANT.

449 N.W.2d 553

Filed December 29, 1989. No. 89-152.

1. **Modification of Decree: Child Custody: Proof: Appeal and Error.** The party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child, and, if a finding on that issue is not made in the trial court, the Supreme Court, in its de novo review, may make such finding if the evidence supports it.
2. **Modification of Decree: Child Custody: Appeal and Error.** In the Supreme Court's review of cases involving the modification of a decree of dissolution with respect to a change of custody, we review the record de novo to determine if the trial court abused its discretion in deciding that issue.

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

Deborah R. Pred, of Pred Law Offices, for appellant.

Jerry L. Pettit for appellee.

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

PER CURIAM.

This is an appeal from a January 30, 1989, order of the district court for Douglas County granting the application of the petitioner-appellee father to modify the parties' December 3, 1986, decree of dissolution. The order changed custody of the minor child of the parties to the appellee and granted reasonable rights of visitation in the respondent-appellant mother.

The mother has appealed, assigning two errors in this court: (1) that the trial court erred in determining that there was a material change in circumstances "indicating that appellant-mother was unfit or that it was in the best interests of the minor child to require a change of custody," and (2) that the trial court abused its discretion in changing the custody of the child from her mother to her father. We affirm.

The underlying difficulty in deciding appellant's first assignment of error is that the order appealed from, as prepared by appellee's counsel, makes no findings at all. The court, in its

oral findings, did find that the best interests of the child required a change of custody.

That exact situation was presented in *Hoschar v. Hoschar*, 220 Neb. 913, 374 N.W.2d 64 (1985). In *Hoschar*, we reversed and remanded with directions to dismiss the order of the trial court changing custody, because the trial court had not made a finding that there had been a material change of circumstances affecting the best interests of the children. That holding was reversed, sub silentio, in *Hicks v. Hicks*, 223 Neb. 189, 192, 388 N.W.2d 510, 513 (1986), where we said: "In the present case the trial court made no finding of a material change of circumstances in transferring custody to the petitioner. The question then becomes whether upon de novo review we conclude that the record shows a material change in circumstances."

So that the review procedures will be clear in cases involving a change of custody of minor children, we disapprove the holding set out above in the *Hoschar* case, and specifically adopt the procedures set out in *Hicks*. We hold that the party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child, and, if a finding on that issue is not made in the trial court, the Supreme Court, in its de novo review, may make such finding if the evidence supports it.

We note that appropriate findings by the trial court, supported by the record, are helpful in establishing a firm and logical basis for the ultimate decision of a case in this court. If findings are not made, this court can make little application of our general rule that in our de novo review, we consider, and may give weight to, the fact that the trial court saw and heard the witnesses.

With regard to the first assignment of error, the record shows that approximately 3 months after the entry of the decree herein, the appellant took the child to Philadelphia and left the child with the child's maternal grandmother for approximately 5 months. The appellee sought judicial relief, and the child was returned to Nebraska to visit with her father for 4 weeks, pursuant to a court order. After a few days of the visit, the appellee returned the child to appellant, and appellant returned

the child to Philadelphia, where the child was enrolled in kindergarten. The child was returned to Nebraska in late December 1987.

In July 1988, after 9 days of a 1-month visitation arranged for appellee, appellant picked the child up for a weekend visit in Omaha but, instead, took her to a friend's family reunion in Alabama and then to Philadelphia, from which the mother and child returned on approximately August 26. These actions denied appellee some of his summer visitation with the child.

Such conduct by appellant was a direct violation of the parties' settlement agreement relating to visitation approved by the court and, in this case, constituted a material change in circumstances affecting the best interests of the minor child involved. In our de novo review, we so find.

Our conclusion is based on our established holdings that "[v]isitation and custody coexist; generally, visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor child or children of the marriage." *Heyne v. Kucirek*, 203 Neb. 59, 63, 277 N.W.2d 439, 440-41 (1979). In the case at bar, appellant, within 4 months after the decree, began a pattern of conduct resulting in a substantial reduction of appellee's visitation rights as ordered by the initial trial court. The appellant's conduct resulted in the child's being in the physical custody of individuals other than either of her parents.

These facts show that "something has occurred, which if the trial court had been aware of [such], the trial court in the best interests of the children would have granted their custody to the other parent," and thus constituted a material change in circumstances. *Hoschar v. Hoschar, supra* at 915, 374 N.W.2d at 66. We find that there was a material change of circumstances sufficient to justify a court hearing to determine if custody should be changed. Appellant's first assignment of error is without merit.

Appellant's second assignment of error is that the trial court abused its discretion in changing custody of the child from appellant to appellee. In the Supreme Court's review of cases involving the modification of a decree of dissolution with respect to a change of custody, we review the record de novo to

determine if the trial court abused its discretion in deciding the issue. That de novo review leads to the same conclusion reached by the trial court, namely, the best interests of the child required that custody be changed. As changed, the custody arrangement now will, as far as the record shows, result in the noncustodial parent, the appellant, having visitation that will result in the appropriate continuation of the relationships of the minor child with both of her parents. That situation did not exist prior to the change. The trial court did not abuse its discretion in ordering such a change in custody. Appellant's second assignment of error is without merit.

AFFIRMED.

---

STATE OF NEBRASKA, APPELLEE, V. JOHN J. ARMENDARIZ, APPELLANT.

449 N.W.2d 555

Filed December 29, 1989. No. 89-215.

1. **Search Warrants: Probable Cause.** Probable cause for the issuance of a search warrant is reasonable suspicion founded on articulable facts.
2. **Search Warrants: Probable Cause: Affidavits.** If the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate that there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient.
3. **Search Warrants.** A search warrant designated as authorizing a nighttime search may lawfully be served in the daytime.
4. **Search Warrants: Controlled Substances: Judicial Notice.** A court may take judicial notice that substances such as cocaine may be easily disposed of by flushing down a drain, justifying the issuance of a no-knock search warrant.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

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

John J. Armendariz, pro se.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

WHITE, J.

This is an appeal from the judgment of conviction and sentence for the offense of possession of a controlled substance, cocaine, Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988). The appellant was sentenced to the maximum term for a Class IV felony, 20 months' to 5 years' imprisonment, and given credit for 95 days spent in custody prior to sentencing.

The appellant, pro se, and his counsel assign various errors, some relating to the issuance and execution of a search warrant for the premises at 1901 Park Avenue, apartment No. 2, Omaha, Nebraska; a certain 1966 Chevrolet Impala automobile; and the persons of John J. Armendariz and a female companion named Annette. Other assignments by the appellant, pro se, relate to the alleged incompetence of trial counsel.

The assignments are: (1) The affidavit was insufficient to establish probable cause for the search; (2) the warrant authorizing a nighttime search was executed in the daytime hours; (3) the use of a no-knock warrant in this case was constitutionally prohibited and not authorized by the statute; (4) defense counsel failed to inquire as to the credibility of the confidential informant whose information was relied on by the police and the issuing court; and (5) the evidence was insufficient to support the conviction. We will consider the errors in order.

In evaluating showing of probable cause necessary to support issuance of a warrant, only probability and not prima facie evidence of criminal activity is required. Probable cause is reasonable suspicion founded on articulable facts. *State v. Cullen*, 231 Neb. 57, 434 N.W.2d 546 (1989). In *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987), we noted that the *Aguilar-Spinelli* tests for sufficiency of an affidavit were abandoned in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), in favor of the totality of circumstances

test. This court defined this test as meaning that if the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate that there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient.

With the above considerations in mind, we consider the sufficiency of the affidavit. The affidavit, dated November 2, 1988, describes the places and persons to be searched and recites that within 48 hours of November 1, Omaha Police Sergeant Mark T. Langan was contacted by a confidential informant (previously reliable and responsible for a number of controlled purchases of cocaine). The informant observed the appellant and Annette conducting possible drug transactions. The informant advised Langan that the appellant sells cocaine exclusively during nighttime hours because of limited surveillance opportunities.

Surveillance was established on appellant, identifying his place of residence. Surveillants observed appellant's meeting with a male at a restaurant parking lot and observed him and his female companion enter an apartment complex at 67th and Grover Streets, and from there go to an outside pay phone at 60th and Grover Streets. From the pay phone, the appellant drove to 29th and Jackson Streets, where Annette left the car. Later, Annette returned to the car, which then left the scene.

The informant again contacted Langan and stated that he had observed appellant in the described car with a quantity of prepackaged cocaine and that appellant had access to additional amounts of cocaine and was selling it in the Omaha area. The informant also observed appellant with a large amount of currency, which, the informant said, appellant stated was made through his cocaine sales.

On a third occasion, the informant again contacted Langan. The informant advised Langan that appellant had told him that he had a quantity of cocaine for sale at the searched address. The three contacts and observations were made within 72 hours of the affidavit and warrant. In addition, two previous anonymous callers informed police that appellant was a cocaine dealer.

The affidavit also recites a previous conviction for possession of a controlled substance in 1979. The affidavit requested that a no-knock warrant be issued, since the narcotics could be easily destroyed. It further requested a nighttime warrant. The county court issued the warrant, and the same was executed on November 2, 1988. In the search, the officers recovered from the apartment a substance later identified at trial as cocaine.

As to the first assignment, the totality of the circumstances support the trial court's finding that there was a fair probability that evidence of a crime would be found at the place to be searched. The first assignment is without merit.

The second assignment of error involves the construction of Neb. Rev. Stat. § 29-814.04 (Reissue 1985). That section provides in part:

> The warrant shall command the officer named in the warrant to search the person or place named for the purpose specified. The warrant shall direct that it be served in the daytime unless the magistrate or judge is satisfied that the public interest requires that it should not be so restricted, in which case the warrant may direct that it may be served at any time.

The warrant, as issued, directed the warrant was to be served in the "night time." The alternatives in the statute are "daytime" or "any time." The warrant was served at or about 10:30 a.m. on November 2.

In *State v. Holman*, 229 Neb. 57, 424 N.W.2d 627 (1988), a warrant served in the nighttime, contrary to the warrant's directive that it be served in the daytime, resulted in the suppression of the seized items.

Appellant urges us to apply *Holman* literally. He ignores the reading of the statute that if a warrant is limited to daytime service, it may only be accomplished in the daytime; if not so limited, it may be accomplished anytime. As the warrant in this case was not so limited, its service in the daytime or nighttime was authorized. The assignment cannot be sustained.

In *State v. Meyer*, 209 Neb. 757, 311 N.W.2d 520 (1981), this court reviewed the circumstances justifying a no-knock, or no-notice, entry into a dwelling house for the purpose of

executing a search warrant. The court concluded that Neb. Rev. Stat. § 29-411 (Reissue 1985) was constitutional. The statute provides in part:

> In executing . . . a search warrant . . . the officer may break open any . . . door . . . of a dwelling . . . if, after notice of his office and purpose, he is refused admittance; *or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given* . . . .

(Emphasis supplied.)

This court held that the court can take judicial notice that substances such as cocaine may be easily and quickly disposed of by flushing down a drain. We concluded in *Meyer* that neither *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), nor *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), nullifies the above provision of § 29-411. We reaffirm the reasoning in *Meyer*. The no-notice entry was authorized by statute and is not prohibited by the U.S. Constitution. Therefore, the third assignment of error is also without merit.

The fourth assignment of error raised by appellant, pro se, is that his counsel was ineffective by failing to require disclosure of more information regarding the confidential informant. Appellant asserts, all without foundation in the record, that his wish to call witnesses and his desire to request an in-camera hearing were disregarded by his counsel. He does not point to anything in the record indicating any possible prejudice by this alleged failure of counsel. To sustain a claim of ineffective assistance of counsel, the defendant must show (1) counsel's performance was deficient, and (2) such deficient performance prejudiced the defense. *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989). The appellant here has shown neither of the two requirements of *Kern*. The assignment is meritless.

The final assignment of error is that the evidence adduced at

trial is not sufficient to sustain the verdict. Cocaine was seized from an apartment where appellant was living. The only element of the crime is possession. The assignment is not only meritless, but borders on the frivolous. The judgment and sentence are affirmed.

AFFIRMED.

---

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. EGGER, APPELLANT.
449 N.W.2d 558

Filed December 29, 1989. No. 89-376.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Remanded with directions.

James H. Buhrmann for appellant.

Robert M. Spire, Attorney General, and Donald A. Kohtz for appellee.

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

PER CURIAM.

Appellant was convicted of making a terroristic threat, see Neb. Rev. Stat. § 28-311.01 (Cum. Supp. 1988), a Class IV felony punishable by up to 5 years' imprisonment, up to a $10,000 fine, or both, and use of a firearm to commit a felony, see Neb. Rev. Stat. § 28-1205 (Reissue 1985), a Class III felony punishable by 1 to 20 years' imprisonment, up to a $25,000 fine, or both. He was sentenced to 2 years in the penal complex. He was not sentenced to a separate consecutive term on the firearm charge, as required by statute. See, *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985); § 28-1205(3).

Therefore, the matter must be remanded to the district court for resentencing.

REMANDED WITH DIRECTIONS.

JOSEPH DOTZLER, APPELLANT, V. BRUCE TUTTLE, APPELLEE.
449 N.W.2d 774

Filed January 5, 1990. No. 88-238.

1. **Actions: Torts: Negligence.** A participant in a game involving a contact sport is liable for injuries in a tort action only if his or her conduct is such that it is either willful or with a reckless disregard for the safety of the other player, but is not liable for ordinary negligence.
2. **Trial: Expert Witnesses: Appeal and Error.** Generally, the admission of evidence from expert witnesses is a matter left to the discretion of the trial court, and its ruling will be upheld absent an abuse of that discretion.
3. **Trial: Expert Witnesses.** Expert testimony is normally admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens.
4. **Jury Instructions: Appeal and Error.** There is no prejudicial error in jury instructions which, when read together, correctly state the law, are not misleading, and adequately cover the issues.
5. **Negligence: Torts: Intent: Words and Phrases.** Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act. Conduct is in reckless disregard to the safety of another if the actor intentionally does an act, or intentionally fails to do an act which it is his or her duty to another to do, knowing or having reason to know of facts which would lead a reasonable person to realize not only that his or her conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his or her conduct negligent. Recklessness differs from intentional wrongdoing in that while the act must be intended by the actor in order to be considered reckless, the actor does not intend to cause the harm which results from the act.
6. **Jury Instructions: Appeal and Error.** The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear.
7. _____: _____. Jury instructions should be confined to the issues found in the pleadings and which find support in the evidence. Generally, it is error to submit to the jury an issue which is not sustained by the evidence.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for a new trial.

Thomas M. White, of Fitzgerald, Schorr, Barmettler & Brennan, for appellant.

Joseph E. Jones and Kevin L. Reiner, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

HASTINGS, C.J.

Plaintiff, Joseph Dotzler, sued the defendant, Bruce Tuttle, for injuries arising out of a collision between them during a "pickup" basketball game. The trial court sustained defendant's demurrer as to plaintiff's cause of action for negligence; the jury returned a verdict in favor of the defendant on the cause of action involving an allegation of recklessness. Plaintiff appeals.

Plaintiff assigns as error the actions of the trial court in (1) sustaining defendant's demurrer as to plaintiff's cause of action in negligence; (2) sustaining defendant's motion in limine excluding the testimony of plaintiff's expert witness; (3) instructing the jury that plaintiff, in order to meet his burden of proof, must establish that defendant acted with intent; (4) failing to instruct the jury that intent was not a part of plaintiff's burden of proof; (5) giving an instruction defining negligence and explaining the relationship between negligence and recklessness without defining intent; and (6) instructing that contributory negligence is a defense to recklessness.

Plaintiff and defendant were playing on opposing teams in a pickup basketball game during the noon hour at the Omaha Southwest YMCA on December 28, 1984. The two parties were not acquainted and had not played basketball against each other before.

It was plaintiff's testimony that he had just made a shot at the basket and moved back to play defense. He stated that he was standing near the top of the key when he saw a blur and felt a shove or push on his chest. The force of the collision sent him flying backward 19 or 20 feet, causing him to land near the baseline. Reaching back to break his fall, he fractured both of his wrists when he landed on the floor.

Plaintiff's brother Ron was playing on the same team with the defendant. Ron testified that he saw the plaintiff standing at about the free throw line and that the defendant ran to the plaintiff and the defendant's hands came out and pushed the plaintiff. The witness said he went up to the defendant immediately, and the latter said that "he's been doing it to me

the whole game and I'm getting sick and tired of it."

The defendant testified that he was coming down the court as if on a fast break, trying to get open for a pass. He said that he was not particularly aware of the plaintiff's presence. He stated that the two of them "banged together." He denied that he pushed the plaintiff and denied telling the plaintiff's brother that he was tired of being pushed around by the plaintiff.

Another witness, Frederick Stehlik, was on the sideline and saw the plaintiff at approximately halfway between the basket and the free throw line. Stehlik was not sure whether the plaintiff was stationary or moving. Stehlik did see the ball being brought down the court and saw the defendant moving. A player came across the court and obscured the witness' vision for just a split second, and the next thing he saw was the plaintiff falling.

Plaintiff contends that the trial court erred in sustaining the demurrer to his negligence cause of action. At issue is whether an individual participating in a contact sport has a cause of action against another participant because of injuries sustained as a result of ordinary negligence on the part of that other participant.

The majority of jurisdictions which have addressed this issue have held that suit by the injured participant, if not based on intentional infliction of injury, must be based on reckless disregard of safety; an allegation of negligence is not sufficient to state a cause of action.

The plaintiff in *Gauvin v. Clark*, 404 Mass. 450, 537 N.E.2d 94 (1989), was "butt-ended" in the abdomen with a hockey stick by the defendant. The court held that participants in an athletic event owe a duty to other participants to refrain from reckless misconduct, and liability may result from injuries caused to a player by reason of the breach of that duty. According to the court:

> The problem of imposing a duty of care on participants in a sports competition is a difficult one. Players, when they engage in sport, agree to undergo some physical contacts which could amount to assault and battery absent the players' consent. Restatement (Second) of Torts § 50 comment b (1965). The courts are wary of imposing wide

tort liability on sports participants, lest the law chill the vigor of athletic competition. See, e.g., *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo.1982). Nevertheless, "some of the restraints of civilization must accompany every athlete on to the playing field." *Nabozny v. Barnhill*, 31 Ill.App.3d 212, 215, 334 N.E.2d 258 (1975). "[R]easonable controls should exist to protect the players and the game." *Ross v. Clouser, supra.*

The majority of jurisdictions which have considered this issue have concluded that personal injury cases arising out of an athletic event must be predicated on reckless disregard of safety. See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524 (10th Cir.1979); *Nabozny v. Barnhill, supra*; *Ross v. Clouser, supra* at 14; *Kabella v. Bouschelle*, 100 N.M. 461, 465, 672 P.2d 290 (1983). Restatement (Second) of Torts § 500 comments e & g (1965).

We adopt this standard. Allowing the imposition of liability in cases of reckless disregard of safety diminishes the need for players to seek retaliation during the game or future games. See *Hackbart v. Cincinnati Bengals, Inc., supra* at 521. Precluding the imposition of liability in cases of negligence without reckless misconduct furthers the policy that "[v]igorous and active participation in sporting events should not be chilled by the threat of litigation." *Kabella v. Bouschelle, supra.*

*Gauvin, supra* at ____, 537 N.E.2d at 96-97.

Recovery of damages for injuries sustained in an informal game of tackle football was sought in *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290 (1983). Following the rationale of Restatement (Second) of Torts § 50, comment *b.* (1965), the court found that voluntary participation in a football game constitutes an implied consent to the normal risks accompanying bodily contact permitted by the rules of the sport because such risks are foreseeable or inherent to the playing of the game. However, noted the court, participation in a game involving bodily contact does not constitute consent to contacts which are prohibited by the rules or usages of the sport if such rules are designed for the protection of the participants

and not merely to control the play of the game. Holding that participants in sports activities may not recover in tort from a fellow player under a pure negligence theory, the court stated:

> Vigorous and active participation in sporting events should not be chilled by the threat of litigation. The players in informal sandlot or neighborhood games do not, in most instances, have the benefit of written rules, coaches, referees or instant replay to supervise or re-evaluate a player's actions.

*Kabella, supra* at 465, 672 P.2d at 294.

In *Ross v. Clouser*, 637 S.W.2d 11 (Mo. 1982), the plaintiff third baseman sustained a severe knee injury during a softball game when the defendant runner, despite the fact that the plaintiff was not at the time blocking the base path, ran very fast toward the plaintiff rather than third base and then dove headfirst through the air at him. Holding that the basis for a cause of action for personal injuries sustained during athletic competition must be recklessness rather than mere negligence, the court stated:

> Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation, yet it must be recognized that reasonable controls should exist to protect the players and the game. Balancing these seemingly opposite interests, we conclude that a player's reckless disregard for the safety of his fellow participants cannot be tolerated. If a plaintiff pleads and proves such recklessness, he may seek relief for injuries incurred in an athletic competition.

*Id.* at 14.

A line of cases from Illinois establishes that jurisdiction's adherence to the position that a tort suit brought by an injured participant in a contact sport, if not based on intentional infliction of injury, must be based on recklessness. The plaintiff in *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975), sued the defendant for injuries sustained during a soccer game. The defendant, instead of turning away, continued to run toward the plaintiff, who, as goalkeeper, had possession of

the ball inside the penalty area, and kicked the plaintiff in the head and caused severe injuries. Addressing the issue of whether the defendant owed a duty to the plaintiff, the court stated:

> [W]hen athletes are engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule. A reckless disregard for the safety of other players cannot be excused. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants.

*Id.* at 215, 334 N.E.2d at 260-61. Furthermore,

> a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player so as to cause injury to that player, the same being a question of fact to be decided by a jury.

*Id.* at 215, 334 N.E.2d at 261.

In *Oswald v. Township High School Dist. No. 214*, 84 Ill. App. 3d 723, 406 N.E.2d 157 (1980) (plaintiff was kicked and injured by defendant in the course of a physical education class basketball game), the court made it clear that *Nabozny v. Barnhill, supra*, was to be interpreted to mean that liability for injuries sustained as a result of breach of a safety rule in a contact sport cannot be predicated upon ordinary negligence; willful and wanton misconduct must be shown to permit recovery. The court found no merit to the plaintiff's suggestion that cases which hold that golfers owe a duty of ordinary care to other golfers are controlling, stating:

> [P]articipants in bodily contact games such as basketball assume greater risks than do golfers and others involved in nonphysical contact sports. Because rule infractions, deliberate or unintentional, are virtually inevitable in contact games, we believe the imposition of a different standard of conduct is justified where injury results from

such contact.

*Oswald, supra* at 727, 406 N.E.2d at 160.

The appellate court clarified *Oswald v. Township High School Dist. No. 214, supra*, in *Keller v. Mols*, 156 Ill. App. 3d 235, 509 N.E.2d 584 (1987) (plaintiff, goalie in a game of floor hockey, was struck in the eye by a plastic puck shot by defendant). According to the court, *Oswald v. Township High School Dist. No. 214, supra*, established that in order to determine whether a sports participant may be liable for injuries to another player caused by mere negligence, the relevant inquiry is whether the participants were involved in a contact sport, not whether they were organized and coached. See, also, *Ramos v. City of Countryside*, 137 Ill. App. 3d 1028, 485 N.E.2d 418 (1985).

A line of Louisiana cases, although couched in terms of negligence, indicates that the Louisiana courts require reckless conduct rather than mere negligence in order for a participant to recover from another participant for injury sustained during the course of a contact sport. The plaintiff in *Bourque v. Duplechin*, 331 So. 2d 40 (La. App. 1976), *writ denied* 334 So. 2d 210, filed suit to recover damages for injuries received in a softball game when the defendant, in running from first to second base, ran out of his way in order to run into the plaintiff second baseman, who was standing 5 feet away from second base. The court found that the defendant's conduct constituted negligence or perhaps even wanton negligence, but was not intentional because he did not intend the harm that resulted. According to the court:

> A participant in a game or sport assumes all of the risks incidental to that particular activity which are obvious and foreseeable. A participant does not assume the risk of injury from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating.

*Id.* at 42. See, also, *Novak v. Lamar Ins. Co.*, 488 So. 2d 739 (La. App. 1986), *writ denied* 491 So. 2d 23 (plaintiff first baseman was injured by defendant runner, who was racing for first base).

In *Ginsberg v. Hontas*, 545 So. 2d 1154 (La. App. 1989), the

plaintiff was injured as the result of a collision which occurred as the defendant runner attempted to slide into second base and the plaintiff second baseman attempted to tag the defendant. Holding that the plaintiff failed to establish that the defendant acted negligently, the court noted:

> The duty owed by the defendant in the instant matter is a common duty, the duty to act reasonably under the circumstances. In this softball game defendant owed plaintiff the duty to act reasonably, that is, to play fairly according to the rules of the game and to refrain from any wanton, reckless conduct likely to result in harm or injury to another.

*Id.* at 1155.

Adopting the rationale of the majority rule, we hold that a participant in a game involving a contact sport such as basketball is liable for injuries in a tort action only if his or her conduct is such that it is either willful or with a reckless disregard for the safety of the other player, but is not liable for ordinary negligence. The allegation as to ordinary negligence did not state a cause of action, and the trial court was correct in sustaining defendant's demurrer.

Plaintiff was going to offer the testimony of one Steven Lefler as an expert in the area of pickup basketball. Lefler claimed to have played 15,000 to 20,000 games of basketball of one style or another. According to an offer of proof made following the hearing on defendant's motion in limine and at commencement of the trial, Lefler would testify that he was thoroughly familiar with the safety rules and usages of basketball, that he had studied the depositions of the witnesses listed above, and that in his opinion the defendant was reckless in that he was running too fast without watching where he was going or caring where the plaintiff and other participants in the game were located. The defendant's motion was sustained. The court gave as its reason for such a ruling that the witness' understanding as to how he normally played pickup basketball was not relevant to whatever rules the participants on this day were following.

Generally, the admission of evidence from expert witnesses is a matter left to the discretion of the trial court, and its ruling

will be upheld absent an abuse of that discretion. *Kasper v. Carlson*, 232 Neb. 170, 440 N.W.2d 195 (1989); *Sanchez v. Derby*, 230 Neb. 782, 433 N.W.2d 523 (1989).

Neb. Rev. Stat. § 27-702 (Reissue 1985) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Accordingly, as recognized in *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), and *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981), expert testimony generally is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens.

While a trial court may admit expert testimony if it believes such may assist the jury, it is not error to exclude such testimony relating to matters which are not complicated and which embrace matters of common knowledge. *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987). The trial court did not rule, contrary to plaintiff's assertion in his brief, that informal games of basketball do not have safety rules or usages. The gist of the court's ruling was that the jury was perfectly capable of determining for itself whether defendant acted with reckless disregard for the safety of the plaintiff.

The trial court did not abuse its discretion in excluding the testimony of Lefler.

We next deal with assignments of error Nos. 3, 4, and 5, dealing generally with the court's instructions relating to the definition of recklessness.

There is no prejudicial error in jury instructions which, when read together, correctly state the law, are not misleading, and adequately cover the issues. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

The trial court instructed the jury on the issue of recklessness in the following manner:

> You are instructed that the standard for Defendant's

conduct is recklessness - a reckless disregard for the safety of the other player, i.e the Plaintiff. The term "recklessness" is conduct amounting to more than negligence. It is needlessness [sic] or indifference to the rights of others or of the consequences of one's act. It indicates an indifferent disregard for the rights of others or of the consequences.

The Defendant's conduct was in reckless disregard of the safety of the Plaintiff if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Reckless misconduct differs from negligence, in that the latter consists of mere inadvertance [sic], lack of skillfulness or failure to take precautions, while reckless misconduct involves a choice or adoption of a course of action either with knowledge of the danger or with knowledge of facts which would disclose this danger to a reasonable man.

Recklessness also differs in that it consists of intentionally doing an act with knowledge not only that it contains a risk of harm to others as does negligence, but that it actually involves a risk substantially greater in magnitude than is necessary in the case of negligence.

The language of the first paragraph appears to have been taken from Nebraska cases in which Iowa's guest statute was applied. See, *Peterson v. Dean*, 186 Neb. 716, 186 N.W.2d 107 (1971); *Cappellano v. Pane*, 178 Neb. 493, 134 N.W.2d 76 (1965). The second paragraph is taken from Restatement (Second) of Torts § 500 (1965). The third paragraph is taken from *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290 (1983), and the fourth paragraph from *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1976). See, also, the Restatement, *supra*, comment *g*.

Plaintiff objects to the instruction because of the inclusion of language instructing the jury that the defendant's conduct was

in reckless disregard of the safety of plaintiff if he "intentionally fails to do an act which it is his duty to the other to do" and that recklessness consists of "intentionally doing an act with knowledge." According to plaintiff, the jury was misled into believing the plaintiff had to prove that defendant acted with actual intent. As evidence that the jury was confused and misled, plaintiff emphasizes the fact that the jury sent a note to the judge requesting clarification of instruction No. 9, specifically asking, "Is acting intentionally included in the definition of reckless disregard?" It appears to be plaintiff's position that acting intentionally is not an element of recklessness. That is not correct.

The terms "wanton," "willful," and "reckless" have in practice been treated as meaning the same thing. According to Prosser and Keeton:

> The usual meaning assigned to "willful," "wanton," or "reckless" . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

Prosser and Keeton on the Law of Torts, *Negligence: Standard of Conduct* § 34 at 213 (5th ed. 1984). According to The Restatement, *supra* at comment *b.* at 588-89:

> Conduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended, notwithstanding that the actor knows of facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others.

Looking at willful negligence and wanton negligence because Nebraska has no cases directly dealing with recklessness, this court has stated:

> "In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the

> act done or the omission to act, and a constructive intention as to the consequences. . . ."

(Emphasis in original.) *Wicker v. City of Ord*, 233 Neb. 705, 712, 447 N.W.2d 628, 633 (1989), quoting *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988).

The Restatement, *supra* at 587, defines reckless disregard of safety as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or *intentionally* fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

(Emphasis supplied.)

It is somewhat puzzling why the failure to do an act is modified by "intentionally" whereas doing an act is not. This is particularly true in light of the Restatement (Second) of Torts § 500, comments *f.* and *g.* (1965), which are discussed in *Hackbart v. Cincinnati Bengals, Inc.*, *supra* at 524, as follows:

> The Restatement of Torts Second, § 500, distinguishes between reckless and negligent misconduct. Reckless misconduct differs from negligence, according to the authors, in that negligence consists of mere inadvertence, lack of skillfulness or failure to take precautions; reckless misconduct, on the other hand, involves a choice or adoption of a course of action either with knowledge of the danger or with knowledge of facts which would disclose this danger to a reasonable man. Recklessness also differs in that it consists of intentionally doing an act with knowledge not only that it contains a risk of harm to others as does negligence, but that it actually involves a risk substantially greater in magnitude than is necessary in the case of negligence. The authors explain the difference, therefore, in the degree of risk by saying that the difference is so significant as to amount to a difference in kind.
>
> Subsection (f) also distinguishes between reckless

misconduct and intentional wrongdoing. To be reckless the *act* must have been intended by the actor. At the same time, the actor does not intend to cause the harm which results from it. It is enough that he realized, or from the facts should have realized, that there was a strong probability that harm would result even though he may hope or expect that this conduct will prove harmless. Nevertheless, existence of probability is different from substantial certainty which is an ingredient of intent to cause the harm which results from the act.

Therefore, recklessness exists where a person knows that the act is harmful but fails to realize that it will produce the extreme harm which it did produce. It is in this respect that recklessness and intentional conduct differ in degree.

We therefore adopt the following as a definition of recklessness: Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act. Conduct is in reckless disregard to the safety of another if the actor intentionally does an act, or intentionally fails to do an act which it is his or her duty to another to do, knowing or having reason to know of facts which would lead a reasonable person to realize not only that his or her conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his or her conduct negligent. Recklessness differs from intentional wrongdoing in that while the act must be intended by the actor in order to be considered reckless, the actor does not intend to cause the harm which results from the act.

Although the court's instruction which was given was somewhat lengthy, it contained a correct statement of the law. Plaintiff's claim that the instruction was misleading because the jury asked for clarification is without avail. "The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear." *Landmesser v. Ahlberg*, 184 Neb. 182, 187, 166 N.W.2d 124, 128 (1969). Such was the case here.

Plaintiff next raises the question as to whether contributory

negligence is a defense against a cause of action based on reckless behavior. Defendant in his answer alleged that plaintiff was guilty of contributory negligence more than slight in failing to keep a proper lookout and by failing to control his body in such a manner as to avoid an impact with defendant.

However, it is not necessary for us to discuss that legal proposition. Even assuming that contributory negligence can be a defense in a case such as this, the record does not support such a finding. The plaintiff testified that he was standing still when pushed by the defendant. The defendant stated that he was not particularly aware of the plaintiff's presence. That was all of the evidence in the record, and it was not sufficient to permit a finding by the jury of absence of lookout or lack of control on the part of the plaintiff. Jury instructions should be confined to the issues found in the pleadings and which find support in the evidence. Generally, it is error to submit to the jury an issue which is not sustained by the evidence. *Steed v. Oak Ridge Equestrian Ctr.*, 224 Neb. 792, 401 N.W.2d 495 (1987). The trial court committed prejudicial error in submitting that issue.

The judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., not participating.

---

FRANK J. STAVA AND WINDEN, INC., A NEBRASKA CORPORATION, APPELLANTS, V. LOUIS F. STAVA ET AL., APPELLEES.

450 N.W.2d 199

Filed January 12, 1990. No. 87-1130.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, upon the recommendation of the Appellate Division of the District Court, MORAN, WOLF, and HANNON, District Judges. Reversed and remanded for a new trial.

Louis Michael Thrasher for appellants.

Robert E. Sullivan, of Haessler & Sullivan, for appellees.

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

PER CURIAM.

Having considered the record, briefs, and recommendation of the Appellate Division of the District Court, we reverse the judgment of the district court because of a clearly erroneous finding of fact and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

---

DWAIN JOHN, APPELLANT, V. OO (INFINITY) S DEVELOPMENT COMPANY, A GENERAL PARTNERSHIP, DEFENDANT AND THIRD-PARTY PLAINTIFF, NATIONAL UNION FIRE INSURANCE COMPANY, AND GINGER D. STOREY-ZIMMER, DOING BUSINESS AS ZIMMER MANAGEMENT SERVICES, THIRD-PARTY DEFENDANT, APPELLEES.

450 N.W.2d 199

Filed January 12, 1990. No. 88-045.

1. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is 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.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** If the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts unreasonably.
4. _____. A plaintiff does not assume a risk of harm unless he or she voluntarily accepts the risk. A plaintiff's acceptance of a risk is not voluntary if the defendant's conduct has left plaintiff no reasonable alternative course of conduct in order to avert harm to plaintiff.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded for further proceedings.

T.J. Hallinan and Gordon D. Ehrlich, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Robert L. Bals, of Nelson & Harding, for appellee Infinity.

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

GRANT, J.

Plaintiff-appellant, Dwain John, brought a negligence action against defendant-appellee OO (Infinity) S Development Company, a partnership (referred to hereinafter as "defendant"). Plaintiff alleged that defendant failed to maintain a "reasonable safe means" of ingress and egress, in that portable wooden stairs provided for plaintiff's use, as the employee of one of defendant's tenants, at defendant's loading dock were maintained by defendant in a defective state and as a result tipped over when plaintiff attempted to descend them, causing plaintiff injury. Defendant answered, denying it was negligent, and pleaded the defenses of contributory negligence and assumption of risk. Defendant also filed a third-party complaint against Ginger D. Storey-Zimmer, doing business as Zimmer Management Services, whom defendant had hired before the time of the injury to manage and maintain the property on which the plaintiff was injured. Defendant subsequently moved for summary judgment against plaintiff on the basis that the pleadings, deposition testimony, and affidavits demonstrated as a matter of law that plaintiff was contributorily negligent and had assumed any risk of injury from the stairs. The trial court sustained the motion for summary judgment on the grounds that the plaintiff was contributorily negligent as a matter of law, and dismissed plaintiff's petition. The trial court made no finding as to plaintiff's assumption of the risk.

Plaintiff appeals from this order, assigning as error the district court's holding that plaintiff was contributorily negligent as a matter of law. We reverse.

A party defendant is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with affidavits, show there is 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. Neb. Rev. Stat. § 25-1332 (Reissue 1985); *Wicker v. City of Ord*, 233 Neb. 705, 447 N.W.2d 628 (1989). Further, as we stated in *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 830, 448 N.W.2d 168, 170 (1989), "[i]n appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence."

Considered in the light most favorable to plaintiff, the record shows the following. At the time of the incident on July 31, 1984, plaintiff was an employee of ADT Security Systems, for which he installed and maintained security systems. ADT was a tenant on the second floor of a two-story building owned by defendant Infinity and managed by defendant Ginger Storey-Zimmer of Zimmer Management Services. There was a parking lot on the west side of the building. There was an entrance on the northern end of the west side of the building and an entrance on the southern end of the west side of the building. Just south of the northern entrance and about 40 feet from the southern entrance there was a garage-type overhead door, about 10 to 12 feet wide, which opened into an interior loading area. The loading area was approximately 30 feet long and 20 feet wide. On the east end of the loading area was a loading dock which ran the length of the east wall of the loading area. The loading dock was approximately 3 feet above the level of the floor of the loading area.

Apart from jumping or stepping directly down from the loading dock, the only direct access from the dock to the floor of the loading area was a portable "step-stool" of wooden steps. The whereabouts of the actual steps is unknown. The oral descriptions and drawings of the steps by the witnesses and attorneys are approximate. Plaintiff supervised the construction of a model of the steps, and the model was admitted into evidence. The model shows that the steps were 2 feet high and extended outward 3 feet at the base. The three steps each extended 1 foot outward and were 1 1/2 feet wide. The

drop from the loading dock to the first stair was 1 foot. The next drop was 10 inches, the next 10 inches, and the final drop from the third stair to the floor was 4 inches. There were no means for anchoring the steps to the loading dock. The steps had no "cross supports."

The steps had been used in the dock area since at least the time plaintiff helped ADT move into the building in 1982. At that time the steps were "wobbly" and would sway approximately 4 inches from side to side. Plaintiff used the steps about a hundred times in the course of moving ADT into the building, and about once a week after that. He used the dock area whenever he needed to load materials into the van. Plaintiff testified that he did not trust the steps and that he thought the steps could possibly collapse or tip, and therefore was always careful in using them, and was particularly careful in descending them. The condition of the steps deteriorated only slightly between the time ADT moved into the building in 1982 and the time of the incident in this case in July 1984.

The statements of the manager and at least one of the owner partners indicated that they were personally familiar with the condition of the steps, including, we infer, the instability of the steps. The manager of the property used the steps upon occasion and did not feel they were dangerous. Neither the manager nor the owner partner had ever received a complaint about the steps.

On July 31, 1984, plaintiff parked the company van inside the loading area and went upstairs to the office. About one-half hour later, he filled a 2- by 2- by 1.5-foot box with about 30 pounds of materials and took the elevator down to the first floor. Apparently, the elevator opens directly into the loading area. Plaintiff was carrying the box in front of his stomach. As he approached the portable wooden steps, he looked around the box at the top stair. Plaintiff intended to step onto the center of the first step. As plaintiff stepped onto the top step, the stairs tipped over, and plaintiff fell to the floor and was injured. The owner partner stated that after the incident he saw the steps in about the same condition they were in before the incident.

Under Neb. Rev. Stat. § 25-21,185 (Reissue 1985), plaintiff's contributory negligence will not bar recovery when the

contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison. Thus, to entitle defendant to summary judgment, defendant had the burden of proving, under the facts viewed most favorably to plaintiff, that (1) plaintiff's contributory negligence was more than slight as a matter of law or (2) defendant's negligence was not gross in comparison to plaintiff's negligence as a matter of law.

Defendant did not meet its burden to show that plaintiff's contributory negligence was more than slight as a matter of law. We said in *Tichenor v. Lohaus*, 212 Neb. 218, 224, 322 N.W.2d 629, 633 (1982): " 'If the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts unreasonably.' "

The evidence, viewed most favorably to plaintiff, shows that although he did not trust the steps, he believed that the steps could be used safely as long as he was careful. It cannot be said as a matter of law that this belief was unreasonable. Plaintiff had used the steps without incident on more than two hundred prior occasions. Others used the steps regularly for a number of years, and the manager did not feel they were dangerous. There were no complaints about the steps or evidence that the steps had ever tipped or caused injury before the incident involving plaintiff.

If plaintiff's belief was reasonable, then he only breached his duty to protect himself to the extent he was not careful. The evidence, viewed most favorably to plaintiff, shows that plaintiff was being particularly careful when descending the steps. He looked at the top stair before stepping down and attempted to step into the middle of the top stair. Also, the evidence, viewed most favorably to plaintiff, does not show that he was unreasonable as a matter of law in not selecting an alternative route. The evidence is unclear as to the convenience of loading through the other exits of the building, and it appears to have been customary for defendant's tenants to use the loading area and the steps in the loading area, which were provided for that purpose. The only direct elevator access was

apparently in the loading area. As we discussed above, the degree of danger evident in the wobbliness of the steps apparently did not prevent them from being used. Defendant has not demonstrated as a matter of law that the danger evident from the steps justified the inconvenience of using alternative exits or setting the box down before attempting the steps. Consequently, it cannot be stated, as a matter of law, that plaintiff's belief that the steps could be used safely as long as he was careful was unreasonable and that his action resulted in a breach more than slight of his duty to care for his own safety. That is a question on which reasonable minds could differ.

The next issue is whether defendant met its burden to prove as a matter of law that defendant's negligence was not gross in comparison to plaintiff's. To assess defendant's negligence, we must first define defendant's duty to the plaintiff. We note that the plaintiff argued that defendant's duty toward him should be measured by his status as an invitee. Defendant did not take issue with plaintiff's characterization, and for the purpose of this litigation we accept it.

In defining a landowner's duty to an invitee in reference to known or obvious dangers, we have adopted the language from Restatement (Second) of Torts § 343 at 215-16 (1965), which states:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

See *Tichenor, supra*. See, also, *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989); Restatement (Second) of Torts § 343 A, comment *f*. (1965).

Under this rule, defendant owed a duty to plaintiff to take reasonable measures to make the steps safe for their intended use. Defendant provided the steps to its tenants for the purpose

of loading and unloading their vehicles. The steps were small, wobbly, and unanchored. Defendant's manager stated that she did not think the steps were dangerous and that she personally used the steps, as, presumably, did the owners. It is a reasonable inference that defendant knew of the wobbly condition of the small steps. Defendant knew or should have known that its tenants would be using the steps while carrying heavy and bulky objects and that a wobble in the steps could cause tenants to lose their balance, to slip, or to drop their packages. A careful tenant could have been injured by using these steps. For the above reasons, it might be reasonably inferred that the instability of the steps created an unreasonable risk of harm.

Defendant should have expected that its tenants would fail to protect themselves from the danger of the steps. Defendant was aware that the tenants were using the steps and would continue to use the steps despite their poor condition. The dock was designed and provided for loading. Over the years, it must have been obvious to the defendant that its tenants might fail to protect themselves from the possible danger of the steps. Defendant, therefore, had a duty to make the steps safe for use by its tenants.

A jury could reasonably find that defendant's failure to replace or repair the steps was a substantial breach of defendant's duty to plaintiff. Repair or replacement of the steps with sturdier or permanent steps would have been relatively easy and inexpensive. The chance that someone would fall and sustain serious injury was significant enough to warrant repair or replacement of the steps. In fact, part of the reason why the risk in this case was "unreasonable" is that the risk could have been so easily removed by defendant. See *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982). Whether defendant breached its duty to plaintiff to a degree which a jury would consider gross as compared to plaintiff's breach of his duty to protect himself remains a genuine issue as to a material question of fact.

Defendant's negligence in this case was of such a degree that a reasonable jury could determine that it was gross as compared to the negligence of plaintiff. Defendant has not overcome its burden to show as a matter of law that the negligence of

plaintiff was more than slight or that its negligence was not gross as compared to plaintiff's negligence. We believe that reasonable minds could differ on the issue of contributory negligence in this case and the question should not be determined on defendant's motion for summary judgment.

Defendant then argues that even if the plaintiff was not contributorily negligent as a matter of law, he assumed the risk of injury from the steps as a matter of law. The trial court did not rule on this point, but we must address it, because if defendant is correct in this contention, the order of the trial court would still be affirmed, even though the trial court was not correct in its disposition of the contributory negligence question.

In *Carnes v. Weesner*, 229 Neb. 641, 647, 428 N.W.2d 493, 497 (1988), we quoted with approval the holding in *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988), on the assumption of risk doctrine as follows: " 'Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage.' "

In the *Carnes* case, the plaintiff had traversed an icy parking lot and reached her destination at defendants' office. She was injured during her return to her car. Defendants objected to the trial court's instruction in the *Carnes* case on this issue. The instruction objected to stated: " 'A plaintiff does not assume a risk of harm unless he or she voluntarily accepts the risk. A plaintiff's acceptance of a risk is not voluntary if the defendant's conduct has left plaintiff no reasonable alternative course of conduct in order to avert harm to plaintiff.' " *Id.* at 647, 428 N.W.2d at 497.

We held that "[i]t was not prejudicial error to instruct the jury to consider whether or not defendants' conduct had left plaintiff with a reasonable alternative course of conduct to return to her car." *Id.* at 647-48, 428 N.W.2d at 497-98.

Similarly, in this case, it is not appropriate to dispose of defendant's assumption of risk defense on a motion for summary judgment. At this point in time, whether defendant's

conduct left plaintiff with a *reasonable* alternative course of conduct remains a genuine issue and cannot be decided as a matter of law. Defendant's contention that the doctrine of assumption of risk requires that its motion for summary judgment be granted is without merit.

The order of the district court granting summary judgment in favor of defendant and dismissing the petition of plaintiff is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

---

ROBERT GINN, APPELLANT, V. DONALD G. LAMP, APPELLEE.

450 N.W.2d 388

Filed January 12, 1990. No. 88-160.

1. **Directed Verdict.** In order to sustain a motion for a directed 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.
2. _____. In considering the evidence for the purpose of a motion for directed 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.
3. **Agency.** A relationship may be an agency regardless of what the parties call it.
4. **Principal and Agent: Liability.** One who is in complete control over land is under the same duty to protect others from the condition of such land as is the actual possessor.
5. _____: _____. The custodian in complete charge of land is not excused from liability by the fact that he is acting for the benefit of another. He is subject to the same liability and has the same immunities as the possessor.
6. **Landlord and Tenant: Invitor-Invitee: Negligence.** Guests and invitees of the tenant derive their right to enter upon the premises leased through the tenant and have the same right that the tenant has to proceed against the landlord for personal injuries resulting from alleged defects on the premises.

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

Murray Ogborn and Roger P. Cox, of Nelson & Harding, for appellant.

P. Shawn McCann and Joseph S. Daly, of Sodoro, Daly & Sodoro, for appellee.

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

FAHRNBRUCH, J.

Robert Ginn appeals the dismissal of his claim against the appellee, Donald G. Lamp, for personal injuries the appellant sustained in a water-skiing accident on Ginger Cove Lake near Valley, Nebraska.

We affirm an evidentiary ruling of the district court for Douglas County, reverse its action in directing a verdict against Ginn, and remand the cause for a new trial.

Ginn was injured on July 9, 1980, while he was water-skiing on the lake that abutted the leasehold on which his parents maintained a house. Appellant's witnesses testified that the area where Ginn was water-skiing, commonly referred to as "Skinny River," was approximately 200 to 250 feet wide, with an approximate depth of 18 to 34 inches where he fell. Ginn alleged he fell while water-skiing and struck his head on the bottom of the lakebed, resulting in a traumatic fracture of the C5-6 vertebras, rendering him a quadriplegic.

In his amended petition, appellant contends that before and at the time of the accident, Lamp acted as a landlord over the Ginger Cove development and, as such, breached his duty to maintain a reasonably safe condition on the lake, a common area, in the following respects: (1) by failing to maintain sufficient water depth to accommodate the intended and expected recreational uses of the common area of the lake where appellant fell, (2) by failing to dredge to a safe depth in the area of the lake where appellant fell, and (3) by failing to warn of the existence of the dangerous condition of shallow water in the area of the lake where appellant fell.

In his answer, Lamp admitted that Ginn was injured on Ginger Cove Lake, but denied appellee was acting as a landlord or that he had a duty to maintain common areas of Ginger Cove

in a reasonably safe condition. Lamp alleged that Marjorie Lamp was in fact the landlord of Ginger Cove. He raised the defenses of contributory negligence and assumption of the risk on the part of Ginn.

In presenting his case, Ginn attempted to introduce a declaration of insurance to prove that Lamp exercised control over the Ginger Cove development. Lamp objected on the grounds that the probative value of the declaration was outweighed by the danger of unfair prejudice and, further, that the declaration did not establish that Lamp was in control of Ginger Cove Lake. See Neb. Rev. Stat. § 27-403 (Reissue 1985). The trial court sustained Lamp's objection, stating that there was no mention of ownership or control of the property in the declaration of insurance, and, as such, it would be extremely prejudicial, without any probative value.

At the close of appellant's evidence, the trial court sustained Lamp's motion for directed verdict and dismissed the case. Ginn's motion for a new trial was overruled.

On appeal, Ginn contends the trial court erred in (1) sustaining Lamp's motion for directed verdict; (2) determining that appellant failed to present sufficient evidence to raise a question of fact for the jury to resolve on the issue of whether Lamp was a landlord or an acting landlord of the Ginger Cove development at the time appellant sustained his injuries; and (3) excluding evidence of Lamp's property/liability insurance under Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1985)), which evidence was offered to prove "ownership" or "control" pursuant to Neb. Evid. R. 411 (Neb. Rev. Stat. § 27-411 (Reissue 1985)).

We address Ginn's first two assignments of error together. In order to sustain a motion for a directed 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. *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989). In considering the evidence for the purpose of a motion for directed 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. *Id.*

The trial court sustained Lamp's motion for directed verdict, stating, "[T]here is no showing that Don Lamp, by competent evidence that would allow the case to go to the jury, is a landlord [and] there is insufficient evidence to show that he was an acting landlord, too, to allow it to go to the jury." We note that Ginn's amended petition does not allege that Lamp was a landlord. Rather, it alleges Lamp "acted as landlord." Therefore, we limit our review to the facts alleged in the appellant's amended petition and review the record to determine if there was evidence from which a jury could find that the appellee "acted as landlord" over Ginger Cove.

Although we have not passed upon the definition of an "acting landlord," its intended meaning is apparent from a reading of the appellant's amended petition. In substance, the amended petition alleges that Lamp was acting as an agent. A relationship may be an agency regardless of what the parties call it. *Valentine Oil Co. v. Powers*, 157 Neb. 87, 59 N.W.2d 160 (1953).

At trial, circumstantial evidence adduced by appellant established a prima facie case that before and at the time of Ginn's accident, Lamp acted as a custodial agent. One who is in complete control over land is under the same duty to protect others from the condition of such land as is the actual possessor. See Restatement (Second) of Agency § 355, comment *a.* (1958). See, also, *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972). "The custodian in complete charge is not excused from liability by the fact that he is acting for the benefit of another. He is subject to the same liability and has the same immunities as the possessor." The Restatement, *supra* at comment *a.* at 129. See, also, the Restatement, *supra*, comment *b.* (an agent with limited control over land is subject to liability only to the extent that he is authorized to exercise such control).

Under the custodial agent theory, Ginn would be required to prove, among other things, that he was a guest or invitee and entitled to water-ski on the lake; that he was injured by a condition on the lake involving an unreasonable risk of harm to water skiers; that the appellant's accident occurred on a part of Ginger Cove Lake that was under the control of Lamp; that

Lamp, as a custodial agent, knew, or in the exercise of reasonable care should have known, of the condition and the unreasonable risk involved to water skiers and could have, in the exercise of reasonable care, made the condition safe or provided adequate warning of the condition; and that Lamp failed to exercise reasonable care to make the condition safe or to provide adequate warning. See *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 306 N.W.2d 580 (1981). See, also, Restatement (Second) of Torts § 360 (1965); NJI2d 8.32.

From the evidence adduced by Ginn, a jury could find that the appellant, when he was involved in the water-skiing accident, was a guest or invitee of his parents, who maintained a house on land they leased at Ginger Cove. The jury could further find that as a part of the parents' lease, the lake upon which Ginn's accident occurred was for the use in common of the Ginger Cove lessees. " '[G]uests and invitees of the tenant derive their right to enter upon the premises leased, through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.' " *Roan v. Bruckner*, 180 Neb. 399, 403, 143 N.W.2d 108, 111 (1966) (quoting *Van Avery v. Platte Valley Land & Investment Co.*, 133 Neb. 314, 275 N.W. 288 (1937)).

On the issue of control over Ginger Cove Lake, Ginn adduced evidence that Lamp promulgated and proposed the rules and regulations of the Ginger Cove Homeowners Association and that the lessees negotiated with Lamp for changes in the rules and regulations. There was evidence that Lamp collected $50 from the lessees to enforce the rules and was the person to call if there were any safety problems on the lake. There also was evidence that rental payments were paid to Lamp and that Lamp made assessments for any additional charges on the property. There was testimony that Lamp was the person to call to lower the water level of the lake.

The evidence adduced by Ginn established a prima facie case of liability against Lamp. The trial court erred in directing a verdict in his favor at the close of appellant's evidence.

Appellant's final assignment of error claims the trial court erred in failing to admit into evidence a declaration of insurance

offered for the purpose of proving Lamp's control over Ginger Cove. A review of the declaration reveals that the trial court correctly excluded the declaration. Nothing in the declaration proves that Lamp asserted control over Ginger Cove. The declaration reads, in pertinent part, as follows:

Donald G. Lamp; Marjorie M. Lamp
Named Insured: DBA: Ginger Cove; Ginger Woods Home Association;
Ginger Woods II Home Association

The only reference to Ginger Cove in the declaration is associated with Marjorie M. Lamp. As such, the policy has no probative value in proving Donald Lamp exercised control over Ginger Cove, and its admission would have been prejudicial.

This matter is reversed and remanded for a new trial.

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

CAPORALE, J., not participating.

---

SUSAN JANE RITTER, APPELLANT AND CROSS-APPELLEE, V. GARY DOUGLAS RITTER, APPELLEE AND CROSS-APPELLANT.

450 N.W.2d 204

Filed January 12, 1990. No. 89-125.

1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Divorce: Child Custody.** Child custody in a proceeding to dissolve a marriage is a matter within the trial court's discretion.
3. **Alimony: Appeal and Error.** The Supreme Court evaluates the amount of alimony in reference to the factors contained in Neb. Rev. Stat. § 42-365 (Reissue 1988). For a decree pertaining to alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. The ultimate test for determining correctness in the amount of alimony is reasonableness.
4. **Divorce: Attorney Fees: Appeal and Error.** An award of an attorney fee in a

marital dissolution proceeding is a matter within the trial court's discretion, is reviewed de novo on the record, and will be affirmed on appeal in the absence of abuse of discretion.

5. **Divorce: Child Custody: Guardians Ad Litem.** Although a guardian ad litem may be appointed pursuant to Neb. Rev. Stat. § 42-358(1) (Reissue 1988) in a marital dissolution proceeding, such appointment is a matter within a trial court's discretion.
6. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
7. _____: _____. In a marital dissolution proceeding, child custody is denied to an unfit parent or a fit parent when the best interests of the child require such denial of custody.
8. **Divorce: Child Custody: Words and Phrases.** Parental unfitness, in relation to child custody in a marital dissolution proceeding, means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
9. **Divorce: Child Custody: Sexual Misconduct.** Although a parent's extramarital conduct does not necessarily determine a child custody issue, such sexual conduct may be considered in determining custody of a minor child affected by a marital dissolution proceeding.
10. **Divorce: Child Custody: Presumptions.** When child custody must be decided in a marital dissolution proceeding, neither parent is presumed to be more fit than the other or granted custodial preference on the basis of gender.
11. **Child Custody.** In determining a child's best interests in custody matters, a court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.
12. **Divorce: Child Custody.** The time which a parent is able to devote to a child is a consideration in resolving a child custody question in a marital dissolution proceeding.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed in part, and in part reversed and remanded with direction.

Mark S. Bertolini, of Bertolini, Schroeder & Blount, for appellant.

James E. Case for appellee.

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

SHANAHAN, J.

In an appeal from the judgment entered by the district court for Cass County in a proceeding to dissolve the marriage of Susan Jane Ritter and Gary Douglas Ritter, neither party claims the court erred in the division of marital property. However, Susan Ritter contends that the district court erred in failing to (1) grant Susan the custody of the parties' child, Travis Ritter, rather than granting custody to Gary Ritter; (2) award more than $500 as an attorney fee for Susan's lawyer; (3) retain legal custody of Travis and grant physical custody of the child to Susan; (4) appoint a guardian ad litem for the minor, Travis; and (5) provide suitable visitation rights for Susan in view of Travis' custody granted to Gary. In his cross-appeal, Gary claims that the district court committed error in requiring Gary to pay alimony to Susan and in failing to order Susan to pay child support for Travis.

Before marrying Gary Ritter, Susan Hefner obtained an associate degree in home economics from Central College in McPherson, Kansas, and was the mother of Melissa Hefner, who was born on August 16, 1982. Susan married Gary on October 1, 1983. The Ritters lived with Melissa in a two-bedroom home in Murray, Nebraska, while Susan worked part time at the office of the Cass County treasurer in Plattsmouth and Gary farmed leased land and worked as a part-time janitor.

Within a few months of the marriage, the Ritters' marital relationship began to deteriorate rapidly. The couple fought frequently, usually about Susan's poor housekeeping, and quarreled about family finances. Gary prohibited Susan's driving the family car to visit friends, apparently because gasoline was high priced, and would not allow Susan to make long-distance phone calls. In his anger with Susan, Gary became withdrawn and indifferent toward Susan, but would give her no explanation for his moodiness. Susan felt that Gary was always angry, so that she constantly "walked on eggshells"

when they were together. In August 1984, the Ritters sought professional marriage counseling from a certified counselor, Joyce Williams, who met frequently with the couple, but the marital problems persisted. Although Gary discontinued the counseling, Susan continued.

When Susan was 6 months pregnant with Travis, Gary struck Susan during a dinner table dispute in the presence of Melissa. The Ritters' marital relationship seemed to improve with the birth of Travis on May 4, 1985. However, early in 1987, Gary threatened to leave with Travis and go to the home of Gary's parents in Pennsylvania. After a violent argument with Susan, who was pregnant with the couple's second child, Gary decided not to leave and remained in the Ritter house with Melissa, Travis, and Susan. The couple's second child, Jeffrey, was stillborn in February 1987. Sometime in June 1987, Gary and Susan decided to get a divorce, but, for financial reasons, continued to live together in Murray. On occasion, Gary would reprimand Melissa for certain things and would not correct or discipline Travis for the same conduct which was the basis for the reprimand of Melissa. Gary's farming activities required most of his time, which left Susan mainly responsible for rearing the children. During the fall of 1987, Susan frequently left the Ritter house and "escaped" to local bars to meet her friends, male and female, since there were no other places for her to meet with friends. In October, Gary moved from the family home. Shortly thereafter, Susan moved to an apartment in Plattsmouth where she lived with Melissa and Travis. Susan had an extramarital affair with a male friend and dated several other men, although neither Melissa nor Travis ever saw Susan with a boyfriend. Susan filed a petition for dissolution of marriage in November 1987.

At the time of trial, Melissa was 6 years of age and Travis was 3 1/2. Although Susan Ritter had requested that the court appoint a guardian ad litem for Travis, the court declined to make such appointment. There was testimony concerning three irresolute events characterized as Susan's attempts to "harm herself." In 1984, Susan took a handful of Extra-Strength Tylenol, but sustained no adverse reaction. In 1986, she took a partial bottle of erythromycin, an antibiotic, for which she was

taken to a hospital for a 2-hour observation. In 1987, Susan inflicted "scratches" with a razor blade on her wrist, but no medical attention was necessary. The marriage counselor, who had continued to counsel Susan after the divorce action was filed, indicated that Susan's "overall health" improved after marital stress was eliminated by the Ritters' separation. Similar observations were expressed by other witnesses. Williams, the counselor, verified the strong bond between Melissa and Travis and expressed the opinion that it was important that Travis be in Susan's custody with Melissa. Other witnesses bore out the extremely strong bond between Melissa and Travis.

Susan commenced full-time employment with the county treasurer's office on August 1, 1988, and described the day-care arrangements for Travis and Melissa while she worked. The children were at a day-care center from 8 a.m. until 5:15 p.m., when Susan came for the children after work and took the children to their home. Susan's parents, who reside in Plattsmouth, have a good relationship with Melissa and Travis and visit frequently with the children. Susan's gross earnings were $1,046 per month with net earnings of $907 monthly.

Gary testified that he worked in Omaha from 10:30 each weeknight until 7 o'clock the following morning. His traveltime, from Murray to Omaha and return, was just under 2 hours. For that reason, if Travis were with Gary during the week, Travis would be in the care of a babysitter from approximately 9 p.m. until 8 o'clock the next morning. Gary offered no evidence about the daily care for Travis outside arrangements for a babysitter when Gary was at work. Consequently, the record does not indicate arrangements for Travis while Gary would be sleeping during weekdays. Also, Gary's present residence is located where there are few young children who might be playmates for Travis. Moreover, Gary never disputed his abuse of Susan, especially during her two pregnancies during the Ritter marriage.

In disposing of the various issues in the Ritter dissolution proceeding, the district court made no explicit finding of fitness regarding either Susan or Gary and expressed no determination concerning the best interests of Travis Ritter regarding the custody question. Neb. Rev. Stat. § 42-364 (Reissue 1988)

provides in part: "Custody and visitation of minor children shall be determined on the basis of their best interests." However, the district court, in addition to making a division of marital property, granted custody of Travis to Gary Ritter, subject to Susan Ritter's visitation rights. Also, the court ordered Gary to pay Susan alimony of $100 per month for 2 years and an attorney fee of $500 for Susan's lawyer. The court did not order child support concerning Travis.

## STANDARD OF REVIEW

> In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

*Huffman v. Huffman*, 232 Neb. 742, 747-48, 441 N.W.2d 899, 903-04 (1989). See, also, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988). Child custody in a proceeding to dissolve a marriage is a matter within the trial court's discretion. *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987).

## ALIMONY AWARD

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Neb. Rev. Stat. § 42-365 (Reissue 1988).

The Supreme Court evaluates the amount of alimony in reference to the factors contained in § 42-365. For a decree pertaining to alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. The ultimate test for determining correctness in the amount of alimony is reasonableness. *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); *Ritchie v. Ritchie*, 226 Neb. 623, 626, 413 N.W.2d 635, 637 (1987) ("In addition to the factors set out in § 42-365, the income and earning capacity of each party must also be considered").

Considering the statutory factors affecting alimony, we note that Gary has gross monthly income of approximately $1,387 and that Susan has gross monthly income of $1,046. Both parties have had full-time employment during their marriage. However, neither Gary nor Susan interrupted "personal careers or educational opportunities," see § 42-365, as the result of their marriage. Each party is capable of self-support. Given the duration of the Ritter marriage for approximately 4 years, and after our de novo review, we conclude that the district court abused its discretion in awarding alimony to Susan. Therefore, the district court's judgment regarding alimony is reversed.

## ATTORNEY FEES

Susan claims that the $500 attorney fee awarded by the district court is insufficient. An award of an attorney fee in a marital dissolution proceeding is a matter within the trial court's discretion, is reviewed de novo on the record, and will be affirmed on appeal in the absence of abuse of discretion.

> The award may depend on a variety of factors, including the nature of the case, the amount of property divided and alimony awarded, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

*Ritchie v. Ritchie, supra* at 627, 413 N.W.2d at 638. Under the circumstances, the district court did not abuse its discretion in awarding an attorney fee of $500. The district court's judgment

concerning the attorney fee is, therefore, affirmed.

## GUARDIAN AD LITEM

Susan Ritter contends that the trial court erred in declining to appoint a guardian ad litem for Travis Ritter. Although a guardian ad litem may be appointed pursuant to Neb. Rev. Stat. § 42-358(1) (Reissue 1988) in a marital dissolution proceeding, such appointment is a matter within a trial court's discretion. *Chalupa v. Chalupa*, 220 Neb. 704, 371 N.W.2d 706 (1985); *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980). Susan has failed to demonstrate any prejudice from the absence of a guardian ad litem. The rule, succinctly stated, is: No prejudice, no reversal. The district court's declination to appoint a guardian ad litem is affirmed.

## CUSTODY OF TRAVIS RITTER

When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987). Thus, in a marital dissolution proceeding, child custody is denied to an unfit parent or a fit parent when the best interests of the child require such denial of custody.

"Nonexistent at common law, divorce is a matter within the exclusive and supreme province of the Legislature, subject to limitations imposed by the Constitutions, state and federal." *Else v. Else*, 219 Neb. 878, 880, 367 N.W.2d 701, 703 (1985). There is no statutory definition or characterization of a parent's fitness or unfitness in reference to a child custody issue in a proceeding to dissolve a marriage. Yet, parental fitness may be a factor in determination of a child custody question in a dissolution proceeding. For that reason, we adopt a definition or characterization for parental unfitness in relation to child custody in a marital dissolution proceeding: Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *In re Johnson*, 214 Kan. 780, 522 P.2d 330 (1974); *In re Christina P.*, 175 Cal.

App. 3d 115, 220 Cal. Rptr. 525 (1985); *Guardianship of a Minor*, 19 Mass. App. 333, 474 N.E.2d 192 (1985). Cf. *Matter of Adoption of JLP*, 774 P.2d 624 (Wyo. 1989) (termination of parental rights on account of a parent's unfitness).

We have held that although a parent's extramarital conduct does not necessarily determine a child custody issue, such sexual conduct may be considered in determining custody of a minor child affected by a marital dissolution proceeding. *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982). See, *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984) (although the mother engaged in extramarital activity at her home while her two minor sons "were in, around, and about the house," there was no showing that "the boys were exposed to the activity or that they were damaged in any way by the sexual conduct of their mother . . . ." 217 Neb. at 161, 347 N.W.2d at 872); *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983) (the mother engaged in extramarital sexual activity at the minor children's residence, but "[t]he record discloses that the live-in relationship was of but a brief duration, and has now ended. Although [the mother] had planned to marry [her extramarital sexual partner], she has since reconsidered those plans. This evidence alone did not establish that [the mother] was an unfit parent." 215 Neb. at 651, 341 N.W.2d at 314).

When child custody must be decided in a marital dissolution proceeding, neither parent is presumed to be more fit than the other or granted custodial preference on the basis of gender. *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980); *Turner v. Turner*, 205 Neb. 6, 286 N.W.2d 100 (1979). See, also, § 42-364(2).

> In determining a child's best interests in custody matters, a court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and

> satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.

*Christen v. Christen*, 228 Neb. 268, 271-72, 422 N.W.2d 92, 95 (1988). See, also, *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987); *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986).

Applying the foregoing principles to the record presented in this appeal, nothing indicates that Susan's sexual conduct has been, or likely will be, a detriment, or otherwise injurious, to Travis Ritter. Consequently, we conclude that both Susan and Gary Ritter are parents fit to have custody of Travis. What is more important, however, is the respective environments which each parent offers Travis in view of the fact that his parents are unable to live together.

While availability of Travis' playmates might be placed on a lower level for consideration in the custody question, other features of Travis' custody with Gary Ritter raise more practical, and yet critical, considerations in the child custody question. While Gary lives in Murray, he works in Omaha. There is no prospect that Gary's employment situation will change within the foreseeable future. This necessitates a babysitter for Travis during the period from 9 p.m. to 8 a.m. for each of the 5 days during which Gary works throughout the week and results in 11 hours of babysitting for Travis while Gary is working and traveling to and from work. When Gary sleeps during the day, or tries to sleep, someone will have to take care of Travis. Assuming that Gary will sleep at least 6 hours during the day, somebody, presumably a babysitter, will have to attend to Travis for 6 hours, which brings the babysitting time for Travis to 17 or 18 hours per day for 5 days of each week. With no reflection on Gary and his desire to be a good parent to Travis, even with the 2 days each week when Gary is not working and traveling to work, the vastly substantial amount of Travis' life will be spent with a babysitter.

On the other hand, Susan has an established routine with

Travis and Melissa. Susan works from 8 a.m. to 5 p.m. and leaves the children at a day-care center while she works. Susan is able to call upon Travis' grandparents, if and when the need arises. Cf. *Kringel v. Kringel, supra* (availability of grandparents produced a stable living environment for a child affected by a marital dissolution action and was a consideration in a child custody question). The time which a parent is able to devote to a child is a consideration in resolving a child custody question in a marital dissolution proceeding. See *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983) ("The mother is able to spend more time with the children than is their father, a medical student with several years of residency training ahead of him." 215 Neb. at 651, 341 N.W.2d at 314). See, also, *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987); *Turner v. Turner*, 205 Neb. 6, 286 N.W.2d 100 (1979).

Another factor regarding the custody of Travis Ritter is his physical separation from Melissa, with whom he has a strong sibling bond, if custody is granted to Gary Ritter. In *Boroff v. Boroff*, 197 Neb. 641, 648, 250 N.W.2d 613, 617 (1977), this court noted:

> Although this court has acknowledged that it is sound public policy to keep children together when possible, considerations of public policy do not, in all cases, prevent the splitting of the custody of the children when a marriage is dissolved; rather, the ultimate standard is the best interests of the children. [Citations omitted.]

See, also, *Richey v. Richey*, 216 Neb. 565, 344 N.W.2d 642 (1984); *State ex rel. Hamilton v. Boiler,* 159 Neb. 458, 67 N.W.2d 426 (1954); *In re Guardianship of Herten,* 127 Neb. 88, 254 N.W. 698 (1934).

The record is abundantly clear that Travis enjoys a healthy, loving, and close relationship with Melissa. In view of the testimony of witnesses and beyond the testimony of the parties, it appears likely that separation from Melissa will have a detrimental effect on Travis. The record leads to the conclusion that it would be in the best interests of Travis that he not be separated from his sibling, Melissa.

As we have mentioned earlier in this opinion, the district court expressed no determination regarding the best interests of

Travis Ritter in relation to the child custody issue. Perhaps implicit in the district court's custody order is a determination of Travis' best interests. Nevertheless, we conclude that the best interests of Travis require that his custody be granted to Susan Ritter and that, therefore, the district court abused its discretion in granting custody of Travis to Gary Ritter. Consequently, we reverse the district court's judgment concerning custody of Travis Ritter, and, on remand, the district court shall enter its order granting custody of Travis to Susan Ritter in conformity with our decision and opinion issued today in this case.

In view of our decision, it is unnecessary to consider Susan Ritter's question about her visitation rights regarding Travis, and it is equally unnecessary that we consider Gary Ritter's cross-appeal on the issue of child support from Susan. However, as a consequence of the reversal obtained in this appeal, the district court, on remand, shall, as soon as practicable, hold a hearing to determine the questions of Gary Ritter's visitation rights regarding Travis Ritter and whether Gary Ritter shall pay child support for Travis.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

---

STATE OF NEBRASKA, APPELLEE, V. ROGER A. CAPEK, APPELLANT.
450 N.W.2d 212

Filed January 12, 1990. No. 89-735.

**Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Lance J. Johnson for appellant.

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

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

PER CURIAM.

Appellant pled no contest to the offense of manslaughter, specifically that he did "unintentionally and without malice kill Bridgett M. Belding while the Defendant was in the commission of the unlawful act of knowingly, intentionally or negligently causing a minor child to be placed in a situation that endangered her life or be cruelly punished . . . ." After an extensive dialogue with the district judge, the plea was determined to be voluntary after ascertaining appellant's knowledge of all applicable constitutional and statutory rights and his waiving of such rights. A factual basis was established, and the plea was accepted. The appellant was sentenced to a term of 5 to 15 years in the penal complex, with credit for time spent in jail prior to sentencing. This appeal followed. We affirm.

Manslaughter, Neb. Rev. Stat. § 28-305(1) (Reissue 1985), is committed if one kills another without malice, either upon a sudden quarrel, *or causes the death of another unintentionally while in the commission of an unlawful act.* It is the latter alternative which is here involved, and thus an intention to kill is not an essential element of this phase of the offense. See *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

Two errors are assigned: (1) Appellant was denied effective assistance of counsel by counsel's failing to investigate and raise the defense of insanity, and (2) the sentence is excessive.

Apart from the obvious fact that in this direct appeal the first assigned error was never presented to the trial court, the assignment is meritless. We neither have a record indicating any failure of counsel to consider the defense of insanity, nor do we have any record justifying a finding that such a defense had merit. We have only the contentions of appellant's present counsel that a report from the Menninger Clinic had not yet been received when the negotiated plea was entered. The report is shown in the presentence investigation report and does not

show any opinion of the examiners that the appellant could not distinguish between right and wrong at the time of the commission of the offense.

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. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989).

Manslaughter is a Class III felony and provides a range of penalties from 1 to 20 years' imprisonment, up to a $25,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. §§ 28-305 and 28-105 (Reissue 1985). The victim was a small child, brutally and senselessly punished unto death. The sentence is not excessive.

AFFIRMED.

---

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MICHAEL G. BUCHAN, RESPONDENT.

450 N.W.2d 214

Filed January 12, 1990. No. 89-1214.

Original action. Judgment of disbarment.

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

PER CURIAM.

This court, in an original proceeding, considered the relator's application for temporary suspension of the respondent, Michael G. Buchan.

We suspended the respondent and directed him to comply with Neb. Ct. R. of Discipline 16 (rev. 1989), which he failed to do. This court then ordered the respondent to show cause why he should not be disbarred for failure to comply with the rules and orders of the court.

Having failed to show cause why he should not be disbarred,

the respondent, Michael G. Buchan, is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

---

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL R. JOHNSTON, RESPONDENT.
450 N.W.2d 214

Filed January 12, 1990. No. 89-1409.

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, Paul R. Johnston, filed a voluntary surrender of license with this court.

A disciplinary complaint was filed against Johnston with the Counsel for Discipline of the Nebraska State Bar Association. The respondent freely and voluntarily waives all proceedings against him in connection with the pending disciplinary complaint. The respondent knowingly admits that he has violated Canon 1, DR 1-102(A)(1), (4), (5), and (6), of the Code of Professional Responsibility. He also freely and voluntarily consents to an order of disbarment and waives any right to notice, appearance, or hearing prior to entry of the order.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

# IN RE INTEREST OF C.C. AND E.C., CHILDREN UNDER 18 YEARS OF AGE.
# STATE OF NEBRASKA, APPELLEE, V. M.C., APPELLANT.

450 N.W.2d 392

Filed January 19, 1990. No. 88-830.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation presents an independent reason justifying termination of parental rights.
3. **Parental Rights: Proof: Appeal and Error.** A judgment terminating parental rights will be affirmed when the State has established by clear and convincing evidence that the parent has willfully failed to comply, in whole or in part, with a material provision of the rehabilitation plan, and termination of parental rights is in the best interests of the children.
4. **Parental Rights.** 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.
5. _____. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

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

Gene T. Oglesby, of Oglesby, Brown, Thomas, Peterson & Orton, for appellant.

James A. Elworth, Deputy Lancaster County Attorney, for appellee.

Richard Douglas McClain, guardian ad litem.

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

BOSLAUGH, J.

The appellant is a mother whose parental rights to her two children, born March 20, 1981, and May 11, 1982, were terminated by an order of the separate juvenile court of Lancaster County, Nebraska, on September 6, 1988. She

contends that the trial court erred in finding that the evidence was clear and convincing that she had substantially and continuously or repeatedly neglected the children and refused to give the children necessary parental care and protection, that she failed to comply with the reasonable provisions of the court-ordered plan, and that termination of her parental rights was in the best interests of the children.

Only the mother's parental rights are involved in this appeal. The father's parental rights to the children were terminated by relinquishment.

On October 27, 1983, a petition was filed alleging that the children were lacking proper parental care by reason of the faults and habits of their parents, as provided in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982). The petition specifically alleged that the children lacked a stable home, having lived in at least eight different locations since May 1983, that the mother had failed to provide adequate food for the children, and that the parents had failed to provide proper medical attention for the children since at least May 1983.

At an adjudication hearing held on November 15, 1983, the trial court found that the allegations of the petition were true and that the children were children as defined in § 43-247(3)(a).

Following a dispositional hearing on November 29, 1983, temporary legal custody of the children was placed with the Nebraska Department of Social Services (DSS), with physical care remaining with the mother subject to the parents' correcting the conditions of neglect under the plan approved by the court. That plan required that the mother (1) stabilize her living situation, not remove the children from Lancaster County, Nebraska, without prior approval of the court, and not leave Lancaster County unless she has made adequate arrangements approved by the court for the care of the children; (2) cooperate with the workers on the case; (3) provide appropriate medical care for the children and follow through with instructions from the doctor; (4) provide for the children's nutritional needs; (5) make the whereabouts of the children and herself known to the caseworker at all times; and (6) follow the directions of the caseworker regarding the care of the children.

At a review hearing on February 15, 1984, at the request of

the mother the trial court authorized DSS to place the children in foster care at any time upon the request of the mother.

The mother failed to attend the review hearing held on May 29, 1984. Testimony showed that she was not attending day treatment for alcoholism at the Independence Center and that on May 16, 1984, she had been seen with the children in York, Nebraska, in violation of the November 29 order. The court's plan at the time of the May 29 hearing required the mother (1) complete alcohol treatment as recommended by the counselor at the Independence Center; (2) keep Child Protective Services informed of all persons living in the same home with the children or providing care to the children; (3) follow the directions and recommendations of the public health nurse, homemaker, and caseworker regarding the care and discipline of the children; (4) not use physical discipline on the children and not allow the children to be physically disciplined by others; (5) provide for the children's nutritional needs; (6) provide appropriate medical care for the children and follow through with instructions from the doctor or the public health nurse; (7) make the whereabouts of the children and herself known to the caseworker at all times; (8) not drink alcoholic beverages or use drugs or allow other persons to drink alcoholic beverages or use drugs in the presence of the children; (9) keep the children in day care arranged by the caseworker; (10) provide transportation to day care, alcohol treatment, and medical appointments to the extent able; (11) not take the children from Lancaster County without prior approval of the caseworker or the court; (12) keep her living situation stable; and (13) participate in PACT parental training.

On June 20, 1984, the mother voluntarily placed the children in foster care. The children have remained in foster care with the same family since that date.

On November 27, 1984, the matter was again reviewed. The court further ordered the mother to visit with the children on a regular basis, to continue activity and regular involvement with the parenting program at Servant House, to be actively involved in the alcohol program through the Lincoln Indian Center, to obtain inpatient treatment recommended by the Indian Center, and not to leave the children in the care of others

during her visitation.

The next hearing was on February 6, 1985. There was testimony concerning alleged sexual contact between the older child and the mother's live-in boyfriend. The mother testified she did not believe her daughter's version of the incident, but admitted she had told the caseworker that if necessary, she would give up the children in order to remain with the boyfriend. At a further hearing regarding the touching incident, the trial court continued the previous order and further ordered the mother and her boyfriend to follow through with counseling at Child Guidance Center on a regular basis or at a comparable professional agency approved by the caseworker.

The matter was again reviewed, at a hearing on August 26, 1985. The predispositional report submitted by the caseworker showed the mother had reported to the police in June 1985 that an ex-boyfriend had sexually assaulted her in front of the children at her residence. Despite this incident, the mother wanted to remain friends with her assailant.

This incident led to problems between the mother and her boyfriend who was involved in the touching incident. Apparently, these problems caused the mother to miss a scheduled visit with the children and to return all of the children's toys and clothes to the foster home, telling the foster family that she could no longer cope with the children and that she felt the children would be better off with them.

Despite these incidents, the trial court was in the process of authorizing a 2-week trial placement of the children with the mother, when she abruptly left the courtroom after the court stated the trial placement would be monitored and subject to change. As a result of her leaving the courtroom, there was no trial placement or change in disposition.

At the September 19, 1985, hearing, the mother testified she was involved in alcohol counseling at the Indian Center and counseling at family services. She also expressed an interest in becoming involved in the PACT parental training program. In addition to the conditions imposed in previous orders, the court authorized DSS to provide extended visits and trial placement and ordered the mother to be actively and regularly involved in

the spouse abuse program, as well as any other counseling recommended by family services, to participate in the PACT program, and to report any statements and comments by the children concerning neglect or sexual contact by anyone with the children.

At the March 19, 1986, review hearing, the final report prepared by the PACT staff regarding the mother's 5-month participation in the program was received in evidence. The report indicated that the mother routinely placed her own needs above those of her children and that she was unrealistic in her expectations of both children and unable to protect her children from potentially dangerous situations and dangerous individuals. The report concluded that because of her lack of insight and her inability to recognize the practical realities involved in adequate parenting, it was unlikely that she would ever be capable of meeting her children's developmental and basic custodial needs on a routine or daily basis, even when closely monitored by community representatives.

Other evidence showed the mother had moved three times since the last court hearing, in September 1985, and had plans to move again in the near future. It was established that the mother had quit attending alcohol and chemical dependency counseling at the Indian Center in December 1985 and had not become reinvolved in any other chemical dependence program despite having taken an overdose of 25 "downers" in January 1986. At this time, the trial court continued the previous order and also ordered the mother to enter a treatment program to correct her dependency problems and the problems PACT had found to exist.

At the review hearing on September 22, 1986, there was evidence that the mother was psychotic. The predispositional report showed the mother had moved seven times since the last hearing. The trial court added to its previous orders that the mother involve herself in therapy for her mental illness and follow all recommendations of her therapist and that she begin a new PACT program and cooperate in any training assessment that may be recommended by the program or DSS.

At the March 24, 1987, review hearing, the trial court found that there had been no change, and no new orders were made.

On May 12, 1987, the mother testified she would permit the trial court to allow the children to move to Colorado with their foster family. The trial court approved the children's move, but also ordered DSS to continue to work on a plan to provide permanent placement of the children with the mother or if that was not possible, with an appropriate family.

At the November 16, 1987, review hearing, the mother requested the children be returned to Lincoln. The trial court found she had not furnished proof that she had corrected her problems and did not order the return of the children.

At the review hearing held on March 21, 1988, the mother testified that she had been sexually assaulted in early January by her ex-brother-in-law, but did not report this incident to the police. As a result of this assault, her boyfriend beat her up, causing her to go to Lincoln General Hospital for treatment. Despite this physical abuse, which the mother testified was not the first such assault by the boyfriend, she still planned to move in with him.

The mother requested the children be returned to Lincoln. The trial court ordered the children be returned at the end of the school year and continued its order of March 24, 1987.

On April 7, 1988, the guardian ad litem filed a petition to terminate the mother's parental rights based on Neb. Rev. Stat. § 43-292(2) (Reissue 1988), in that the mother had substantially and continuously or repeatedly neglected the children and refused to give the children the necessary parental care and protection to which they were entitled, and on § 43-292(6), in that reasonable efforts under the direction of the court had failed to correct the conditions leading to the determination that the children were children as defined by § 43-247(3)(a).

The petition for termination of the appellant's parental rights was heard on 7 separate days commencing June 1 and ending August 25, 1988. At the request of the guardian ad litem and the county attorney, and with no objection by the appellant's counsel, the trial court took judicial notice of all prior evidence, records, and proceedings in the case. The following were the principal witnesses who testified: Cindy Kadavy, a former employee of Friendship House; Diane Sundermeier, an outpatient counselor at the Indian Center; Dr. Chin S. Chung,

the psychiatrist who had been treating the appellant since April 1986; Cindy Peterson, a public health nurse who had treated the children beginning in December 1983; Debra Carlson, who had supervised the appellant in the vocational rehabilitation program; Linda Belford, a caseworker with DSS who had been the appellant's caseworker since November 1983; Rhonda James, the children's foster mother; Melinda Luers, a counselor at Child Guidance Center; Ann Hopkins, one of the appellant's PACT trainers; Bertine Loop, another PACT trainer; and the appellant.

The evidence was in substance a recapitulation of what had gone on before and described in detail the appellant's failure to comply with the orders of the trial court and demonstrate that she could be a satisfactory parent for the children.

The trial court found the appellant had failed to visit the children on a regular basis; that she visited with the children in Colorado less often than was possible, even though transportation was available from DSS; that on one visit in Colorado, one of the children became ill, and the mother brought her back to the foster family rather than care for the child herself; that the mother was directed to complete the parental training program called PACT and that she participated in the program on two different occasions, but was unable to successfully complete the program; that the mother had not stabilized her living environment and her personal situation so as to demonstrate that she could care for herself and also care for the children; that the mother had been offered numerous services in an attempt to enable her to correct the neglect; that the mother was still in need of services, and it was uncertain how soon she would have her own problems corrected sufficiently to start to care for the children; that the children had lived longer with their foster family than they had with their mother, and removing them from the loving and nurturing home of the foster family and returning them to uncertain care in Lancaster County would be harmful to the children; and that the evidence was clear and convincing that grounds under § 43-292(2) and (6) exist to terminate the parental rights of the mother, and it was in the best interests of the children that the parental rights be terminated.

Orders terminating parental rights are reviewed by the Supreme Court in accordance with the following rule:

> " ' "In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another." ' "

*In re Interest of R.T. and R.T.*, 233 Neb. 483, 486, 446 N.W.2d 12, 15 (1989); *In re Interest of S.C., S.J., and B.C.*, 232 Neb 80, 439 N.W.2d 500 (1989); *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989); *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989).

The appellant argues that she had shown progress in her parenting skills and had stabilized her living situation since Dr. Chung began treating her with Dilantin and that it was error for the court to terminate her parental rights in light of that evidence. The record does not support her contention.

Even after her treatment with Dilantin began, the appellant continued to be involved with men who physically and sexually abused her. She was involved for the second time in the PACT parental training program, but failed to show any improvement in her ability to successfully parent her children. She moved three times in the 4 months prior to the filing of the petition to terminate. Dr. Chung testified that it could take 2 to 3 years of continued treatment for the mother to reach the necessary level of stability and self-esteem to function in society and expressed no opinion concerning the best interests of the children. During this time period, the appellant discussed relinquishing her rights to the children.

There is an abundance of clear and convincing evidence in the record that shows the appellant refused and neglected to give the children necessary parental care and protection and failed to make reasonable efforts to comply with the trial court's orders concerning a plan of rehabilitation.

Throughout the entire time that the proceedings were pending in the trial court, the appellant, on numerous

occasions, demonstrated hostility and defiance to the efforts of the trial judge and other personnel who were attempting to assist her to become a satisfactory parent. Her attitude was one of indifference to the welfare of the children when some personal concern of hers interfered. As the appellant said to Ann Hopkins at one time, "I tell someone I'm going to do something, I do that first. . . . My commitments come first. . . . Of course, I have a commitment to my children, too, in a way. But they get along without me so easily, they don't really need me most of the time."

Her neglect of the children ranged from a failure to give the children adequate food and hygiene care to a failure to dress them adequately.

A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation presents an independent reason justifying termination of parental rights. *In re Interest of J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989). A judgment terminating parental rights will be affirmed when the State has established by clear and convincing evidence that the parent has willfully failed to comply, in whole or in part, with a material provision of the plan, and termination of parental rights is in the best interests of the children. *In re Interest of R.T. and R.T., supra.* In this case the evidence is clear and convincing.

Since 1983 the appellant has been involved in a variety of programs in an effort to correct the conditions which led to the State's involvement in this case. "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 J.H. et al., supra* at 347, 445 N.W.2d at 605.

The evidence shows that the appellant has not been able to stabilize her living situation. It is doubtful that she ever will be able to do so. "Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." *Id.* at 347-48, 445 N.W.2d at 605. The children have been in foster care with the same family since June 20, 1984, and that family is willing to permanently adopt the children.

The children deserve the security of a permanent home and

the opportunity to have a better life than the appellant would provide. As this court stated in *In re Interest of R.H., T.H., and J.H.*, 219 Neb. 904, 907, 367 N.W.2d 145, 147 (1985):

> The law is not unmindful of a mother's love, of the crippling effects of a history of child abuse and alcoholic parents, and of the grinding effects of an inferior education and habitual poverty, but the law is also not so cruel that punishment for these apparently unchangeable conditions should be imposed on the children. If the only way to break the chain is termination, the law and this court will not flinch.

The judgment is affirmed.

AFFIRMED.

---

## STATE OF NEBRASKA, APPELLEE, V. ROBERT L. KIPF, APPELLANT.

450 N.W.2d 397

Filed January 19, 1990. No. 88-974.

1. **Constitutional Law: Statutes: Presumptions.** Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before the Nebraska Supreme Court may declare it void.
2. **Constitutional Law: Criminal Law: Statutes.** The Nebraska Supreme Court is required to construe a penal statute so as to give it an interpretation which meets constitutional requirements if such can reasonably be done.
3. **Constitutional Law: Statutes: Standing.** One who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others.
4. **Constitutional Law: Criminal Law: Statutes: Presumptions: Legislature.** While, in affording legislative enactments a presumption of constitutionality, the Nebraska Supreme Court construes penal statutes strictly, it nonetheless gives them a sensible construction in the context of the object the Legislature sought to accomplish, the evils and mischiefs it sought to remedy, and the purpose it sought to serve.
5. **Constitutional Law: Criminal Law: Due Process: Statutes.** To meet the due process requirements of the federal and Nebraska Constitutions, a penal statute must define the proscribed conduct with sufficient clarity so as to provide a person of ordinary intelligence with fair notice of exactly what is forbidden and so as not to permit arbitrary and discriminatory enforcement.

6. **Statutes: Words and Phrases.** Words grouped in a list should be given related meaning.
7. **Statutes: Telecommunications: Obscenity: Words and Phrases.** A telephone harassment statute deals with different concerns than do statutes which seek to control literary or artistic content; it would be foolish indeed to attempt to determine whether a sensual telephone conversation had a redeeming social value by possessing serious literary, artistic, political, or scientific content; thus, the definition of obscene in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), *reh'g denied* 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128, does not apply to a telephone harassment statute.
8. **Criminal Law: Intent: Words and Phrases.** Intent is the state of mind operative at the time of an action and may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct.
9. _____: _____: _____. In the context of a criminal statute, that which is done willfully or purposefully, rather than accidentally or involuntarily, is done intentionally.
10. **Constitutional Law: Statutes.** Article I, § 5, of the Nebraska Constitution, providing that every person "may freely speak . . . being responsible for the abuse of that liberty," does not provide any greater protection regarding the overbreadth of statutes than does the 1st amendment to the U.S. Constitution, which prohibits the Congress and, through the 14th amendment, the several states from making any law "abridging the freedom of speech."
11. **Constitutional Law: Statutes: Standing.** The first amendment doctrine of substantial overbreadth provides an exception to the traditional rule of standing.
12. _____: _____: _____. Under the overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.
13. **Constitutional Law: Statutes.** A statute may be invalidated on its face only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies.
14. _____: _____. In order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized first amendment protections of parties not before the court.
15. **Constitutional Law: Statutes: Standing.** A litigant must show that the statute is substantially overbroad before he or she is deemed to have standing to challenge it on the ground it is unconstitutional with respect to a hypothetical party.
16. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the first amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.

17. _____: _____. In order for a statute which regulates the content of speech which is protected by the first amendment to withstand constitutional challenge, the government must show that the regulation is necessary to serve a compelling state interest and that the statute is narrowly drawn to achieve that end.
18. _____: _____. Generally, statements may not be punished merely because they are profane and therefore offensive to listeners, unless substantial privacy interests are at stake.
19. _____: _____. That speech is directed toward a captive audience, one which cannot easily avoid exposure to the speech, is a factor to be considered in favor of allowing restriction on the expression.
20. **Criminal Law: Telecommunications: Intent.** Neb. Rev. Stat. § 28-1310(1)(b) (Reissue 1985) proscribes only telephone calls made with the intention of causing mental discomfort by the use of language which conjures up repugnant sexual images or which suggests the performance of repugnant sexual acts.
21. **Presumptions: Words and Phrases.** A presumption is an assumption of fact made from another fact or group of facts found or otherwise established.
22. **Trial: Evidence: Proof: Words and Phrases.** Prima facie proof is evidence sufficient to submit an issue to the fact finder and precludes a directed verdict on the issue.
23. **Trial: Evidence.** The concept of prima facie evidence is usually one for the trial judge to use in determining if there is sufficient evidence to send the case to the jury.
24. **Trial: Presumptions: Evidence: Proof.** A presumption is utilized by the fact finder, whereas prima facie evidence or proof and, correspondingly, a prima facie case are utilized by a court for the legal determination whether a matter, including a particular issue or an entire case, is submissible for determination to the fact finder notwithstanding a request for a directed verdict, or even dismissal, in an action.
25. **Criminal Law: Due Process: Proof.** Due process in a criminal case requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged against the defendant.
26. **Criminal Law: Due Process: Proof: Presumptions.** The due process requirement of the State's burden of proof beyond a reasonable doubt in criminal cases prohibits the State from using evidentiary presumptions that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.
27. **Intent: Words and Phrases.** 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.
28. **Trial: Jurors.** Jurors shall be permitted to take notes if, and only if, the parties agree, outside the jury's presence, (1) that jurors may, but need not, take notes and (2) that such notes as are taken may be used during the jury's deliberations but not preserved for review on appeal; rather, the notes shall be treated as confidential between the juror making them and the other jurors.
29. _____: _____. In the event the parties agree to the taking of notes by jurors, the trial judge shall ensure the confidentiality of the notes during the course of

trial and the jury's deliberations and shall cause the notes to be destroyed immediately upon return of the verdict.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JANICE L. GRADWOHL, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

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

CAPORALE, J.

## I. INTRODUCTION

Defendant, Robert L. Kipf, was convicted in the county court of intimidation by telephone call, a Class III misdemeanor, in violation of Neb. Rev. Stat. § 28-1310(1)(b) (Reissue 1985), which conviction was affirmed by the district court. In his appeal to this court, Kipf assigns 18 errors, which can be summarized as claiming that the district court erred by failing to find the county judge erred (1) in failing to sustain Kipf's motion to quash the complaint on the ground the subject statute is unconstitutional and by subsequently mischarging the jury in reliance upon the statute's unconstitutional language and (2) in permitting the jurors to take notes during the course of the trial for use during their deliberations and in refusing to preserve the notes for review. We reverse and remand for a new trial.

## II. BACKGROUND

The challenged portions of § 28-1310 provide:

> (1) A person commits the offense of intimidation by phone call if with intent to terrify, intimidate, threaten, harass, annoy, or offend, he:
>
> . . . .
>
> (b) Telephones another and uses indecent, lewd,

lascivious, or obscene language or suggests any indecent, lewd, or lascivious act . . .

. . . .

(2) The use of indecent, lewd, or obscene language or the making of a threat or lewd suggestion shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy, or offend.

In addition to Kipf's failed effort to have the complaint quashed, he, at the commencement of the trial, unsuccessfully objected to the taking of notes by jurors for use during their deliberations. Kipf then unsuccessfully moved that the notes be preserved for purposes of appeal.

The evidence adduced reveals that for a period of approximately 6 to 8 months, the prosecuting witness had been receiving bothersome telephone calls at her residence at various times of the day, including the early morning hours, at the rate of about one call a week. Each time she recognized the voice as that of the same male caller, who never identified himself to her.

The prosecuting witness described the calls as harassing and stated that the caller said "nasty" things. On one occasion the caller told her, " 'I'd like to put my cock in your pussy,' " and on another occasion stated, " 'Hi babe, whatcha doing, can I come over?' " Normally, the prosecuting witness reacted to the calls by disengaging the connection. At least once, she asked the caller to stop calling, to which request the caller snickered. In response to one of the calls, the prosecuting witness was herself moved to ask the caller, " '[W]hy don't you go get screwed?' "

At the request of the prosecuting witness, the telephone company serving her residence traced the calls on her line. During the period of this surveillance, the caller rang the prosecuting witness twice, thereby enabling the telephone company to identify the subscriber of the number from which the calls were placed.

A police officer for the city of Lincoln then investigated at the subscriber's residence, which she apparently shared with Kipf. After initially denying that he had made the calls, Kipf admitted having done so. He insisted, however, that he could neither identify the number he called nor remember what exactly he had said. The prosecuting witness testified that Kipf's

calls frightened and annoyed her.

Kipf's tendered instructions concentrated on definitions for the words "indecent," "lewd," "lascivious," and "obscene" used in § 28-1310. Without request by either party, the court instructed that as to the burden of proof:

> The defendant is presumed to be innocent.
>
> This presumption of innocence is evidence in favor of the defendant and continues throughout the trial, until he shall have been proved guilty beyond a reasonable doubt.

That:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are:
>
> 1. That between April 1, 1987 and October 24, 1987 the defendant did telephone [the prosecuting witness].
>
> 2. That in such telephone call or calls the defendant did use indecent, lewd, lascivious or obscene language, or did suggest an indecent, lewd or lascivious act.
>
> 3. That the defendant intended to intimidate, threaten, harass, annoy, or offend the said [prosecuting witness].
>
> 4. That said act or acts occurred in Lancaster County, Nebraska.
>
> The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction.
>
> If you find from the evidence, beyond a reasonable doubt, that each of the foregoing material elements has been proven, it is your duty to find the defendant guilty. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty.
>
> The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

And that:

> The use of indecent, lewd or obscene language or the making of a threat or lewd suggestion is prima facie evidence of the intent to terrify, intimidate, threaten,

harass, annoy, or offend.

Kipf objected to the last of the three instructions set forth above.

## III. ANALYSIS

### 1. Motion to Quash and Jury Charge

Kipf's contention that the county judge erred in failing to quash the complaint against him rests on the claim that § 28-1310 is unconstitutional in that the language of subsections (1)(b) and (2) is vague, the language of subsection (1)(b) is overbroad, and subsection (2) impermissibly shifts the burden of proof.

We begin that analysis by recalling that statutes are afforded a presumption of constitutionality and that the unconstitutionality of a statute must be clearly established before this court may declare it void. Moreover, we are required to construe a penal statute so as to give it an interpretation which meets constitutional requirements if such can reasonably be done. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

#### a. Vagueness Claim

Kipf claims that subsection (1)(b) of § 28-1310 is impermissibly vague "with respect to both the type of speech which is proscribed and the nature of the result intended by the actor," brief for appellant at 11, in violation of the due process clauses of the 5th and 14th amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution.

The traditional rule of standing applies to first amendment challenges to a statute on the ground of vagueness. That is, one who has engaged in conduct which is clearly prohibited by the questioned statute cannot complain that the statute is vague when applied to the conduct of others. *State v. Burke, supra*; *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). It has been observed that this rule of standing reflects both the personal nature of constitutional rights and the prudential limitations on constitutional adjudication. *State v. Burke, supra*.

While, in affording legislative enactments a presumption of constitutionality, we construe penal statutes strictly, we

nonetheless give them a sensible construction in the context of the object the Legislature sought to accomplish, the evils and mischiefs it sought to remedy, and the purpose it sought to serve. *State v. Comeau,* 233 Neb. 907, 448 N.W.2d 595 (1989); *State v. Ring,* 233 Neb. 720, 447 N.W.2d 908 (1989); *State v. Burke, supra.* There is no question but that to meet the due process requirements of the federal and Nebraska Constitutions, a penal statute must define the proscribed conduct with sufficient clarity so as to provide a person of ordinary intelligence with fair notice of exactly what is forbidden, *State v. Burke, supra,* and so as not to permit arbitrary and discriminatory enforcement, *State v. Monastero,* 228 Neb. 818, 424 N.W.2d 837 (1988), *appeal dismissed* 488 U.S. 936, 109 S. Ct. 358, 102 L. Ed. 2d 349. See, also, *State v. Reichstein,* 233 Neb. 715, 447 N.W.2d 635 (1989).

Thus, we must first determine what language the statute seeks to proscribe and then determine whether it does so in sufficiently clear terms. In making those determinations, we need to be mindful that, like people, words are known by the company they keep, *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961), and thus take meaning from the words with which they are associated, *People v. Parkins*, 77 Ill. 2d 253, 396 N.E.2d 22 (1979), *appeal dismissed* 446 U.S. 901, 100 S. Ct. 1825, 64 L. Ed. 2d 254 (1980). Consequently, words grouped in a list should be given related meaning. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 105 S. Ct. 2458, 86 L. Ed. 2d 1 (1985); *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 97 S. Ct. 2307, 53 L. Ed. 2d 368 (1977). See *Wright v. State Bd. of Engineering Examiners*, 250 N.W.2d 412 (Iowa 1977).

Each of the words in the phrase "indecent, lewd, lascivious, or obscene," found in the first prohibition of § 28-1310(1)(b), has sexual connotations. Included in the common, everyday meaning of "indecent" is that which tends to be obscene and which is morally indelicate. Webster's Third New International Dictionary, Unabridged 1147 (1981). The word "lewd" characterizes, among other things, that which incites sensual desire or imagination. *Id.* at 1301. This court has said that lewd denotes an " 'unlawful indulgence of lust, dissolute, lustful,

filthy . . . .' " *State v. Lawrence*, 19 Neb. 307, 313, 27 N.W. 126, 129 (1886). "Lascivious" is commonly understood to mean that which is lewd or lustful. Webster's at 1274. In *Purvis v. State*, 117 Neb. 377, 220 N.W. 599 (1928), this court said lascivious was synonymous with "licentious," which is defined, among other things, as that marked with lewdness. Webster's at 1304. And a common meaning of the word "obscene" is to revel in the lewd or lustful. *Id.* at 1557.

Kipf's suggestion that the words indecent, lewd, and lascivious should all be read as obscene and that obscene should be defined in accordance with the standard set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), *reh'g denied* 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128, is without merit. *Miller*, which dealt with the mailing of materials advertising books and a film, characterizes as obscene those materials "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. at 24. See, also, *State v. Embassy Corp.*, 215 Neb. 631, 340 N.W.2d 160 (1983); *Midtown Palace, Inc. v. City of Omaha*, 193 Neb. 785, 229 N.W.2d 56 (1975).

However, a telephone harassment statute deals with different concerns than do statutes which seek to control literary or artistic content. It would be foolish indeed to attempt to determine whether a sensual telephone conversation had a redeeming social value by possessing serious literary, artistic, political, or scientific content. See, *State v. Crelly*, 313 N.W.2d 455 (S.D. 1981); *State v. Jaeger*, 249 N.W.2d 688 (Iowa 1977); *State v. Keaton*, 371 So. 2d 86 (Fla. 1979); *Baker v. State*, 16 Ariz. App. 463, 494 P.2d 68 (1972); *State v. Starsky*, 106 Ariz. 329, 475 P.2d 943 (1970); *People v. Cirruzzo*, 53 Misc. 2d 995, 281 N.Y.S.2d 562 (1967); *People v. Anonymous*, 52 Misc. 2d 772, 276 N.Y.S.2d 717 (1965). Accordingly, the *Miller* definition of obscenity simply has no application to the statute at hand.

Thus, what is prohibited by the phrase in question is the use of language which conjures up repugnant sexual images. True enough, coitus performed under appropriate circumstances as

an expression of love is natural and fulfilling and not repugnant; thus, conjuring up an image of such an act cannot be said to be repugnant. However, coitus performed as an act of violence is indeed repugnant, so much so that it is criminal. See Neb. Rev. Stat. § 28-319 (Reissue 1985). Moreover, an otherwise natural and fulfilling sexual act may be repugnant because of the known or unknown identity of the other actual or would-be participant. An even more important consideration, given that the statute concerns itself with the use of language, is that even a natural and fulfilling sexual act can be described in terms which are repugnant.

Using the same analysis as applied to the language of the first prohibition of § 28-1310(1)(b), the second prohibition of that statutory clause, that of suggesting any "indecent, lewd, or lascivious" act, proscribes the use of language which proposes the performance of any repugnant sexual act.

The question we must next ask is, What intended result does § 28-1310 prohibit? We begin by recalling that intent is the state of mind operative at the time of an action and may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct. *State v. Robb*, 224 Neb. 14, 395 N.W.2d 534 (1986). In the context of a criminal statute, that which is done willfully or purposefully, rather than accidentally or involuntarily, is done intentionally. *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

The words "terrify," "intimidate," "threaten," "harass," "annoy," and "offend" all describe the same species of behavior. To "terrify" is to fill with terror, to frighten greatly. Webster's Third New International Dictionary, Unabridged 2360 (1981). To "intimidate" is to frighten. *Id.* at 1184. To "threaten" is to promise punishment, reprisal, or other distress. *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988); Webster's at 2382. In *McKenzie v. State*, 113 Neb. 576, 204 N.W. 60 (1925), we characterized the term in the criminal law to be a declaration of one's purpose to work injury to the person, property, or rights of another. Later, in *State v. Maez*, 204 Neb. 129, 281 N.W.2d 531 (1979), we said that the term "threaten" does not, in and of itself, necessarily import an unlawful act and must therefore be restricted in its meaning in the light of the

objective or purpose sought to be accomplished by the threats. To "harass" is to vex, trouble, or annoy continually or chronically. Webster's at 1031. To "annoy" is to harass, to irritate with a nettling or exasperating effect, especially by being a continuous or repeatedly renewed source of vexation. *Id.* at 87. To "offend" is to cause difficulty, discomfort, or injury. *Id.* at 1566. Thus, § 28-1310(1) concerns itself with the making of telephone calls which are designed to inflict mental discomfort.

The portions of the statute before us are therefore not impermissibly vague—they give fair notice of exactly what is forbidden in terms which are understandable to persons of ordinary intelligence.

b. Overbreadth Claim

Kipf also contends that subsection (1)(b) of § 28-1310 is overbroad "in that it interferes with constitutionally protected speech," brief for appellant at 11, in violation of the first amendment to the U.S. Constitution and article I, § 5, of the Nebraska Constitution.

We have held that article I, § 5, providing that every person "may freely speak . . . being responsible for the abuse of that liberty," does not provide any greater protection regarding the overbreadth of statutes than does the 1st amendment to the U.S. Constitution, which prohibits the Congress and, through the 14th amendment, the several states from making any law "abridging the freedom of speech." *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986).

(i) *Standing*

The first amendment doctrine of substantial overbreadth provides an exception to the traditional rule of standing discussed in part III(1)(a) above. *Massachusetts v. Oakes*, ____ U.S. ____, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989); *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). Under that doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. *Airport Comm'rs v. Jews for*

*Jesus, Inc.*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

A statute may be invalidated on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. *Airport Comm'rs v. Jews for Jesus, Inc., supra*; *Regan v. Time, Inc.*, 468 U.S. 641, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984); *State v. Monastero,* 228 Neb. 818, 424 N.W.2d 837 (1988), *appeal dismissed* 488 U.S. 936, 109 S. Ct. 358, 102 L. Ed. 2d 349; *State v. Burke, supra*; *State v. Copple,* 224 Neb. 672, 401 N.W.2d 141 (1987). Stated another way, in order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized first amendment protections of parties not before the court. *New York State Club Assn. v. New York City,* 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988). The requirement that the overbreadth be substantial arose from a recognition that the application of the overbreadth doctrine is " 'manifestly strong medicine,' " and that " 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.' " *Airport Comm'rs v. Jews for Jesus, Inc., supra* at 574. Accordingly, a litigant must show that the statute is substantially overbroad before he or she is deemed to have standing to challenge it on the ground it is unconstitutional with respect to a hypothetical party. *Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

(ii) *General First Amendment Principles*

A statute is unconstitutionally overbroad and thus offends the first amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. See *State v. Copple, supra*. Not all speech is protected by the first

amendment. *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989); *State v. Monastero, supra*; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). Material which is obscene, as defined in accordance with the standard set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), *reh'g denied* 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128, is not protected by the first amendment. *Miller v. California, supra*; *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). However, the U.S. Supreme Court has determined that in order for a statute which regulates the content of speech which is protected by the first amendment to withstand constitutional challenge, the government must show that the regulation is necessary to serve a compelling state interest and that the statute is narrowly drawn to achieve that end. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983); *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981).

The U.S. Supreme Court has held that, generally, statements may not be punished merely because they are profane and therefore offensive to listeners, unless substantial privacy interests are at stake. *Cohen v. California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), *reh'g denied* 404 U.S. 876, 92 S. Ct. 26, 30 L. Ed. 2d 124 ("The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner"). That speech is directed toward a captive audience, one which cannot easily avoid exposure to the speech, is a factor to be considered in favor of allowing restriction on the expression. *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978), *reh'g denied* 439 U.S. 883, 99 S. Ct. 227, 58 L. Ed. 2d 198; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974).

In *FCC v. Pacifica Foundation*, a plurality of the High Court upheld a Federal Communications Commission sanction pursuant to federal statute against a radio station which broadcast obscene, indecent, or profane language during a

monologue entitled "Filthy Words." The Court stated: " '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " 438 U.S. at 746. Further, "Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment." *Id.* The Court determined that even speech protected by the first amendment could be prohibited in contexts where it is especially offensive, such as where a broadcast "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748.

(iii) *Views of Other Jurisdictions*

Some courts have found statutes containing language similar to that of § 28-1310(1)(b) unconstitutionally overbroad. For example, in *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975), the Colorado Supreme Court declared overbroad a statute prohibiting any communication, whether by telephone, mail, or any other form, made with the intent to harass, annoy, or alarm and in a manner likely to harass or cause alarm. The court noted that if "alarm" means "arouse to a sense of danger," then the statute reached speech entitled to first amendment protection, such as storm forecasts, political trend predictions, or warnings concerning illnesses. *Id.* at 398, 541 P.2d at 83. The *Bolles* court observed that a function of free speech under our system of government is to invite dispute, including unsettling, disturbing, arousing, or annoying communications, and that the absurdity of prohibiting such speech is "patently obvious to anyone who envisions our society in anything but a state of languid repose." *Id.*

*Bolles v. People, supra*, was followed in *Everett v. Moore*, 37 Wash. App. 862, 683 P.2d 617 (1984), wherein the court held that a city ordinance identical to the statute in *Bolles* encroached on constitutionally protected speech. The court stated that although the city "unquestionably has a legitimate and substantial interest in protecting its residents from fear and

abuse at the hands of persons who employ the telephone to torment others . . . and in protecting the privacy of residents' homes from the intrusion of unwanted telephone calls," the statute failed because it was not limited to telephone calls, intrusions into the home, and communications which abuse the listener " 'in an essentially intolerable manner.' " *Everett* at 865-66, 683 P.2d at 619, quoting *Cohen v. California, supra.*

In *State v. Keaton*, 371 So. 2d 86 (Fla. 1979), the court held overbroad a Florida statute prohibiting the use of telephone communication to make any comment, request, suggestion, or proposition which is obscene, lewd, lascivious, filthy, or indecent, because it covered consensual as well as nonconsensual conversations. In dicta, the court observed that the statute would pass constitutional muster if it were limited to calls made to the listener at a location where he enjoys a reasonable expectation of privacy and which were intended to harass the listener.

*State v. Ray*, 302 Or. 595, 733 P.2d 28 (1987), held that a statute which prohibited subjecting another to alarm or annoyance by telephonic use of obscenities or the description of sexual excitement, sadomasochistic abuse, or sexual conduct was overbroad because it was not limited to unwanted, unsolicited, or nonconsensual calls nor to the person placing the call and thus could prohibit calls between spouses, lovers, or friends that may from time to time cause annoyance; consensual calls from legitimate polling organizations collecting data on attitudes pertaining to sexual matters; and discussions between patients and doctors concerning sexual matters which cause alarm.

Other courts have found similar statutes which include a specific intent element not to be overbroad. For example, in *State v. Hagen*, 27 Ariz. App. 722, 558 P.2d 750 (1976), the court upheld a statute which makes it unlawful for any person to telephone another and use any obscene, lewd, or profane language or suggest a lewd or lascivious act with the intent to terrify, intimidate, threaten, harass, annoy, or offend. The court determined that the state has a legitimate interest in prohibiting obscene, threatening, or harassing telephone calls, none of which are protected by the first amendment, and

concluded that because the statute specifies the intent with which the calls must be made and the nature of the language prohibited, the statute reaches no speech protected by the first amendment.

A similar holding is found in *United States v. Lampley*, 573 F.2d 783 (3d Cir. 1978). There, the court upheld against an overbreadth challenge 47 U.S.C. § 223(1)(D) (1982), which prohibits making repeated telephone calls, during which conversation ensues, solely to harass any person at the called number. The court observed that Congress has power to impose criminal sanctions on the placement of interstate telephone calls made with the intent to harass, abuse, or annoy, stating: "Congress ha[s] a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives." 573 F.2d at 787.

*State v. Gattis*, 105 N.M. 194, 730 P.2d 497 (1986), held that a statute which proscribes obscene telephone calls initiated by one with the intent and sole purpose of conveying an unsolicited, obscene, imminently threatening, or harassing message to an unwilling recipient did not encroach on the first amendment.

In *State v. Koetting*, 691 S.W.2d 328 (Mo. App. 1985), the court considered the constitutionality of a statute prohibiting the making of repeated telephone calls if done for the purpose of frightening or disturbing another person. Limiting the statute to language directed to a specific individual in the privacy of her or his home or business, the court held that the government had a compelling state interest in protecting the privacy rights of its citizens and thus could regulate speech content.

The Illinois experience is most instructive. In *People v. Klick*, 66 Ill. 2d 269, 362 N.E.2d 329 (1977), upon which Kipf places major reliance, the court declared overbroad a disorderly conduct statute prohibiting telephone calls made with the intent to annoy another, irrespective of whether conversation thereby ensues. Applying the rule that a statute is overly broad if it may reasonably be interpreted to prohibit conduct which is

constitutionally protected, the court determined that because the subject statute applied to any call made with the intent to annoy, it was too broad. Although recognizing that the state has a legitimate interest in protecting the privacy of its citizens from unwanted telephone intrusions, the court observed that first amendment protection is not limited to amiable communications, but must be considered to extend to consumer complaints, contractual disputes among businessmen, and citizen complaints to public officials, as well as family quarrels. In answer to the state's contention that one's right to communicate must be balanced against another's right to privacy in his home, the court, relying on *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), *reh'g denied* 404 U.S. 876, 92 S. Ct. 26, 30 L. Ed. 2d 124, ruled that the ability of government to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner and observed that the statute was not limited to intolerable conduct, nor was it limited to calls made to private homes. Subsequent to that decision, the Illinois statute was rewritten to prohibit telephone calls made with *the intent to abuse, threaten, or harass*, rather than with the intent to annoy, and the court upheld the statute, holding that the words "abuse" and "harass" take color from, and were narrowed by, the word "threaten." *People v. Parkins*, 77 Ill. 2d 253, 396 N.E.2d 22 (1979), *appeal dismissed* 446 U.S. 901, 100 S. Ct. 1825, 64 L. Ed. 2d 254 (1980).

(iv) *Section 28-1310(1)(b) Not Overbroad*

As determined in part III(1)(a) of this opinion, § 28-1310(1)(b) proscribes only telephone calls made with the intention of causing mental discomfort by the use of language which conjures up repugnant sexual images or which suggests the performance of repugnant sexual acts. The statute thus concerns itself with sexual speech which intrudes upon the privacy of innocent citizens, not for the purpose of communicating any thought, but for the purpose of causing mental discomfort by conjuring up repugnant sexual images. It therefore regulates in an area in which the State has a

compelling interest. *United States v. Lampley*, 573 F.2d 783 (3d Cir. 1978). Accordingly, Kipf has failed to establish that § 28-1310(1)(b) creates in every application an impermissible risk of suppressing ideas or that it is otherwise "substantially" overbroad. To the extent that an overbreadth problem should arise in isolated cases, the appropriate remedy is to handle such cases on an individual basis to prevent any restriction on constitutionally protected speech rather than striking down in toto a statute prohibiting constitutionally unprotected speech. *People v Taravella*, 133 Mich. App. 515, 350 N.W.2d 780 (1984).

c. Burden of Proof

Kipf next contends that § 28-1310(2), applied in his case through the instruction concerning "prima facie" evidence of intent, involves a mandatory conclusive presumption of criminal intent and "violates due process by impermissibly shifting the burden of proof from the State to the defendant on the material element of intent." Brief for appellant at 24.

In substance, § 28-1310 makes it a crime for one who has the intent to terrify, intimidate, threaten, harass, annoy, or offend another to use the telephone for communication of certain statutorily prohibited language. An essential element of the crime is the intent with which one communicates the proscribed language to another. Unless the telephone caller intends to produce a particular reaction in the recipient of the communication, such as the recipient's terror, intimidation, or annoyance, the caller does not commit the crime described in § 28-1310. Under § 28-1310(2), the telephone caller's criminal intent, as an element of the offense, "shall" exist or, more simply, has been conclusively established by two facts—the telephone call and the prohibited content of the call.

A presumption is an assumption of fact made from another fact or group of facts found or otherwise established. Prima facie proof is evidence sufficient to submit an issue to the fact finder and precludes a directed verdict on the issue. See *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Cf. *State v. Stalder*, 231 Neb. 896, 906, 438 N.W.2d 498, 505 (1989): "The concept of 'prima facie evidence' is usually one for the trial

judge to use in determining if there is sufficient evidence to send the case to the jury." Thus, the distinction between a presumption and prima facie evidence or proof is readily discernible: A presumption is utilized by the fact finder, whereas prima facie evidence or proof and, correspondingly, a prima facie case are utilized by a court for the legal determination whether a matter, including a particular issue or an entire case, is submissible for determination to the fact finder notwithstanding a request for a directed verdict, or even dismissal, in an action.

Although § 28-1310(2) contains the phrase "prima facie evidence," in view of the distinction between a presumption and prima facie evidence or proof, as noted above, we conclude that an instruction patterned on § 28-1310(2) results in a mandatory and conclusive presumption of criminal intent, that is, factual establishment of the telephone call with its statutorily prohibited conduct necessarily ("shall") results in the conclusively established criminal intent of the caller.

Since *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), due process in a criminal case requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged against the defendant. 397 U.S. at 364.

In *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), the Supreme Court examined the conviction of David Sandstrom, whom a jury found guilty of " 'deliberate homicide' " in that he " 'purposely or knowingly' " caused the victim's death. 442 U.S. at 512. At trial, Sandstrom claimed that he did not purposely or knowingly kill the victim and therefore was not guilty of deliberate homicide. The trial court instructed the jury that " '[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.' " 442 U.S. at 515. Sandstrom objected and maintained that the instruction effectively shifted the burden of proof on the question of purpose or knowledge and required the defendant to disprove an element of the crime charged.

The *Sandstrom* Court stated the constitutional question:

> The question presented is whether, in a case in which

> intent is an element of the crime charged, the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

442 U.S. at 512. The Court answered the question in the affirmative, observing:

> The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. See *Ulster County Court v. Allen*, [442 U.S. 140,] 157-163 [99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)]. That determination requires careful attention to the words actually spoken to the jury, see *ante*, at 157-159, n. 16, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

442 U.S. at 514.

The *Sandstrom* Court also noted:

> Given the common definition of "presume" as "to suppose to be true without proof," Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.
>
> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence—thus effectively shifting the burden of persuasion on the element of intent. Numerous federal

> and state courts have warned that instructions of the type given here can be interpreted in just these ways.

(Emphasis in original.) 442 U.S. at 517. The Court further commented:

> We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant come forward with "some" evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.

442 U.S. at 519. Continuing, the *Sandstrom* Court stated:

> Thus, the question before this Court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind. . . .
>
> We consider first the validity of a conclusive presumption. This Court has considered such a presumption on at least two prior occasions. In *Morissette v. United States*, 342 U. S. 246 [72 S. Ct. 240, 96 L. Ed. 288] (1952), the defendant was charged with willful and knowing theft of Government property. Although his attorney argued that for his client to be found guilty, "the taking must have been with felonious intent," the trial judge ruled that "[t]hat is presumed by his own act." *Id.*, at 249. After first concluding that intent was in fact an element of the crime charged, and after declaring that "[w]here intent of the accused is an ingredient of the crime charged, its existence is . . . a jury issue," *Morissette* held:
>
> "*It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.* It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . . [But] [w]e think presumptive intent has no place in this case. *A*

*conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.* A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, *this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." Id.,* at 274-275. (Emphasis added; footnote omitted.)

. . . [I]n *United States v. United States Gypsum Co.*, 438 U. S. 422 [98 S. Ct. 2864, 57 L. Ed. 2d 854] (1978), we reaffirmed the holding of *Morissette.* In that case defendants, who were charged with criminal violations of the Sherman Act, challenged the following jury instruction:

" 'The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.' " 438 U. S., at 430. After again determining that the offense included the element of intent, we held: "[A] defendant's state of mind or *intent is an element of a criminal antitrust offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption* of wrongful intent from proof of an effect on prices. Cf. *Morissette v. United States* . . . .

. . . .

"Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference. . . . [U]ltimately the decision on the issue of intent must be left

to the trier of fact alone. The instruction given invaded this factfinding function." *Id.*, at 435, 446 (emphasis added)....

As in *Morissette* and *United States Gypsum Co.*, a conclusive presumption in this case would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and would "invade [the] factfinding function" which in a criminal case the law assigns solely to the jury. The instruction announced to David Sandstrom's jury may well have had exactly these consequences. Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and "ordinary consequences" of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," 397 U. S., at 364, and defendant was deprived of his constitutional rights as explicated in *Winship*.

442 U.S. at 521-23.

In condemning the instruction in *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), the Court expressed the following:

A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to the defendant, would have suffered from similar infirmities. If Sandstrom's jury interpreted the presumption in that manner, it could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in *Mullaney v. Wilbur*, 421 U. S. 684 [95 S. Ct. 1881, 44 L. Ed. 2d 508] (1975). In *Mullaney*, the charge was murder, which under Maine law required proof not only of intent but of malice. The trial court charged the jury that " 'malice aforethought is an

> essential and indispensable element of the crime of murder.' " *Id.*, at 686. However, it also instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. *Ibid.* As we recounted just two Terms ago in *Patterson v. New York*, "[t]his Court . . . unanimously agreed with the Court of Appeals that Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation." 432 U. S., at 214. And *Patterson* reaffirmed that "a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant" by means of such a presumption. *Id.*, at 215.
>
> Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in *Mullaney*, or a conclusive presumption like those in *Morissette* and *United States Gypsum Co.*, and because either interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional.

442 U.S. at 524.

Therefore, on account of the constitutionally impermissible instruction, the Supreme Court reversed Sandstrom's conviction and remanded the case for further proceedings.

Subsequently, in *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985), the Supreme Court reaffirmed the principles enunciated in *Sandstrom* and, concerning presumptions, whether mandatory, conclusive, or rebuttable, concluded that the due process requirement of the State's burden of proof beyond a reasonable doubt in criminal cases "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." 471 U.S. at 313. See, also, *Carella*

*v. California*, ____ U.S. ____, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989).

If we were to approve an instruction framed in the literal language of § 28-1310(2), which informs a jury about the function of prima facie evidence or proof of intent, such an instruction, in the absence of a defendant's presentation of evidence negativing intent established by the "prima facie evidence," would have the legal effect of a directed verdict on the issue of criminal intent as an element of the offense prohibited by § 28-1310: "[V]erdicts may not be directed against defendants in criminal cases. *United States v. Martin Linen Supply Co.*, 430 U. S. 564, 572-573 [97 S. Ct. 1349, 51 L. Ed. 2d 642] (1977); *Carpenters v. United States*, 330 U. S. 395, 408 [67 S. Ct. 775, 91 L. Ed. 973] (1947) . . . ." *Sandstrom v. Montana, supra* at 516 n.5.

In accordance with *Sandstrom*, we conclude that a jury instruction founded on the presumption created by § 28-1310(2) is constitutionally impermissible because such an instruction deprives a defendant of the due process right that the State must prove beyond a reasonable doubt each element of the crime charged, and shifts the burden to the defendant to disprove the element of intent in the offense charged.

Since the jury instruction given in this case informed the jury that based on § 28-1310(2), Kipf's criminal intent had been established, the instruction is erroneous and prejudicial because it deprived Kipf of his substantial right to a trial by jury on the issue of criminal intent necessary for the crime charged under § 28-1310. Such prejudicial error requires reversal of Kipf's conviction.

However, the reversal required in this appeal does not mean that upon retrial the element of Kipf's criminal intent may not be proved by appropriate circumstantial evidence or direct evidence, if any. See *State v. Pierce*, 231 Neb. 966, 971, 439 N.W.2d 435, 440 (1989): "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." See, also, *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989).

### 2. Jury Notes

Because the issue is likely to arise at the new trial, we address Kipf's concern with the practice of permitting jurors to take notes.

In *Omaha Fire Ins. Co. v. Crighton*, 50 Neb. 314, 69 N.W. 766 (1897), this court, without laying down any rule, implicitly adopted a commissioner's recommendation that it not be said that the trial court abused its discretion in permitting jurors, at the request of Crighton's counsel, to take notes during testimony relating to the numerous items claimed to have been destroyed by fire.

Five years later, in *Swift & Co. v. Bleise*, 63 Neb. 739, 89 N.W. 310 (1902), this court explicitly adopted a commissioner's recommendation that the taking of notes by two jurors not be considered misconduct in and of itself, particularly in view of the fact that any error was waived by the defendant's failure to object.

This court next faced the issue 73 years later in *Bakhit v. Thomsen*, 193 Neb. 133, 225 N.W.2d 860 (1975). The defendant therein complained that the taking of notes by some jurors during the reading of a deposition into evidence and carrying those notes into their deliberations constituted error. We noted that

> the taking of notes of the testimony of a witness by jurors has never been prohibited in this state, although it has been held that such practice was frowned upon and *may* constitute prejudicial error. . . . The validity of an objection to the taking of such notes by jurors would seem to be based upon the subsequent use of such notes.

(Emphasis in original.) *Id.* at 145, 225 N.W.2d at 867-68. The court concluded:

> In this case the defendant's counsel had almost 3 weeks before argument for new trial to obtain evidence regarding the use of such notes after the jury returned to the jury room, but there is no showing in the record that the notes were used, and no showing of prejudice to the defendant.

*Id.* at 145, 225 N.W.2d at 868.

A year later, in *Ward v. Nebraska Electric G. & T. Coop.*,

*Inc.*, 195 Neb. 641, 240 N.W.2d 18 (1976), a condemnation proceeding, the trial court noticed one of the jurors taking notes, instructed him that such was not permitted, and confiscated them. In answer to the appellant's claim that the lower court erred in not granting a new trial on the basis of the improper note-taking, we again noted that juror note-taking was not prohibited, but that it was frowned upon and might, in some cases, constitute prejudicial error. We held, however, that appellant had failed to show such error.

To this point then, we have discouraged note-taking by jurors but have required a party seeking relief because of such practice to show prejudice, and have said that the existence of prejudice depends upon the use made of the notes.

Over the years, there has developed a respectable body of thought that jurors ought to be permitted to take notes at the discretion of the trial judge and under appropriate controls. ABA Standards for Criminal Justice § 15-3.2 (2d ed. Supp. 1986); Unif. R. of Crim. P. § 513(e), 10 U.L.A. 129 (Sp. Pamph. 1987); Urbom, *Toward Better Treatment of Jurors by Judges*, 61 Neb. L. Rev. 409 (1982). Typical of the courts adopting that view is that in *Travis v. Commonwealth*, 457 S.W.2d 481 (Ky. 1970), which concluded that if not attended with undue consumption of time, jurors should be encouraged to take notes as an aid to memory. The court observed that the better educational backgrounds jurors now possess make earlier concerns with the practice irrelevant. See, also, *Goodloe v. United States,* 188 F.2d 621 (D.C. Cir. 1950), *cert. denied* 342 U.S. 819, 72 S. Ct. 35, 96 L. Ed. 619 (1951); *Watkins v. State*, 216 Tenn. 545, 393 S.W.2d 141 (1965).

Courts which forbid the practice do so on the grounds that a note-taking juror may emphasize to himself or herself and perhaps other jurors some aspects of the case and neglect other aspects, that an unskilled note-taker is likely to miss what is said, and that a note-taking juror is apt to divert the attention of other jurors and be perceived as being more alert than non-note-takers and thus regarded as more informed than others. *Thornton, Admrx. v. Weaber, Admr., Aplnt.*, 380 Pa. 590, 112 A.2d 344 (1955). See, also, *State v. Jones*, 222 Kan. 56, 563 P.2d 1021 (1977); *State v. Groves*, 311 So. 2d 230 (La.

1975), *overruled on other grounds*, *State v. Lee*, 331 So. 2d 455 (La. 1976).

It is true, of course, that trial attorneys and judges routinely take notes as aids to memory; but lay jurors lack the legal training which enables attorneys and judges to distinguish between the legally relevant and irrelevant, and many jurors lack the note-taking skills which develop with practice. Moreover, trial attorneys and judges have a greater degree of control over the speed with which the adduction of evidence proceeds than an individual juror would ordinarily possess and thus are less likely to be distracted by the note-taking process than are jurors.

We are not persuaded that juror note-taking is such an aid to the search for truth that a party ought to be compelled to submit to the practice. Neither can there be two trial records. We therefore rule that henceforth, jurors shall be permitted to take notes if, and only if, the parties agree, outside the jury's presence, (1) that jurors may, but need not, take notes and (2) that such notes as are taken may be used during the jury's deliberations but not preserved for review on appeal; rather, the notes shall be treated as confidential between the juror making them and the other jurors. In the event the parties so agree, the trial judge shall ensure the confidentiality of the notes during the course of trial and the jury's deliberations, and shall cause the notes to be destroyed immediately upon return of the verdict.

REVERSED AND REMANDED FOR A NEW TRIAL.

HASTINGS, C.J., concurring.

I concur in the result reached by the majority, but do not embrace all of the concepts and theories discussed in that opinion, particularly with reference to presumptions as applied to the statute in this case.

The section of the statute under attack does not create a true presumption. It merely establishes a prima facie case; i.e., if the evidence discloses that the caller used indecent, lewd, or obscene language or made a lewd suggestion, the fact finder may, but is not required to, infer an intent to terrify, intimidate, threaten, harass, annoy, or offend. *State v. Bird Head*, 181 Neb. 885, 151 N.W.2d 615 (1967).

> "The statutory provision does not affect the risk of nonpersuasion. If specific instructions on the inference are given, they ought to dispel any notion that proof of the basic fact shifts the burden of persuasion to defendant. A jury may, but is not required to, infer guilt from existence of the basic fact."

*Id.* at 886-87, 151 N.W.2d at 616.

I do agree that the trial court erred in instructing the jury as to prima facie evidence. This is especially true when it is apparent that the jury was not instructed as to the definition of "prima facie" and when the jury was not given an instruction on criminal intent.

In any event, the language of a statutory provision such as is found in Neb. Rev. Stat. § 28-1310(2) (Reissue 1985) is for the guidance of the trial judge. "The concept of 'prima facie evidence' is usually one for the trial judge to use in determining if there is sufficient evidence to send the case to the jury." *State v. Stalder*, 231 Neb. 896, 906, 438 N.W.2d 498, 505 (1989). The language of the statute in this case should have been reserved for that purpose and should not have been included within the instructions.

BOSLAUGH, J., joins in this concurrence.

---

RICHARD R. THIEM, APPELLEE AND CROSS-APPELLANT, V. ELISSA A. THIEM, APPELLANT AND CROSS-APPELLEE.

450 N.W.2d 660

Filed January 26, 1990. No. 88-028.

Appeal from the District Court for Douglas County, JERRY M. GITNICK, Judge, upon the recommendation of the Appellate Division of the District Court, WHITEHEAD, THOMPSON, and CHEUVRONT, District Judges. Affirmed as modified.

William T. Ginsburg, of Zuber & Ginsburg, for appellant.

Debra Stangl, of Bradford, Coenen, Ashford & Stangl, for appellee.

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

PER CURIAM.

Based on the briefs and the recommendation of the Appellate Division of the District Court, and upon a de novo review of the record, the judgment of the district court is modified as set forth in the recommendation of the Appellate Division of the District Court.

AFFIRMED AS MODIFIED.

---

LARRY SWARTZBAUGH, APPELLANT, V. DIVERSIFIED HEALTH SERVICES OF NEBRASKA, INC., APPELLEE.

450 N.W.2d 660

Filed January 26, 1990. No. 88-186.

Appeal from the District Court for Douglas County, KEITH HOWARD, Judge, upon the recommendation of the Appellate Division of the District Court, REAGAN, ENDACOTT, and OLBERDING, District Judges. Reversed and remanded with directions.

Dean F. Suing and David A. Castello, of Katskee & Henatsch, for appellant.

John P. Fahey, of Broom, Johnson, Fahey & Clarkson, for appellee.

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

PER CURIAM.

Having considered the record, briefs, and recommendation of the Appellate Division of the District Court, we reverse the judgment of the district court because of an erroneous finding of fact and conclusion of law, and we remand the cause with directions to sustain plaintiff's motion for partial summary

judgment and for further proceedings to determine the amount of the renewal commissions due.

REVERSED AND REMANDED WITH DIRECTIONS.

---

UNION INSURANCE COMPANY, APPELLEE, CROSS-APPELLEE, AND CROSS-APPELLANT, V. DANIEL BAILEY AND EARLEEN BAILEY, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLEES; TOWER FINANCIAL, INC., APPELLEE, CROSS-APPELLEE, AND CROSS-APPELLANT; VALLEY RESTORATION AND CONSTRUCTION, INC., APPELLANT.

450 N.W.2d 661

Filed January 26, 1990. No. 88-193.

1. **Declaratory Judgments.** An action for declaratory judgment under the provisions of Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985) is sui generis. Whether such an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Contracts.** If the essence of the dispute sounds in contract, the action is to be treated as one at law.
3. **Declaratory Judgments: Contracts: Appeal and Error.** The Nebraska Supreme Court treats the determination of factual issues in a declaratory judgment action sounding in contract and which is tried without a jury in the same manner as any other action at law; accordingly, the findings of the trial court have the effect of a verdict and will not be set aside unless clearly wrong.
4. **Judgments: Appeal and Error.** In reviewing the trial court's judgment in an action at law tried to the court, the Nebraska Supreme Court does not reweigh the evidence but, instead, considers the judgment in the light most favorable to the successful party and resolves conflicts in favor of the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence.
5. **Trial: Evidence: Witnesses: Appeal and Error.** In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we do not reweigh the evidence on appeal.
6. **Construction Contracts.** In the absence of a contract to pay a definite sum, the contractor is entitled to recover only the reasonable market value for material and labor.
7. _____. When a cost estimate is furnished, the contractor is entitled to the reasonable value of the services provided.
8. **Damages: Trial: Evidence.** The amount of damages to be awarded is one solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.

9. **Prejudgment Interest: Claims.** 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.
10. **Insurance: Attorney Fees.** In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy against any company doing business in this state, the court, upon rendering judgment against such company, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his or her recovery, to be taxed as part of the costs.
11. _____: _____. A beneficiary or other person entitled to bring an action upon an insurance policy at the time suit is commenced is a person who may collect attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 1988).
12. _____: _____. Attorney fees may be awarded under Neb. Rev. Stat. § 44-359 (Reissue 1988) in declaratory judgment actions even if it is the insurer who institutes the action.
13. _____: _____. In actions brought upon certain types of insurance policies, Neb. Rev. Stat. § 44-359 (Reissue 1988) requires that the court, upon rendering judgment against such company, shall allow the successful party a reasonable sum as an attorney fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

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

George A. Sommer for appellant.

Joy Shiffermiller, of Atkins Ferguson Zimmerman Carney, P.C., for appellee Tower Financial.

Robert G. Simmons, Jr., of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellee Union Insurance.

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

FAHRNBRUCH, J.

Valley Restoration and Construction, Inc. (Valley), claiming that it is entitled to $42,375.60 for repairing a house damaged by water from a broken pipe, appeals a declaratory judgment awarding Valley only $31,250 for its restoration work.

The judgment was rendered by the district court for Scotts Bluff County in a lawsuit brought by Union Insurance Company (Union).

Arrangements to repair the house were made between Union

and Valley. After Valley made the repairs, Union filed a declaratory judgment action against Valley; the owners of the house, Daniel and Earleen Bailey; and Tower Financial, Inc., now known as CFS Mortgage Corporation (Tower), as mortgage holder, to determine the amount of money owed for the restoration work and to whom it should be paid. By the time of trial, Tower had become the owner of the house involved and the Baileys had assigned their rights under a Union policy of insurance to Tower. Although Greg Tuttle was named as a defendant in the lawsuit as "Greg Tuttle d/b/a Valley Restoration," it was agreed by Union and Tuttle that he was not a party to the transaction between Union and Valley. No judgment was entered in favor of or against Tuttle, and he is not a party to any appeal or cross-appeal and will not be considered further as a party. Union's policy insured against loss due to accidental discharge or overflow of water or steam from within a plumbing, heating, or air-conditioning system or from within a household appliance.

In consideration of Tower's claims, issues were framed during pretrial conferences as to whether the Bailey house had been totally destroyed, whether it had been completely repaired, and whether Union was liable up to the $65,000 face value of its policy. Both Tower and the Baileys claimed they were entitled to attorney fees.

Following trial, the district court found that Valley, pursuant to contract, repaired the damage caused by water from a broken water pipe, that under the contract the fair and reasonable value of the repairs was $31,250, and that Union had advanced to Valley $15,000. Judgment in the sum of $16,250 was entered in favor of Valley and against Union. Valley's request for attorney fees was denied. The trial court further found that since the repairs had been completed and the cost was to be paid by Union, neither the Baileys nor Tower was damaged, but that each was entitled to attorney fees. Tower was awarded $2,000 in attorney fees and the Baileys $1,250, all to be paid by Union. Motions for a new trial were denied. Valley appealed to this court and Tower cross-appealed. Union also cross-appealed, claiming that attorney fees should not have been awarded Tower or the Baileys.

We affirm the trial court's $16,250 judgment in favor of Valley and the denial of attorney fees to Valley. We reverse the award of attorney fees to Tower and the Baileys.

The essence of the dispute before us sounds in contract. Therefore, our review of the case is guided by our holding in *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 144-45, 440 N.W.2d 187, 189-90 (1989):

> An action for declaratory judgment under the provisions of Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985) is sui generis, *Buhrmann v. Buhrmann*, 231 Neb. 831, 438 N.W.2d 481 (1989), and *Caeli Assoc. v. Firestone Tire & Rubber Co.*, 226 Neb. 752, 415 N.W.2d 116 (1987); whether such an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute, *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987). The essence of the dispute before us sounds in contract. That being so, the action is to be treated as one at law. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). See, also, *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982). This court treats the determination of factual issues in such a declaratory judgment action which was tried without a jury in the same manner as any other action at law; accordingly, the findings of the trial court have the effect of a verdict and will not be set aside unless clearly wrong. *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989); *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988); *Beatrice Nat. Bank v. Southeast Neb. Co-op*, 230 Neb. 671, 432 N.W.2d 842 (1988).

In a law action on a contract, we are also bound by a pronouncement in *Corman v. Musselman*, 232 Neb. 159, 166, 439 N.W.2d 781, 786-87 (1989):

> In reviewing the trial court's judgment in an action at law tried to the court, we do not reweigh the evidence but, instead, consider the judgment in the light most favorable to the successful party and resolve conflicts in favor of the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the

evidence.

Also, in a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we do not reweigh the evidence on appeal. *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989).

Taking the view most favorable to the successful party, the record reflects the following. The Baileys' two-story house near Mitchell, Nebraska, was a converted barn, at least 40 years old, situated on a concrete slab. Around Christmas 1984, the Baileys moved from the property and leased it to tenants until shortly before March 1986. At that time, the vacant house was listed for sale at $61,400.

It is undisputed that about March 15, 1986, a waterline running under the cement slab leaked, washing away soil under the slab and causing the slab to sink. Settling of the concrete slab caused extensive damage to the interior of the house. The first story floor sloped to the west. All carpeting in the house was damp because of water accumulation. A next door neighbor testified that in some places gaps between the walls and the floor were as much as a foot. Most, if not all, of the windows and doors were either jammed or did not work properly. The damage was discovered by the Baileys' real estate agent shortly after it occurred. The leaking pipe was repaired promptly. Daniel Bailey notified his insurance agent.

In mid-March 1986, Greg Tuttle, as president of Valley, inspected the damaged house at Union's request. About May 1, 1986, Valley submitted to Union a $53,458.90 labor, material, and overhead cost plus profit estimate to repair the house.

On May 8, 1986, Union's claim adjuster notified Bailey that Union would cover the loss and that repairs would start as soon as possible. At that time, Bailey authorized Union to select a contractor and proceed with the repairs. Valley received an advance of $15,000 from Union to begin the repairs. On May 12, 1986, Valley began restoring the Baileys' house and completed its work on July 15, 1986. Generally, Valley replaced portions of the concrete slab and footings, made sand and gravel fills under the house, replaced damaged plaster with Sheetrock, repaired doors and windows, performed other

carpentry work, painted, repaired waterlines, checked electrical wiring, texturized Sheetrock and acoustic ceilings, and did general cleaning. Although further repair of the foundation was listed on the estimate, Union's adjuster instructed Valley not to make those repairs because those defects preexisted the broken water pipe. Union's adjuster also determined that the need for any repairs to the garage predated the broken water pipe.

On September 12, 1986, a Union claim adjuster met with Tuttle. There was a dispute over the extent of the repairs. As an example, some costs of repairing defects that preexisted the water pipe's rupture were not eliminated from the estimate. Although listed on the estimate, it was not necessary to rewire the house, nor did all of the plumbing under the slab need to be redone. Tuttle said he had called Union's home office and advised Union that the amount due Valley should be reduced by $8,000 to $10,000. In a deposition, Tuttle testified the reduction was $6,000 to $7,000. Union asked for documentation of costs from Valley. Union continued to protest the cost of repairs after it received a revised bill for $44,078.58. Valley tendered a second revised bill of $42,375.60.

The trial court found that a contract existed between Union and Valley for the repairs of the Bailey house based upon necessary repairs, but not to exceed the estimate arrived at between Union and Valley, and that the fair and reasonable value of the repairs made by Valley under the contract was in the sum of $31,250.

On appeal, Valley claims the trial court erred in (1) finding that Valley was entitled only to $31,250, (2) not allowing interest on the amounts found due to Valley, (3) denying Valley attorney fees, and (4) not directing the payment of Valley's expert witness.

In regard to Valley's first assignment of error, it is important to note that Valley and Union did not arrive at a set contract price for the repair of the Bailey house. Valley only supplied a cost estimate. In the absence of a contract to pay a definite sum, the contractor is entitled to recover only the reasonable market value for material and labor. *Senften v. Church of the Nazarene*, 214 Neb. 708, 335 N.W.2d 753 (1983). It has also

been held that when a cost estimate is furnished, the contractor is entitled to the reasonable value of the services provided. *Ruzicka v. Petersen*, 213 Neb. 642, 330 N.W.2d 913 (1983).

There were conflicts in the evidence as to the cost and extent of labor and materials used in repairing the Bailey house and in the computation of profit to be paid to Valley. Our review of the record does not reflect that the trial court was clearly wrong in resolving those conflicts in favor of Union.

In awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered. Neither is it necessary that an appellate court be able to discern the exact computations by which a verdict is reached. The amount of damages to be awarded is one solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. See *American Tel. & Tel. Corp. v. Thompson*, 193 Neb. 327, 227 N.W.2d 7 (1975). Here, the judgment awarded Valley is supported by evidence and bears a reasonable relationship to the elements of the damages proved. Valley's first assignment of error is without merit.

Our review of the record does not reflect that the trial court was clearly wrong in determining that Union and Valley entered into a construction contract to repair the Bailey house. Neither was the court clearly wrong in determining that Valley was only entitled to $31,250 under the contract.

Valley next contends that it is entitled to interest on its judgment from the date that its work was substantially completed. Prejudgment interest has never been allowed where the amount of the claim has been unliquidated. " '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.' " *Knox v. Cook*, 233 Neb. 387, 394, 446 N.W.2d 1, 5 (1989). There was a reasonable controversy over the amount of Valley's recovery. This is demonstrated by the fact that Valley submitted at least two bills for the repairs, each for a different amount. Valley's second assignment of error is without merit.

In its third assignment of error, Valley contends that it is entitled to attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1988). Section 44-359 provides in relevant part:

> In all cases when the beneficiary or other person entitled thereto brings an action *upon* any type of insurance policy . . . against any company . . . doing business in this state, the court, upon rendering judgment against such company . . . shall allow the plaintiff a reasonable sum as an attorney's fee *in addition to the amount of his or her recovery*, to be taxed as part of the costs.

(Emphasis supplied.)

A beneficiary or other person entitled to bring an action *upon* an insurance policy at the time suit is commenced is a person who may collect attorney fees under § 44-359. *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986). Attorney fees may be awarded under § 44-359 in declaratory judgment actions, *Workman v. Great Plains Ins. Co., Inc.*, 189 Neb. 22, 200 N.W.2d 8 (1972), even if it is the insurer who institutes the action, *State Farm Mut. Auto. Ins. Co. v. Selders*, 189 Neb. 334, 202 N.W.2d 625 (1972).

To support its claim for attorney fees, Valley relies upon our holding in *Rieschick Drilling Co. v. American Cas. Co.*, 208 Neb. 142, 303 N.W.2d 264 (1981). In that case, an action was brought against an insurance carrier *upon* a performance bond. In the present case, the declaratory judgment action was brought to determine the amount Union owed Valley under a repair contract, not upon what Union owed under its insurance policy. Valley's third assignment of error is meritless.

In its last assignment of error, Valley asserts that it was entitled to the amount of $624 for its expert witness, instead of the fee as provided in Neb. Rev. Stat. § 33-139 (Reissue 1988). During oral argument, Valley abandoned this contention. At any rate, *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980), precludes the award of nonstatutory expert witness fees on the record presented here.

In its cross-appeal, Tower asserts that as owner of the Bailey house and as assignee of any claim the Baileys had under Union's insurance policy on the house, it is entitled to receive

from Union (1) money to compensate it for the necessary costs of repairs which it claims were not performed after the house was damaged by the ruptured water pipe or, alternatively, (2) the face value of the Union policy less the amount paid to Valley.

Tower claims that the house's postrepair deterioration was due to the failure to completely repair the damage caused by the ruptured water pipe, primarily the foundation. Although there was some evidence that the foundation should have been repaired in order to avoid the postrepair settling of the slab, there was substantial evidence that any deficiency in the foundation existed prior to the damage that occurred in March 1986 from the broken water pipe. There was also substantial evidence that the damage caused by the broken water pipe was completely repaired. A next door neighbor testified that the house appeared to be completely repaired after the water pipe had broken. A consulting engineer testified that the top of the house's foundation was below grade and that the ground on the west sloped toward the house or was relatively flat. These conditions, the engineer testified, permitted rainwater to run under the slab floor of the house. The engineer testified that surface water was a contributing factor to the postrestoration settling. He further testified that the condition of the foundation had existed for some time and that a roof drain discharged rainwater within inches of the foundation.

The Baileys' real estate agent testified that a downspout extender was missing from the west side of the house and that after torrential rains, "water was running down and going right back into the utility room." Tuttle testified that a downspout on the west side of the house went directly to the ground and due to the slope there was no way for water to leave the area. Neither the engineer nor Tuttle could state whether the March 1986 broken water pipe resulted in any damage to the foundation of the house. Simply stated, Tower failed to carry its burden of proof that water from the ruptured pipe damaged the house's foundation during the policy period, March 22, 1985, to March 22, 1986. Tower also claims that the garage doors and cracks in the floors of the utility room and garage should have been repaired. However, there was evidence that these problems also

predated the leaky water pipe.

Tower's contention that the Bailey house was destroyed and that it should be paid the difference between the face value of the insurance policy and the amount paid to Valley is without merit. There was sufficient evidence for a fact finder to determine that the Bailey house was returned to its condition prior to the water pipe rupture. There was also sufficient evidence for a fact finder to determine that there was no diminution in value related to the broken water pipe. A real estate appraiser employed by Tower testified that he viewed the Bailey house before and after Valley repaired it. He testified that before the house was repaired, it had a value of $42,500 and that after it was repaired, a value of $40,000. The appraiser attributed the difference in value to a change in the market, not to the fact that the home had been damaged and repaired.

Considering the evidence in the light most favorable to Union, and giving Union the benefit of any reasonable inference, it cannot be said that the trial court was clearly wrong in finding that the repairs to the Bailey house caused by a leaking pipe were complete and that Tower suffered no damage.

In its cross-appeal, Union claims that the trial court erred in ordering Union to pay attorney fees of $1,250 and $2,000 to the Baileys and Tower, respectively. The district court did not state under what authority the fees were awarded. The authority to award attorney fees in actions on certain insurance policies is provided by statute. *Hawkeye Casualty Co. v. Stoker*, 154 Neb. 466, 48 N.W.2d 623 (1951). Statutory authority is found in § 44-359. *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986).

In actions brought upon certain types of insurance policies, § 44-359 requires that "the court, upon rendering judgment against such company . . . shall allow the [successful party] a reasonable sum as an attorney's fee *in addition to the amount of his or her recovery*, to be taxed as part of the costs." (Emphasis supplied.) The district court found that the Baileys and Tower suffered no damages, yet awarded them attorney fees. The statute mandates that attorney fees be granted *in addition* to the amount of the recovery. Since neither the Baileys nor Tower recovered a judgment on an insurance policy, attorney fees

should not have been awarded.

The district court's judgment of $16,250 against Union and in favor of Valley is affirmed. The awards of attorney fees to the Baileys and Tower are reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

---

STATE OF NEBRASKA, APPELLEE, V. ALEX PAUL DOMINGUS, APPELLANT.

450 N.W.2d 668

Filed January 26, 1990. No. 88-698.

1. **Postconviction: Effectiveness of Counsel: Proof.** In a postconviction action seeking relief on the basis of ineffective counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
2. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including the credibility and weight to be given the testimony of a witness, and the trial court's findings will be upheld unless the findings are clearly erroneous.
3. **Pleas: Effectiveness of Counsel.** A plea will be found to be freely and voluntarily entered upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases.
4. **Effectiveness of Counsel.** In any effectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
5. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Patrick B. Hays for appellant.

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

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

GRANT, J.

This is an appeal from an order of the district court for Lincoln County denying defendant's motion for postconviction relief. Defendant, Alex Paul Domingus, has timely appealed to this court, assigning as error the district court's failure to find defendant's plea of no contest was not voluntary because it was entered without effective assistance of counsel.

The record shows that following a preliminary hearing, defendant was arraigned in the district court for Lincoln County on the charges of first degree murder in the May 2, 1986, killing of Ruth Anderson Keeney, use of a deadly weapon in the commission of a felony, and being a habitual criminal. Defendant entered pleas of not guilty to the charges.

The record further shows that a plea agreement was eventually negotiated between defendant and the State. Pursuant to the plea agreement, defendant agreed to plead no contest to the charges of first degree murder and use of a deadly weapon in the commission of a felony. In exchange for the pleas, the State agreed to dismiss the habitual criminal charge and further agreed that the State would not adduce any evidence under Neb. Rev. Stat. §§ 29-2520 to 29-2524 (Reissue 1989) at the sentencing hearing following defendant's plea to first degree murder. The State's agreement not to adduce such testimony substantially reduced defendant's chances of receiving the death penalty for the crime.

At his rearraignment on October 3, 1986, defendant withdrew his pleas of not guilty and pled no contest to the charges of first degree murder and use of a deadly weapon in the commission of a felony. The State dismissed the charge of being a habitual criminal. Before accepting defendant's pleas, the court reviewed with defendant the elements of the crime charged in each count and the respective penalties for those crimes, as well as defendant's constitutional rights. As a factual basis for the pleas, the State offered a portion of a police report, a supplemental police report, a written statement signed by a Rudy Rivera, and the bill of exceptions of the preliminary

hearing. The court subsequently accepted the pleas after finding that defendant had been fully advised of and understood his constitutional rights, that there was a factual basis for the pleas, and that the pleas had been freely and voluntarily made by the defendant. The arraignment complied completely with the requirements set out in *State v. Tully*, 226 Neb. 651, 413 N.W.2d 910 (1987).

On November 10, 1986, a sentencing hearing was held, pursuant to § 29-2521, before a single judge of the district court. At the hearing, in satisfaction of its agreement, the State did not offer any evidence. A presentence investigation had been prepared and had been examined by defendant and submitted to the court. The trial court sentenced defendant to consecutive terms of life imprisonment on the first degree murder charge and $6^2/_3$ to 20 years on the deadly weapons charge. The convictions were affirmed on appeal. *State v. Domingus*, 225 Neb. xix (case No. 86-999, May 13, 1987).

On February 4, 1988, defendant filed a pro se "Motion To Vacate Sentence," treated by the trial court as a motion for postconviction relief. The trial court reviewed the complete record of the case and, without hearing, denied five of the eight paragraphs seeking relief. No appeal is taken from that denial. Counsel was appointed, and an evidentiary hearing was held on the other three paragraphs of the motion. These paragraphs, taken as a whole, alleged that trial counsel was ineffective and that as a result, defendant's pleas of guilty were not voluntary. After hearing, the trial court denied defendant's motion for postconviction relief. Defendant timely appealed.

Defendant has the burden of demonstrating ineffective assistance of counsel, and the record must affirmatively support that claim. *State v. Wiley*, 232 Neb. 642, 441 N.W.2d 629 (1989).

> "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."

*State v. Meis*, 233 Neb. 355, 360, 445 N.W.2d 610, 614 (1989) (quoting *State v. Patterson*, 232 Neb. 304, 440 N.W.2d 242 (1989)). A defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989); *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989); *Johnson v. Mabry*, 752 F.2d 313 (8th Cir. 1985).

> In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including the credibility and weight to be given the testimony of a witness, and the trial court's findings will be upheld unless the findings are clearly erroneous.

*State v. Marshall*, 233 Neb. 567, 573, 446 N.W.2d 733, 737 (1989).

Controverted testimony on the effectiveness of defendant's original counsel, Kent E. Florom, was presented at the evidentiary hearing held July 22, 1988. Defendant, who was first to testify, reiterated some of the allegations contained in his motion to vacate his sentence. Defendant testified that he was visited by defense counsel "twice or three times" at the Lincoln County jail, that counsel failed to review his case with him, and that defense counsel coerced defendant into entering the pleas.

With regard to the number of consultations between defendant and his trial counsel, the record shows the following on the cross-examination of defendant:

> Q [by county attorney] Mr. Domingus, how many times did Mr. Florom [defense counsel] come up to see you?
>
> . . . .
>
> A [by defendant] It may have been twice or three times.
>
> Q If I told you it was 17 times, would you say that would be true or false?
>
> A That's a damed [sic] lie.
>
> Q So if I had jail records that indicated Mr. Florom was

up to see you 17 times, that would be — in your own words — "a damed [sic] lie"?

A That's right.

Jail records introduced at the evidentiary hearing showed at least 13 consultations at the jail between defendant and his counsel, as well as several telephone calls. The trial court found that Florom "visited with the defendant on 17 occasions at the Lincoln County Jail . . . ." Defendant's testimony to the contrary was typical of his unfounded charges throughout this proceeding.

The deputy county attorney who tried the case testified that he had many opportunities to observe counsel's performance in the Domingus case and that, in his opinion, counsel provided excellent representation. Florom testified that he had tried four capital cases before representing defendant in this case; that he had spent more than 100 hours investigating the case against defendant; and that he had visited the scene of the murder five times, including one visit at 1 a.m., which was the approximate time of the murder. He also cross-examined each of the eight prosecution witnesses at the preliminary hearing and interviewed other witnesses. He further testified that he reviewed the entire case with defendant and informed him of the State's position and that he asked defendant "to let [counsel] do something that would keep him [defendant] alive." The court considered the testimony concerning the representation provided by counsel and found that his original counsel "did act effectively, properly and did exert his utmost efforts in representation of the defendant in this case." The evidence fully supports that finding.

The gravamen of defendant's argument that his pleas were not freely and voluntarily entered because counsel coerced him into negotiating the pleas is set out in paragraph 5 of his motion. Defendant maintains that counsel coerced him into negotiating the pleas by threatening that "he [defendant] would surly [sic] die if he did not enter a plea in this case." While, as set out above, counsel does not deny that he advised defendant to negotiate the pleas in order to remain alive, he does deny that there was any coercion involved in the pleas.

A plea will be found to be freely and voluntarily entered

upon the advice of counsel if that advice is within the range of competence demanded of attorneys in criminal cases. *Strickland, supra*. The record contains overwhelming proof of defendant's guilt and evidence warranting a death penalty had the case proceeded to trial. The record contains pictures of the victim showing she had been severely beaten and testimony stating the victim was beaten, while alive, with a blunt object in the face and head, causing extensive fracturing leading to her death. Evidence of injuries and bruising on her forearms showed that she had struggled before she died. After reviewing the presentence report, the trial court observed at the sentencing hearing that the defendant received a "substantial concession" under the plea agreement which prevented a recommendation of a death penalty. The record shows that no coercion existed in the plea negotiations and that defendant's trial counsel did not coerce defendant. The record shows that defendant's counsel acted competently in advising defendant as he did to accept the State's offer and enter pleas of no contest.

Defendant also contends that counsel was inadequate in his pretrial investigation of the facts which formed the basis of defendant's pleas. On this point, defendant first alleges that his counsel failed to contact Lee Ann Cooper, who was defendant's girlfriend prior to his incarceration. Cooper provided a statement to the police in an effort to exculpate the defendant of the crime.

Defendant's contention is not supported by the record. Not only did defendant's trial counsel interview Cooper about the statement defendant requested, but Cooper recanted her statement before defendant entered his pleas.

Next, defendant contends that counsel failed to interview a key witness, Rudy Rivera, a 17-year-old nephew of defendant. Defendant contends that Rivera's statement, given to the police 2 days before defendant changed his pleas, was the ultimate inducement for defendant to negotiate the pleas. The essence of defendant's contention is that he based his decision to negotiate the pleas on the information contained in the Rivera statement, but since counsel failed to investigate the statement, counsel's conduct fell below the minimum standard required of attorneys, as set forth in *Ford v. Parratt*, 638 F.2d 1115 (8th Cir.

1981), *vacated on other grounds* 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242.

Defendant would have us adopt a per se rule that if a defendant's counsel does not take the statement of a witness furnishing damaging evidence to the prosecution, that counsel is ineffective as a matter of law. Such is not the law. The *Ford* case states that the duty to obtain the specifics of certain unsubstantiated facts arises conditionally, that is, the issue must be "deemed by both counsel and client to be significant enough to trigger the decision to plead . . . ." 638 F.2d at 1118. In this case the record shows that counsel was not ineffective in not pursuing the Rivera matter, because the statement was cumulative and not significant enough in itself to trigger a decision to plead or not to plead. See, also, *Johnson v. Mabry*, 752 F.2d 313 (8th Cir. 1985).

With regard to the Rivera statement, the record shows that 2 days before defendant entered his pleas, Rivera gave the police a signed statement that defendant had admitted to Rivera that "he [defendant] had killed someone" whose name was "Ruth." Defendant, on the other hand, testified at the hearing that Rivera misunderstood him, that he only told Rivera that he, the defendant, was "involved in a murder."

Rivera also admitted in his statement to the police that he had assisted defendant in burying a sack which Rivera stated contained clothes. Such evidence was cumulative and only corroborated earlier evidence that defendant had been seen with Rivera at the same location burying "something."

" 'In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. . . .' " *Burger v. Kemp*, 483 U.S. 776, 795, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). See, also, *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988). In light of the evidence before us, defendant has demonstrated neither that his attorney's investigating strategy reflected unreasonable professional judgment nor that his attorney failed to perform at least as well as an attorney with ordinary training and skill in the criminal law in the area.

Assuming arguendo, in retrospect, that counsel should have pursued the Rivera matter, such error would not automatically mandate the setting aside of defendant's convictions based on ineffective representation. Defendant must also demonstrate, in addition to establishing counsel's deficiency, that such error constitutes prejudice. See, *Strickland, supra*; *State v. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989). "In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial." *State v. Wakeman*, 231 Neb. 66, 72, 434 N.W.2d 549, 554 (1989).

Although defendant contends Rivera's statement was a key factor triggering his guilty pleas, the record contains other compelling evidence substantiating defendant's guilt. Defendant himself admitted that he buried the sack containing his clothes and that he was "involved in a murder." Another witness, Tammy Lynn Chisam, testified at the preliminary hearing that defendant visited her at her home in the early hours on the morning of the victim's death and used her shower. She testified that she saw blood on defendant's hands and clothes and that after defendant showered, he admitted to her that "he thought he had just killed someone." A third witness, Carmen Moreno, provided additional testimony corroborating much of the evidence of defendant's guilt. Moreno testified that she saw the victim and defendant arguing prior to and not far from where the victim's body was found. Insofar as defendant contends that he based his pleas on the information contained in Rivera's statement, we find that such statement simply provided cumulative evidence of defendant's guilt.

In conclusion, it is clear that at the time defendant entered into the plea agreement, his counsel had investigated the case thoroughly and knew of overwhelming information regarding the death of the victim and defendant's guilt. These facts were furnished to defendant and provided a knowledgeable basis upon which defendant could intelligently formulate the pleas. Defendant has failed to cite any fact that counsel should have revealed to him at the time of the pleas that would have made going to trial a more appealing alternative. Absent some proof,

we cannot hold that a further investigation would have led to the discovery of other facts which, in turn, would have resulted in an informed decision on defendant's part to go to trial, rather than to negotiate the pleas.

In argument to this court, defendant's appellate counsel stated that the county attorney at some time extended and then withdrew an offer allowing the defendant to plead to second degree murder and that the withdrawal was based on the information received from Rivera. In his brief, the contention is made, somewhat more ambiguously, that after the Rivera statement, "the County Attorney was no longer considering allowing the Appellant to plead to 'Second Degree Murder' . . . ." Brief for appellant at 3-4. The bill of exceptions shows there had been some discussion about a plea to second degree murder, and defendant's counsel testified that he was getting close to obtaining such a plea. We have carefully examined the record and are unable to locate any evidence of an actual offer by the State to agree that defendant could plead to second degree murder. The facts in this regard do not support defendant's contention.

Defendant has failed to demonstrate that he is entitled to relief on any of the allegations raised in his motion for postconviction relief. The judgment of the district court is affirmed.

AFFIRMED.

---

STATE OF NEBRASKA, APPELLEE, V. GARY E. GRAHAM, APPELLANT.
450 N.W.2d 673

Filed January 26, 1990. No. 89-217.

1. **Criminal Law: Self-Defense.** Subject to the provisions of Neb. Rev. Stat. §§ 28-1409 and 28-1414 (Reissue 1989), the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
2. _____: _____. In order for the self-defense justification to be applicable, (1)

the belief that force is necessary must be reasonable and in good faith, (2) the force must be immediately necessary, and (3) the force used must be justified under the circumstances.

3. **Trial: Jury Instructions: Evidence.** A defendant is entitled to have the jury instructed on his or her theory of defense if there is any evidence to support it.
4. **Jury Instructions: Appeal and Error.** Failure to give a jury instruction constitutes reversible error only if there is prejudice to the defendant.

Appeal from the District Court for Otoe County, RAYMOND J. CASE, Judge, on appeal thereto from the County Court for Otoe County, RANDALL L. REHMEIER, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Peter K. Blakeslee for appellant.

Robert M. Spire, Attorney General, and Delores Coe-Barbee for appellee.

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

FAHRNBRUCH, J.

Contending that the Otoe County Court erred in refusing to instruct the jury on justification for use of force in self-protection, Gary E. Graham appeals his conviction for third degree assault in violation of Neb. Rev. Stat. § 28-310 (Reissue 1989). We reverse and remand the cause for a new trial.

During the afternoon and continuing into the evening of July 3, 1988, the victim, James R. Barker, had been consuming drinks containing alcohol in several bars in Nebraska City. There was testimony that Barker was intoxicated and belligerent on the night in question.

At approximately 10 p.m., Barker entered the bar in which the alleged third degree assault occurred. It is uncontradicted that while maneuvering for a pool shot, Barker rudely removed a chair upon which the defendant's feet were resting. Graham and his girlfriend then left the premises to avoid the possibility of an altercation. No words were exchanged between Graham and Barker at that time.

Approximately 30 to 45 minutes later, Graham, accompanied by his girlfriend, returned to the bar to pick up a friend. Graham followed his girlfriend to the rear of the bar. As

Graham's girlfriend passed Barker, who was either standing near, or sitting on a stool at, the end of the bar, Barker made a vulgar comment concerning the girlfriend and touched her buttocks. Graham responded, "That's my old lady." To this, Barker said he didn't care. The testimony as to events following this exchange is in conflict.

A police sergeant testified that Graham informed him that Barker drew back his hand and started to rise from his chair. The defendant informed the officer that he thought Barker was going to hit him, so Graham hit Barker one time. Graham also told the sergeant that Barker fell back in his chair and started to come up again. Graham told the sergeant that he again struck Barker and Barker went down to the floor.

A witness testified that he observed Barker pick up a beer bottle and try to hit Graham with it. The witness said he thought the defendant was defending himself. The witness further testified that Graham picked up Barker midlength and threw him headfirst into a pool table.

Graham's girlfriend testified that although she did not see the alleged assault because she continued walking past Barker, Barker could only have been hit a couple of times.

Jim Bohlen, a friend of Graham's, testified that Barker grabbed a beer bottle and was getting ready to take a swing. Bohlen said that at that time, Graham "popped [Barker] twice right between the eyes," and Barker fell to the floor, partially underneath the pool table. Bohlen testified that he thought that Graham was defending himself. He further testified that after Barker's friends lifted him from the floor and placed him in a chair, Barker fell on the floor a couple of times. It was later determined that Barker had suffered a broken neck.

Upon the request of the bartender, Graham left the bar without further incident. As Graham and his girlfriend were departing the premises, Graham informed Barker's friend that he was the one who had hit Barker. At that time, the seriousness of Barker's injury was unknown.

A rescue squad was called for assistance. A member of the rescue squad testified that Barker had blood on his lips, but no wound on his head. A neurosurgeon testified that there were abrasions about Barker's frontal region, just behind his scalp,

and about Barker's temple and one ear. Barker also had an abrasion and cut on his chin. The doctor testified that being struck on the chin alone would not cause a broken neck. The doctor also stated that Barker could have sustained this sort of an injury to his neck by falling. The doctor also testified that falling after being punched and striking his head on a pool table would be consistent with Barker's broken neck. The neurosurgeon testified that if Barker was picked up and his head thrust into the pool table, this too would be consistent with Barker's injury.

After leaving the bar, Graham called the police to determine if they wished to speak with him. At 1:25 a.m. on July 4, Graham was interviewed by the Nebraska City police sergeant and gave his statement regarding the events at the bar.

Graham was charged with third degree assault. A jury trial was had in the county court for Otoe County. The court refused Graham's requested instruction on justification for use of force in self-protection, commonly known as self-defense. The jury found Graham guilty of violating § 28-310(1)(a), which provides that "[a] person commits the offense of assault in the third degree if he . . . [i]ntentionally, knowingly, or recklessly causes bodily injury to another person." The court sentenced Graham to 1 year's imprisonment. On appeal, the district court for Otoe County affirmed the conviction and sentence.

On appeal to this court, Graham alleges that the county court erred in refusing to give to the jury an instruction regarding justification for use of force in self-protection.

Self-defense has been codified in Neb. Rev. Stat. § 28-1409 (Reissue 1989). Section 28-1409(1) provides:

> Subject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

In order for the self-defense justification to be applicable, (1) the belief that force is necessary must be reasonable and in good faith, *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979); (2) the force must be immediately necessary, *State v. Schroeder*,

199 Neb. 822, 261 N.W.2d 759 (1978); and (3) the force used must be justified under the circumstances, *State v. Drew*, 216 Neb. 685, 344 N.W.2d 923 (1984). See, also, NJI 14.33.

A defendant is entitled to have the jury instructed on his or her theory of defense if there is *any* evidence to support it. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986).

Graham did not testify. The trial court refused the self-defense instruction because it apparently believed that a defendant must testify in order to establish his or her good-faith belief that force was necessary. However, this is not the rule in this state. As expressed in *Clayburn*, it is necessary only that there be any evidence to support a theory of self-defense.

If the jury that tried Graham believed the defendant's version of the facts and his state of mind as related in the testimony of the police sergeant, that Barker intended to hit Graham with his hand, that Barker had picked up a beer bottle and was attempting to hit Graham with it, and that it appeared to bystanders that Graham was defending himself when he hit Barker, then the jury could have reasonably found that Graham's use of force against Barker was justified. Since there was evidence supporting a self-protection defense, the trial court should have instructed the jury accordingly.

Failure to give a jury instruction constitutes reversible error only if there is prejudice to the defendant. *State v. Reichstein*, 233 Neb. 715, 447 N.W.2d 635 (1989). Obviously, without a justification for use of force in self-protection instruction, the jury could not consider that defense. Graham is correct in arguing that without authority to consider self-defense, the jury had no choice but to find the defendant guilty of the assault charge.

Because the trial court refused to instruct the jury on self-defense, Graham was prejudiced. We reverse, and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

# IN RE INTEREST OF N.L.B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. M.B., APPELLANT.

450 N.W.2d 676

Filed January 26, 1990. No. 89-305.

1. **Jurisdiction: Affidavits: Appeal and Error.** In order to perfect an appeal in forma pauperis, all that is necessary to confer jurisdiction on the Supreme Court is to file a notice of appeal and an affidavit signed by the appellant, as required by Neb. Rev. Stat. § 25-2301 (Reissue 1989).
2. **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 it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
3. **Parental Rights: Evidence: Proof.** In order to terminate parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan, and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.
4. **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.
5. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate herself or himself within a reasonable time, the best interests of the children require termination of parental rights.
6. _____. The primary consideration in considering whether parental rights should be terminated is a child's best interests.
7. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
8. **Appeal and Error.** This court will only consider errors that are assigned and discussed, although it may note plain error which is not assigned.
9. _____. It is not the duty of a reviewing court to search the record for the purpose of ascertaining whether there is error, and any error must be specifically pointed out.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Mark J. Slowiaczek for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

Michael L. Getty, guardian ad litem.

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

HASTINGS, C.J.

The mother has appealed from an order of the separate juvenile court which terminated her parental rights to her 6-year-old daughter N.L.B. She assigns as error the finding that clear and convincing evidence was presented that she failed to substantially comply with the juvenile court's order of rehabilitation and that the best interests of the minor child would be served by termination of parental rights. We affirm.

Before addressing the merits of this appeal, it is necessary that we dispose of a procedural problem raised by appellee's motion to dismiss. This motion alleges that we have no jurisdiction because appellant failed to file an order of authorization by the trial court to proceed in forma pauperis within the 30-day requirement of Neb. Rev. Stat. § 25-1912 (Reissue 1989).

Section 25-1912 requires that the notice of appeal must be filed and the docket fee paid within 30 days of the rendition of the judgment or decree or the making of the final order from which an appeal is taken. The appeal is deemed perfected upon compliance with those requirements. Conversely, the Supreme Court has no power to exercise appellate jurisdiction in proceedings to review a judgment of the trial court in a civil case unless the appellant shall have filed a notice of appeal and deposited a docket fee in the office of the clerk of the district court within the time fixed by statute. *American Legion Post No. 90 v. Nebraska Liquor Control Commission*, 199 Neb. 429, 259 N.W.2d 36 (1977).

However, Neb. Rev. Stat. § 25-2301 (Reissue 1989) directs that any court of the State of Nebraska shall authorize the commencement of an appeal without prepayment of fees and costs "by a person who makes an affidavit that he or she is unable to pay such costs or give security." It is quite apparent that the Legislature intended that the filing of an affidavit of poverty was to replace the requirement of the payment of the docket fee.

In this case, appellant has filed both the notice of appeal and the poverty affidavit within the time prescribed by statute. However, the appellee points out that no order of the trial court authorizing appellant to proceed in forma pauperis was obtained within the time limitation. Reliance is made upon the following from *In re Interest of K.D.B.*, 233 Neb. 371, 372, 445 N.W.2d 620, 622 (1989): "In addition [to filing the affidavit], 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."

The second sentence of the quoted portion from *K.D.B.* is taken from § 25-2301. However, although it may be customary and a mark of prudence for an appellant to obtain authorization of the trial court in order to forestall any finding of a lack of good faith and possible dismissal of the appeal, contrary to appellee's assertion, there is no statutory requirement that such authorization be obtained in order to make the affidavit effective. *K.D.B* is not controlling here because in that case the appeal was not perfected because the purported affidavit was defective.

In any event, we hold that all that is necessary for one proceeding in forma pauperis to confer jurisdiction on this court on appeal is to file the notice of appeal and the affidavit of poverty required by § 25-2301. The motion to dismiss is overruled.

Turning to the merits of the appeal, this is another case involving one of several children of an unwed mother who by reasons of health or mental capacity and complete lack of interest is wholly unable and unwilling to cope with the situation. This child was one of seven born to the mother as the result of temporary relationships with three or four different men. Beginning in October 1984, the child involved here was placed in voluntary foster care because the mother was overwhelmed with the care of her then three children, particularly with the care of another daughter who was hospitalized because of leukemia.

Pursuant to a petition filed on July 26, 1985, the juvenile court issued an order for immediate custody and placement of

the child in foster care. The petition in substance alleged that because of the mother's nomadic lifestyle and overuse of babysitters the child had been deprived of a stable home; the mother had failed to provide the child timely and necessary medical care; the child's personal hygiene had been neglected; and the mother had refused to cooperate with several agencies made available to assist her with parenting skills.

An adjudication hearing was held on March 11, 1986, following which the court determined in essence that the petition was true. Upon a review hearing held on April 18, 1986, the court ordered that the child remain in the custody of the Department of Social Services and ordered the mother to comply with the following plan for rehabilitation:

a. Maintain a stable and clean residence;

b. Cooperate with all the workers including FITS [Family Intervention and Treatment Service] personnel;

c. Notify the Court of any change in residence immediately;

d. Maintain a steady legal income;

e. Keep all rent payments current;

f. Have visitation as arranged by the guardian ad-litem, probation officer and Nebraska Department of Social Services; to include extended visits, progressing to overnights at the discretion of the FITS Staff and other workers involved;

g. Continue to allow the Visiting Nurse in her home.

On June 18, 1986, the juvenile court modified the previous order to the extent that the child was allowed to be placed in the care and in the home of the mother.

In January 1987, the juvenile court created additional requirements on the mother by requiring that she participate in a job training program and in family therapy or parent education and that the child be enrolled in a preschool program.

At a review hearing held on April 16, 1987, it was discovered that there was inadequate supervision of the child and that there was a problem of alcohol abuse on the part of the mother's current live-in boyfriend. The court found that the best interests of the child required her to be placed in the temporary

custody of the Department of Social Services.

Further review hearings were had on September 23, 1987, and March 22, 1988, at which times it was discovered that the mother continued to be in noncompliance with the plan for rehabilitation.

A motion to terminate parental rights was filed on August 24, 1988, and a series of hearings was held beginning on December 15, 1988, and concluding on January 24, 1989. The juvenile court then sustained the motion on the basis that clear and convincing evidence had shown that the child was within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 1988) because reasonable efforts, under the direction of the court, had failed to correct the conditions leading to the previous determination that the child was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and that in the best interests of the child, the parental rights of the mother over her should be terminated.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989); *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989); *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989).

We have held that to terminate parental rights under § 43-292(6), the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan, and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child. *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989); *In re Interest of P.M.C., supra*; *In re Interest of R.T. and R.T., supra*.

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 J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989).

Where a parent is unable or unwilling to rehabilitate herself within a reasonable time, the best interests of the children require termination of parental rights. *Id.*

The child in this case is a child with certain disabilities requiring special care. Due to problems with speech delay and hearing, the child, while in foster care, has been placed in a special education program. She requires a higher than average home situation in order to help her function in society.

Regarding the failure to provide clean housing, as early as December 1982, an older brother of the child had been removed from the mother's home partially because the house was poorly kept.

The problem with maintaining a clean house is a problem the juvenile court had been addressing for at least 6 years prior to the date of the termination hearing. No consistent or long-lasting progress has been made in this respect in spite of the fact that homemaker service on four different occasions assigned homemakers to work with the mother. She showed, for the most part, complete indifference to this proffered help.

The mother was required to participate in a job training program and obtain employment. She failed to fully comply with these requirements as well. The mother's employment history is equally unimpressive. She worked a total of perhaps 3 or 4 months from March 1987 to May 1988.

Although she was ordered to attend counseling sessions and cooperate with personnel involved, the mother's compliance was sporadic at best. She utterly failed to follow through with required additional counseling and individual therapy. Personnel from Family Intervention and Treatment Service who were to counsel with the mother would frequently find no one at home. The child's foster parents testified that the mother told them that she and her boyfriend would frequently hide in a closet and pretend they were not home when the people from FITS would call.

The mother's excuses for her failure to comply with the court-ordered plan included her pregnancies and a lack of

transportation, although she conceded that she knew transportation could be arranged for her.

It is apparent that the mother has not complied with the court's plan of rehabilitation. In light of the protracted nature of the juvenile court's involvement, dating back nearly 6 years for some deficiencies, the mother's ability to rehabilitate herself seems remote, if not hopeless. The primary consideration in considering whether parental rights should be terminated is a child's best interests. *In re Interest of J.H. et al., supra.* A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *Id.* The mother has been either unable or unwilling to rehabilitate herself within a reasonable period of time. Thus, the best interests of the child require that the parental rights be terminated.

The mother, in her brief, advances argument that the requirements set forth in the court orders are unreasonable and onerous. Exactly which requirements are unreasonable and onerous are not specified. Neither is there an explanation provided as to why any of the requirements are unreasonable and onerous. The argument is also not within the scope of the assigned errors.

This court will only consider errors that are assigned and discussed, although it may note plain error which is not assigned. Neb. Rev. Stat. § 25-1919 (Reissue 1989); Neb. Ct. R. of Prac. 9D(1)d (rev. 1989). It is not the duty of a reviewing court to search the record for the purpose of ascertaining whether there is error, and any error must be specifically pointed out. *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982).

Even if the argument is considered, this court can find no merit in it. A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of J.H. et al., supra.*

The judgment of the juvenile court is affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

Although I agree with the outcome the majority reaches, I

must dissent on procedural grounds.

In deference to the fact that no question as to the validity of the poverty affidavit was raised and briefed by the parties, the majority does not comment on the State's representation in its motion for dismissal that the poverty affidavit was "signed by" the appellant. In actuality, the affidavit was executed not by the appellant, but by her attorney.

As the majority notes, Neb. Rev. Stat. § 25-2301 (Reissue 1989) requires that the impoverished appellant, not her or his attorney, execute the affidavit which substitutes for the payment of fees and costs and the posting of security. Approximately a century and a third ago, Georgia established the principle that statutes such as § 25-2301 are to be strictly construed, and, thus, an affidavit of poverty executed by a party's attorney does not suffice. *Elder vs. Whitehead et al.*, 25 Ga. 262 (1858). Accord, *Jackson v. Fincher*, 128 Ga. App. 148, 195 S.E.2d 762 (1973); *Cohen v. Hautcharow*, 84 N.Y.S. 573 (1903). As stated in *Vance v. Vance*, 197 Miss. 332, 335, 20 So. 2d 825, 826 (1945), "[I]f a statute specifically prescribes who shall make a certain affidavit, it can be made by none other than the person specified, although there is nothing in the language of the statute to show that its designation was intended to be exclusive."

The circumstances of this case demonstrate that there are sound reasons beyond the words of § 25-2301 for requiring that an appellant personally execute an affidavit which asserts poverty. The attorney's affidavit recites that the appellant was not gainfully employed during the period he represented her, that she was now living in Gettysburg, Pennsylvania, and that attempts to contact her concerning the affidavit were unsuccessful. On those meager and meaningless facts the attorney nonetheless ventured to swear that the appellant "is without sufficient funds to pay for the cost of this appeal."

I can understand an attorney's desire to do all that can legally be done to protect a client's interests and to thereby protect himself or herself from a subsequent claim that he or she was derelict in his or her duty, but how could the attorney in this case know his client's financial position at the time he executed the affidavit? The answer is that he cannot. He knew only what she

told him her condition was when she was living in his area. By reciting that he could not reach his client to discuss the poverty affidavit with her, the attorney admitted that he did not know what her condition was at the time he took an oath on the matter. He had no basis for representing that she was then a pauper, and his representation therefore is not worthy of credence. The mere fact that the appellant left the local area suggests that something changed in her life. That change may well have had an effect on her financial position. Beyond that, we have no way of knowing that she wanted to appeal; she may well have accepted the result below as inevitable and elected to move on with her life.

Nor is it too much to ask one whose legal bills are being paid by the taxpayers to keep in touch with her or his attorney and to remain available to do whatever is necessary in furtherance of the litigation, if furthering the litigation is the client's desire. It is only fitting and proper that, in addition to whatever civil or other criminal sanctions may result, an appellant proven to have falsely sworn to poverty be subject to the penalties for perjury.

Moreover, I am not at all certain that an attorney who executes an affidavit concerning a client's financial condition does not violate the advocate-witness rule. See, *State ex rel. NSBA v. Neumeister, ante* p. 47, 449 N.W.2d 17 (1989); *Porter v. Porter*, 274 N.W.2d 235 (N.D. 1979).

For the foregoing reasons, I would dismiss the appeal for want of jurisdiction.

SHANAHAN and FAHRNBRUCH, JJ., join in this dissent.

# STATE OF NEBRASKA, APPELLEE, V. KENNETH J. KEEVER, APPELLANT.

450 N.W.2d 682

Filed January 26, 1990. No. 89-329.

1. **Trial: Judgments.** The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, which through inadvertence or mistake has not been truly recorded.
2. _____: _____. The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to the specific purpose of the proceeding, that is, to correct the record to accurately reflect what actually happened in the proceedings.
3. **Sentences.** The granting of presentence jail time credit is within the trial court's discretion except where the statutory maximums are exceeded.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

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

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

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

PER CURIAM.

On April 20, 1988, the defendant, Kenneth J. Keever, was sentenced to a total of 22 to 46 years' imprisonment for kidnapping, first degree assault, two counts of robbery, and two counts of using a knife in the commission of a felony. Upon direct appeal, the judgments were affirmed.

On March 6, 1989, the defendant filed in the district court a "Motion for an Order Nunc Pro Tunc Crediting Time in Custody Prior to Sentencing." The motion alleged that he was arrested on December 22, 1987, and that he had remained in custody for a period of 119 days prior to sentencing. The defendant requested that the district court credit him for 119 days as allowed by Neb. Rev. Stat. § 83-1,106 (Cum. Supp. 1988); otherwise, he would be denied equal protection of the laws under the U.S. Constitution.

The district court found that the defendant's sentences were within the statutory limits, that the sentences were reasonable, and that there was no statutory basis for a reduction in sentence because § 83-1,106 became effective on July 9, 1988, approximately 3 months after the defendant was sentenced. The defendant has appealed and has assigned as error the failure of the district court to grant the relief requested.

In *State v. Al-Hafeez*, 208 Neb. 681, 305 N.W.2d 379 (1981), the defendant sought an order nunc pro tunc to credit the defendant with 88 days of jail time served awaiting trial in the district court. This court held that the purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, which through inadvertence or mistake has not been truly recorded. We further held:

> The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to the specific purpose of that proceeding, i.e., to correct the record to accurately reflect what actually happened in the proceedings.

*Id.* at 683-84, 305 N.W.2d at 380.

There is no evidence that there was any mistake in recording the sentences imposed in this case. On the contrary, at the time of sentencing, the trial judge stated on the record that he had "given due . . . consideration to the time already served, and decline[d] to give any credit for time served."

Even if considered as a request for relief pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989), the defendant's contentions are without merit. The act applies only where the prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable. *State v. Von Dorn, ante* p. 93, 449 N.W.2d 530 (1989); *State v. Ferrell,* 230 Neb. 958, 434 N.W.2d 331 (1989). Furthermore, a motion for postconviction relief cannot be used as a substitute for an appeal or to receive a further review of issues already resolved. *Id.*

The trial court properly determined that the defendant had no statutory right to a reduction in sentence, since § 83-1,106

(Cum. Supp. 1988) was not in effect at the time the defendant was sentenced and does not apply retrospectively. See *State v. Von Dorn, supra*. We also held in *Von Dorn*, as against an equal protection challenge, that the granting of presentence jail time credit is within the trial court's discretion except where the statutory maximums are exceeded. The district court did not exceed the statutory maximums in sentencing the defendant, and the defendant did not raise the issue of the excessiveness of his sentence in his direct appeals to this court. The defendant's motion did not state a proper basis for nunc pro tunc or postconviction relief, and his assignment of error is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

---

## STATE OF NEBRASKA, APPELLANT, V. DARRYL WREN, APPELLEE.

450 N.W.2d 684

Filed January 26, 1990. No. 89-336.

1. **Appeal and Error.** It is a well-established rule that on questions of law the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.
2. **Courts: Jurisdiction: Appeal and Error.** The trial judge has no authority to decide whether an appeal under Neb. Rev. Stat. § 29-2315.01 (Reissue 1989) may be taken; he or she may only decide if the application is in conformity with the truth and whether the part of the record which is proposed to be presented is adequate for a proper consideration of the matter. The arbitrary refusal of a district judge to endorse the application does not deprive this court of jurisdiction.
3. **Sentences.** The district court lacks statutory authority to sentence a defendant to a term of imprisonment in the county jail for a Class III felony.
4. _____. The authority of a court to reduce a sentence pursuant to Neb. Rev. Stat. § 29-2308.01 (Reissue 1989) extends only to reducing the sentence to a statutorily authorized sentence.
5. _____. A void sentence is no sentence.
6. **Sentences: Appeal and Error.** On direct appeal this court has the power to remand for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself or herself invoked appellate jurisdiction for the correction of errors.

7. **Sentences: Double Jeopardy: Appeal and Error.** Review of a defendant's sentence initiated by the government does not in itself offend double jeopardy principles just because success might deprive the defendant of the benefit of a more lenient sentence.
8. **Sentences: Double Jeopardy.** The double jeopardy clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his or her punishment will turn out to be.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Exceptions sustained, and cause remanded with directions.

Randy R. Stoll, Seward County Attorney, for appellant.

No appearance for appellee.

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

HASTINGS, C.J.

This is an appeal brought by the State through the county attorney for Seward County, pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1989). The State argues that the sentence imposed by the district court is not authorized by Neb. Rev. Stat. § 28-105(2) (Reissue 1985) and that the reduced sentence imposed by the district court is not authorized by Neb. Rev. Stat. § 29-2308.01 (Reissue 1989).

At issue in this appeal are questions of law. It is a well-established rule that on questions of law the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.

On May 18, 1987, pursuant to a plea of guilty, defendant was convicted of one count of burglary, and following the revocation of a sentence of probation for 4 years, he was sentenced on February 21, 1989, to a term of imprisonment in the *Seward County jail* for 1 year. On March 6, 1989, defendant's motion for reduction of sentence was heard and sustained "to the extent that the statute provides that a sentence of one year be served in the Nebraska Correctional Complex it is ordered served in the *Seward County Jail*." (Emphasis supplied.)

On March 13, 1989, the county attorney for Seward County

filed with the district court an application for leave to docket error proceedings. On March 14, stating that an order of sentence reduction is not an appealable order, the district judge denied the application for leave to docket error proceedings.

The application without the judge's signature was filed in this court on March 28, 1989, and on April 17, this court granted leave to docket error proceedings.

The State assigns as errors that a sentence to a term of imprisonment in the county jail for a Class III felony is not authorized by § 28-105(2) and that the district court erred in resentencing the defendant to a term of imprisonment for 1 year in the county jail in response to defendant's application for reduction of sentence pursuant to § 29-2308.01.

At the outset we are met with a question of jurisdiction because the application for appeal was not signed by the district judge. Section 29-2315.01 sets forth the procedures to follow in order for the State to appeal rulings or decisions of the trial court during a criminal case. The application for leave to docket the appeal, as provided in that section, must be presented to the trial court within 20 days after the final order is entered.

> [I]f the trial court finds it is in conformity with the truth the judge of the trial court *shall sign the same* and shall further indicate thereon whether in his or her opinion the part of the record which the county attorney proposes to present to the Supreme Court is adequate for a proper consideration of the matter.

(Emphasis supplied.) § 29-2315.01. The application shall then be presented to the Supreme Court within 30 days from the date of the final order.

As should be apparent, the trial judge has no authority to decide whether an appeal under § 29-2315.01 may be taken; he or she may only decide if the application is in conformity with the truth and whether the part of the record which is proposed to be presented is adequate for a proper consideration of the matter. The arbitrary refusal of the district judge to endorse the application does not deprive this court of jurisdiction.

Defendant was convicted of a Class III felony. See Neb. Rev. Stat. § 28-507 (Reissue 1989). Section 28-105(2) provides in

pertinent part: "All sentences of imprisonment for Class IA, IB, II, and III felonies . . . shall be served in institutions under the jurisdiction of the Department of Correctional Services."

It is clear that the district court lacked statutory authority to sentence defendant to a term of imprisonment in the county jail. See *State v. Rathbun*, 205 Neb. 329, 287 N.W.2d 445 (1980). It is equally clear that the district court lacked authority to utilize § 29-2308.01 to "reduce" defendant's sentence to a term of imprisonment in county jail rather than in an institution of the Department of Correctional Services. Ignoring the fact that reduction of sentence typically means a reduction in the amount of time to be served, it goes without saying that the authority of a court to reduce a sentence pursuant to § 29-2308.01 extends only to reducing the sentence to a statutorily authorized sentence. The State's exceptions must be sustained.

The issue remaining is whether this court can reverse and remand for a new sentence or only point out the trial court's error.

The trial court's sentence was certainly unauthorized as being beyond its power to pronounce. A void sentence is no sentence, *Knothe v. State*, 115 Neb. 119, 211 N.W. 619 (1926), and therefore the defendant is legally without sentence, *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974).

On direct appeal this court has the power to remand for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself or herself invoked appellate jurisdiction for the correction of errors. *State v. Ferrell*, 218 Neb. 463, 356 N.W.2d 868 (1984); *State v. Gaston, supra*. This case, however, is not a direct appeal wherein the defendant invoked appellate jurisdiction for the correction of errors.

As recently as *State v. Schall, ante* p. 101, 449 N.W.2d 225 (1989), in a § 29-2315.01 appeal by the State, we said: "Under § 29-2316 (Reissue 1985), the Nebraska Supreme Court may reverse an appellate ruling of a district court in a criminal case where the defendant has not been placed legally in jeopardy." Neb. Rev. Stat. § 29-2316 (Reissue 1989) provides in part:

The judgment of the court in any action taken under the

> provisions of sections 29-2315.01 to 29-2316 shall not be reversed nor in any manner affected where the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the Supreme Court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may thereafter arise in the state.

*Schall* involved an appeal from the judgment of the district court, which, while acting as an appellate court, reversed the judgment of the county court by reducing the sentence. We in turn reversed the judgment of the district court by reinstating the more severe sentence. However, the same reasoning would apply to the present case, wherein we reverse the more lenient sentence imposed by the district court while acting as a trial court.

The question then becomes whether the defendant in this case has been placed legally in jeopardy as far as his sentence is concerned.

Review of a defendant's sentence initiated by the government does not in itself offend double jeopardy principles just because success might deprive the defendant of the benefit of a more lenient sentence. *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). According to the Court:

> The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.

*Id.* at 132. The Court further stated:

> The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence. We have noted above the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and

> insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. . . . The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.

*Id.* at 136. "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *Id.* at 137.

Inasmuch as no double jeopardy is involved, we reverse the judgment of the district court and remand the cause with directions to resentence the defendant in accordance with this opinion.

EXCEPTIONS SUSTAINED, AND CAUSE REMANDED WITH DIRECTIONS.

---

## DENNIS JOSEPH BERAN, APPELLEE, V. SUSAN LORRAINE BERAN, APPELLANT.

450 N.W.2d 688

Filed January 26, 1990. No. 89-398.

1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of facts rather than another.
2. **Trial: Guardians Ad Litem.** Weight given to the opinion of the guardian ad litem is in the trial court's discretion.
3. **Divorce: Witnesses.** Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is

reversible error to refuse to hear their testimony depends upon the circumstances of the case.

4. **Child Custody.** No court can abdicate its obligation to determine what it deems to be in the best interests of the children, based upon the totality of the circumstances.
5. **Divorce: Child Custody.** When custody of a minor child is involved in a proceeding to dissolve a marriage, child custody is determined by a fit parent's right to have custody of the child and the child's best interests.
6. **Child Custody.** In determining a child's best interests in custody matters, a court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed and remanded with directions.

Sam Grimminger for appellant.

William A. Francis, of Cunningham, Blackburn, Livingston, Francis, Brock & Cunningham, for appellee.

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

WHITE, J.

In this appeal from the judgment of the district court for Hall County in a proceeding to dissolve the marriage of Dennis Joseph Beran and Susan Lorraine Beran, the only issue concerns child custody. Respondent-appellant, Susan Beran, contends that the trial court abused its discretion in failing to award custody of the parties' youngest child, Christina Beran, to appellant, and further claims that the district court erred in failing to (1) give greater weight and consideration to the opinion of the guardian ad litem, (2) allow minor child Jennifer Beran to testify as a witness on behalf of appellant for the limited purposes stated, (3) ask questions of minor child Christina during the in camera hearing calculated to ascertain

the best interests of the child with regard to custody, and (4) reschedule an in camera hearing at appellant's request for the purpose of eliciting information for the court to know which would have been in the best interests of the children.

The record indicates that the parties were married June 27, 1970, in Grand Island, Nebraska. They had three children: Jennifer, born August 21, 1973; Heather, born August 5, 1975; and Christina, born November 4, 1981. Initially, Dennis Beran provided for the family through his work as a barber, while Susan Beran took care of the children and the household and did some bookkeeping at home, mainly for Dennis' barbershop.

In November 1987, Susan began working full time for Metropolitan Life Insurance in Grand Island as a sales representative. Some of Susan's duties consisted of making presentations of policies to new customers and calling on current clients. The job required Susan to make late afternoon and evening appointments in order to meet with prospective customers. Metropolitan requires its sales representatives to meet certain sales quotas to avoid termination of employment.

Susan's employment, therefore, necessitated changes in the Beran household. Dennis took a more active role in caring for the children and the home and in matters such as meal preparation, cleaning, shopping, etc., while Susan juggled similar household chores and routines with the new demands of her job.

Factors incident to Susan's employment eventually appeared to put a great strain on the Berans' relationship. Dennis filed a petition for dissolution of marriage on September 19, 1988. He claimed that Susan had abandoned him and the family and that her job and a relationship with a male coworker had taken priority over her family.

The parties stipulated to a property settlement agreement, and the only issue in the divorce proceedings went to custody of the children. After hearing the evidence, the district court ordered that Susan have custody of Jennifer and that Dennis have custody of Heather and Christina. Susan appeals only from the court's awarding custody of Christina to Dennis.

## STANDARD OF REVIEW

In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of facts rather than another. *Ritter v. Ritter, ante* p. 203, 450 N.W.2d 204 (1990); *Huffman v. Huffman,* 232 Neb. 742, 441 N.W.2d 899 (1989).

However, in *Parker v. Parker, ante* p. 167, 449 N.W.2d 553 (1989), we noted that appropriate findings by the trial court, supported by the record, are helpful in establishing a firm and logical basis for the ultimate decision of a case in this court. If findings are not made, this court can make little application of our general rule that in our de novo review, we consider, and may give weight to, the fact that the trial court saw and heard the witnesses.

The only finding made by the court below regarding the children is that split custody is in their best interests. This is supported by the record regarding Jennifer and Heather, but there is no finding as to why custody in petitioner is in Christina's best interests.

## GUARDIAN AD LITEM

Appellant's first assignment of error is that the district court failed to give greater weight and consideration to the opinion of the guardian ad litem.

In *Jorgensen v. Jorgensen*, 194 Neb. 271, 231 N.W.2d 360 (1975), this court reversed the judgment of the district court, which based its adjudication on a written report by the guardian ad litem. In citing *Dier v. Dier*, 141 Neb. 685, 4 N.W.2d 731 (1942), we said: "Not only did this court hold that ex parte statements are too unreliable to be considered in the investigation of controverted facts but also that due process requires that witnesses be subject to the right of cross-examination by the parties to the proceeding." 194 Neb.

at 276, 231 N.W.2d at 363.

In the case at bar, the guardian ad litem did in fact take the stand as a witness and was subject to cross-examination. In such case, the district court is not required to give this testimony any more or any less weight than the testimony of other witnesses. We refer to our standard of review set out above that the trial judge hears and observes the witnesses and accepts one version of the facts rather than another. See *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985). Therefore, appellant's first assignment of error is without merit.

## TESTIMONY OF JENNIFER

Appellant next claims that the district court erred in failing to allow Jennifer Beran to testify as a witness on behalf of appellant for the limited purposes stated. The attorney for appellant made an offer of proof that Jennifer would testify from her personal knowledge of Susan Beran's conduct while at home regarding homemaking duties and things that she did for the family.

Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to refuse to hear their testimony depends upon the circumstances of the case. *Murdoch v. Murdoch*, 200 Neb. 429, 264 N.W.2d 183 (1978). In *Murdoch*, this court noted that the trial court had questioned two of the children concerning their custody preferences in the presence of counsel for both parties and that, considering all the testimony in the record, additional testimony of the children would not in any way have affected the trial court's determination of the credibility of the witnesses.

In the circumstances of the present case, Jennifer was not being called to testify regarding her custodial preference, to which she did have a strong opinion and which was already apparent, but to corroborate her mother's testimony that she (Susan) took care of the family and household duties as best she could when she was home. Dennis claimed that Susan did very little to care for the family and summoned many witnesses, friends and neighbors, who implied that Susan was no longer taking care of the family or that her family was no longer a

priority to her. On the other hand, Susan, to corroborate her testimony, presented only Jennifer, who lived in the house and could have observed firsthand whether her mother was taking care of the family when she could. This evidence could show stability, attitude, care, and environment provided by Susan, which are all factors in determining the best interests of the child for custody purposes.

Although courts are rightly wary of placing minor children of a divorce proceeding in the traumatic position of testifying, Jennifer nonetheless should have been allowed to testify. She was 15 years old at the time of trial, and it appears from the record that she had a clear understanding of the situation. The guardian ad litem's opinion, based on the recommendations of a Dr. Meidlinger, who was counseling the family, that Jennifer should not testify is a very broad recommendation. There is no further statement as to how she might be affected by testifying. The slight trauma or detriment, if any, to this young lady testifying in such a limited scope must be outweighed by the potential probative value of her testimony.

We therefore find that the district court erred in not allowing Jennifer Beran to testify for the limited purposes stated.

## IN CAMERA HEARING

In the case at bar, the guardian ad litem was of the opinion, and recommended, that it would be in Christina's best interests that she not be placed in a position of making a choice between her parents. In light of this recommendation, the trial judge wisely exercised his discretion in his interview with the three girls when he asked, "Christina, do you have anything you want to say to me?" to which Christina replied, "No." Very shortly thereafter, the following exchange was had: "THE COURT: Okay. And I know you don't want to say anything. Is that right, Christina? MISS CHRISTINA BERAN: Yes. THE COURT: Huh? MISS CHRISTINA BERAN: I don't want to say anything."

Regarding the in camera interviewing of children, we stated in *Krohn v. Krohn*, 217 Neb. 158, 163, 347 N.W.2d 869, 873 (1984):

> Given our de novo review, such a practice is of

> questionable value unless an adequate record is made. Moreover, the young and impressionable age of the children [ages 8 and 5] would entitle any expression as to their preferred living arrangements to little, if any, weight. In the final analysis, no court can abdicate its obligation to determine what it deems to be in the best interests of the children, based upon the totality of the circumstances. Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 1982); *Dennis v. Smith, ante* p. 147, 347 N.W.2d 873 (1984).

Therefore, we determine that the trial court's conduct in the in camera interview was not an abuse of discretion and that consequently there is no merit to appellant's third and fourth assignments of error.

## CUSTODY ISSUE

When custody of a minor child is involved in a proceeding to dissolve a marriage, child custody is determined by a fit parent's right to have custody of the child and the child's best interests. *Ritter v. Ritter, ante* p. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud,* 230 Neb. 720, 433 N.W.2d 192 (1988).

The trial court found that Dennis and Susan are both fit parents. We agree. Therefore, the best interests of the minor child Christina must determine the outcome of this case.

> "In determining a child's best interests in custody matters, a court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child."

*Ritter v. Ritter, supra* at 211-12, 450 N.W.2d at 211; *Christen v. Christen,* 228 Neb. 268, 422 N.W.2d 92 (1988). See, also, *Gerber v. Gerber,* 225 Neb. 611, 407 N.W.2d 497 (1987); *Grace v. Grace,* 221 Neb. 695, 380 N.W.2d 280 (1986).

Applying the foregoing factors to this case, both parents appear to be able to offer stable, safe, and caring environments for their children. Both parents have jobs that permit them some flexibility in caring for the children: Dennis owns a barbershop, and Susan is an office manager for a financial services company. Each parent has the capacity to satisfy the children's needs. Christina seems to have a good relationship with both of her parents.

Although the guardian ad litem testified that, in his presence, Christina said, "I want my mother to have custody of me," there is no evidence of Christina's comprehension of the situation, or even that she understood what those words meant. Further, there is no showing that this preference for custody is based on sound reasons. The only apparent reason for this in the record may be that the guardian ad litem said that Christina misses her mother. Christina's preferential desire can therefore be of little probative value toward determining her best interests in this matter.

There is evidence bearing on another factor of determination—the effect on the child as the result of continuing or disrupting an existing relationship. Testimony from the guardian ad litem and from Susan Beran indicates that Christina has a special relationship with her sister Jennifer. Jennifer would help care for and nurture Christina on a daily basis. Susan testified that Christina loves Jennifer dearly and that Jennifer adores Christina. The guardian ad litem testified that it would be in Christina's best interests that this relationship continue.

From the evidence in the record, it appears that Christina's general health, welfare, and social behavior would be well cared for by either parent and that this decision is, as the guardian ad litem put it, "a difficult call."

However, the decision must be made as to what is in Christina's best interests in light of the evidence adduced. Although nearly all factors of this determination are essentially

in balance, the competent evidence weighs in favor of awarding custody of Christina to her mother. That the close relationship between Christina and Jennifer should continue is a strong factor in making this determination. See *Ritter v. Ritter, supra*.

We therefore find that the district court abused its discretion in granting custody of Christina to Dennis Beran. Consequently, we reverse the district court's judgment concerning custody of Christina Beran and, on remand, the district court shall enter its order granting custody of Christina Beran to Susan Beran and, pursuant to paragraph 10 of the parties' property settlement agreement, order a date on which child support shall commence.

REVERSED AND REMANDED WITH DIRECTIONS.

---

STATE OF NEBRASKA, APPELLEE, V. RICHARD FOLEY, APPELLANT.
450 N.W.2d 694

Filed January 26, 1990. No. 89-429.

1. **Trial: Evidence: 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.
2. **Appeal and Error.** An issue not properly presented and passed upon by the trial court may not be raised on appeal.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Robert C. Wester, Assistant Sarpy County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

FAHRNBRUCH, J.

Contending the district court for Sarpy County erred in admitting a recorded conversation of his participation in an

unlawful drug transaction, Richard Foley appeals his conviction for delivering cocaine in violation of Neb. Rev. Stat. § 28-416 (1)(a) (Cum. Supp. 1988). Foley was sentenced to not less than 1 nor more than 3 years' imprisonment. We affirm.

At trial, Foley objected to the admission in evidence of the tape recording on the grounds that the probative value of the evidence was substantially outweighed by the prejudice to him. Foley complained that somewhere in the conversation there "may be a word that they [the jury] could construe out of that that would be prejudicial taken into context."

Apparently, the defendant's objection was based on Neb. Rev. Stat. § 27-403 (Reissue 1989), which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

On December 3, 1988, after conferring with Joseph Jeanette, an officer of the Bellevue Police Department, Michael Merrick was wired with a microphone and a voice transmitter in anticipation that the defendant would sell Merrick a gram of cocaine. Law enforcement officials recorded the serial numbers of five $20 bills and gave them to Merrick to use in the purchase of the cocaine. Merrick met Foley in Richard Brockman's trailer home in Bellevue, Nebraska, where Merrick purchased and received one-half gram of cocaine from the defendant. Although only one-half gram of cocaine, instead of a full gram, was delivered to Merrick, he gave Foley the five $20 bills provided by the Bellevue police. Foley agreed to obtain another one-half gram of cocaine and deliver it to Merrick. Jeanette monitored and recorded the drug transaction as it was broadcast from the transmitter Merrick was wearing.

After Foley left the trailer home to procure the second one-half gram of cocaine, he was stopped and searched by the Bellevue police. Three of the $20 bills which police had given to Merrick to purchase cocaine were found on the defendant. Foley was released, but was later arrested and charged with delivering cocaine, a Class II felony. A Class II felony carries a penalty of not less than 1 nor more than 50 years'

imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1985).

Before the tape was received into evidence at the trial over Foley's objection, the prosecution established through Officer Jeanette's testimony the time, place, and manner in which the tape was made and established that the tape contained a conversation between the defendant and Merrick concerning the delivery of a controlled substance in Brockman's trailer home on December 3, 1988.

The tape corroborates Merrick's testimony that the defendant sold and delivered to him one-half gram of cocaine, that Foley agreed to obtain another one-half gram of cocaine for Merrick, and that Merrick gave Foley $100 for a full gram of cocaine. The tape also corroborates the testimony of Brockman that he witnessed the drug transaction between Merrick and the defendant. Clearly, the tape of the drug transaction was relevant. Its probative value outweighed any danger of unfair prejudice.

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. Thomas*, 232 Neb. 490, 441 N.W.2d 186 (1989); *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989). We cannot say that the trial court abused its discretion in admitting into evidence the tape recording of the drug transaction between Merrick and the defendant.

In his brief and at oral argument, defendant exceeds the scope of his assigned error and argues that the admission of the recorded conversation lacked sufficient foundation to show that the declarations in the recording were in fact made by Foley. At trial, the defendant did not object to the admission of the recorded conversation on this foundational ground. An issue not properly presented and passed upon by the trial court may not be raised on appeal. *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989).

The evidence is overwhelming that Foley sold and delivered cocaine to Merrick in Sarpy County, Nebraska. His appeal has no merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TIM J. DEETS, APPELLANT.
450 N.W.2d 696

Filed January 26, 1990. No. 89-440.

Appeal from the District Court for Madison County, RICHARD P. GARDEN, Judge, on appeal thereto from the County Court for Madison County, PHILIP R. RILEY, Judge. Judgment of District Court affirmed.

David J. Warnemunde, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

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

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

PER CURIAM.

The defendant has appealed his conviction for driving while intoxicated, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988), which is a Class W misdemeanor. The defendant assigns as errors the failure of the trial court to suppress the results of, and the reception into evidence of, a chemical breath test, when the defendant had not properly been advised of the consequences of his refusal to submit to such test. We affirm.

The defendant was stopped while driving a motor vehicle on July 22, 1988, by a deputy sheriff for Madison County. The officer had observed the defendant's vehicle traveling back and forth across its driving lane, crossing both the centerline and the shoulder line of the road surface. Further observations made by the officer furnished reasonable grounds to suspect that defendant was intoxicated, and he was taken to the sheriff's office.

The deputy then read to the defendant from a form entitled "Implied Consent Advisement." This form explained the penalties for driving while intoxicated and also explained that in the event that defendant refused the breath test, the officer would be required to report the refusal to the Director of Motor Vehicles, who, after a hearing and if deciding that the refusal was not reasonable, would revoke the defendant's driving

privileges for a period of 6 months. The defendant agreed to the test, which gave a reading of .18.

Upon being charged in county court, the defendant moved to suppress the results of the breath test. The motion was overruled. At trial, the defendant objected to the introduction of the results of the breath test. The objection was overruled. The basis of defendant's objection in each instance was that he was not properly advised of the consequences of refusing to submit to such a test.

The defendant, in the argument portion of his brief, makes reference to the requirements of *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980). However, an error not assigned will not be considered. Neb. Ct. R. of Prac. 9D(1)d (rev. 1989).

There is no question but that the implied consent advisement was wrong; i.e., one of the consequences of the refusal to submit to the test is that it may result in the revocation of driving privileges for 1 year, not 6 months. Neb. Rev. Stat. § 39-669.16 (Reissue 1988). Although "a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served." *In re Interest of Richter*, 226 Neb. 874, 875, 415 N.W.2d 476, 477 (1987).

The purpose of the statute requiring the advising of the consequences of a refusal to take a breath test is, among other things, to ensure that the driver knows and is in a position to make a rational and voluntary decision as to whether he or she will comply with the law. The only understanding required by the licensee is an understanding that he or she has been asked to take a test. *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988).

What is of greatest concern, and certainly what the defendant is suggesting, is that a licensee should not be intimidated into giving a breath sample because of erroneous information. Had the defendant been told that his refusal to submit to testing would result in a 2-year suspension, he might very well have been influenced to take his chances with a not guilty verdict and go ahead and have his breath tested. However, in this instance, he was told that the penalty was only

one-half of what it actually is. It is possible that he could have been wrongly influenced into *refusing* the test on that basis, but certainly the threat of a lesser penalty than that actually called for could not have erroneously influenced him in choosing to submit to the test. It is axiomatic that error without prejudice generally calls for no relief.

Because no prejudice appears in the record, the judgment of the district court in affirming the county court is affirmed.

AFFIRMED.

---

GAS 'N SHOP, INC., PETITIONER, V. STATE OF NEBRASKA AND NEBRASKA LIQUOR CONTROL COMMISSION, RESPONDENTS.

451 N.W.2d 81

Filed January 26, 1990. No. 89-807.

**Supreme Court.** The Supreme Court does not render advisory opinions, but simply decides cases and controversies.

Original action. Petition dismissed.

Donald L. Dunn and Kim M. Robak, of Rembolt Ludtke Parker & Berger, for petitioner.

Edwin C. Perry and Maureen A. Lauren, of Perry, Guthery, Haase & Gessford, P.C., for respondents.

William F. Austin, Lincoln City Attorney, and Joel D. Pedersen for amicus curiae City of Lincoln.

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

WHITE, J.

Petitioner, Gas 'N Shop, Inc., a Nebraska corporation, made application to this court for leave to commence an original action pursuant to Neb. Const. art. V, § 2. The application recited that the action was one for declaratory judgment, contending that 1989 Neb. Laws, L.B. 781 is unconstitutional.

This court informed the petitioner that the application for

leave to commence an original action would be considered when a stipulation by the Attorney General and the petitioner was received. The court further required that an agreed statement of facts accompany the petition. The stipulations were filed, and the court granted leave to commence the original action.

In its petition, Gas 'N Shop alleged that it was the holder of 24 liquor licenses for use in its convenience stores and was, at the time of its filing, an applicant for a 25th license. The petition alleged that L.B. 781 was unconstitutional for various reasons, all relating to the conditions of obtaining a license and the substantive and procedural rules for the revocation of a license.

There are no allegations of threatened or pending revocation of any liquor licenses in the application to commence an original action, the petition, or the stipulation of facts. As previously stated, the petition does recite a pending license application. However, at the time of the filing of the factual statement, the license had been granted and there was no pending action on the license.

It is now apparent that the case is moot. This court does not render advisory opinions, but simply decides cases and controversies. See *Vrana Paving Co. v. City of Omaha*, 220 Neb. 269, 369 N.W.2d 613 (1985).

The petition is dismissed.

PETITION DISMISSED.

---

STATE OF NEBRASKA, APPELLANT, V. CHARLES T. HOUSER, APPELLEE.

450 N.W.2d 697

Filed January 26, 1990. No. 89-1220.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed in part, and in part reversed.

Ronald L. Staskiewicz, Douglas County Attorney, Robert Francis Cryne, and S.W. Cooper for appellant.

Donald W. Kleine, of Kleine Law Office, for appellee.

HASTINGS, C.J.

This is an appeal brought by the State through the county attorney for Douglas County for review by a single judge of this court, pursuant to Neb. Rev. Stat. § 29-116 (Reissue 1989), of certain rulings of the trial court in suppressing statements made by the defendant.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Juhl, ante* p. 33, 449 N.W.2d 202 (1989). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding such motion to suppress. *Id.*

Whether an item of evidence, although relevant, is excludable on account of the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay in the proceedings, waste of time, or needless presentation of cumulative evidence, see Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1989)), may depend on a trial court's exercise of judicial discretion. *State v. Juhl, supra.*

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

On Tuesday, September 27, 1988, Omaha police officers received a call regarding a missing person, namely, Janice Ross Patterson, the victim. In following up on this call, police determined that the defendant was the last person to see the victim alive. The defendant was the victim's boyfriend.

At approximately 8:15 that evening police officers went to the defendant's apartment to inquire as to his knowledge of the

victim's whereabouts. The statements made during this initial interview were not suppressed and are not in dispute in these proceedings. During the interview, the defendant stated that the last time he had seen the victim was Monday, the day before.

At some point during the interview the officers received word that the victim's car had been located in the "No Frills" parking lot. The officers left defendant's residence and proceeded to the parking lot. The defendant, of his own accord, later drove to the parking lot.

A substance that appeared to be blood was located in the trunk of the victim's car. After defendant arrived, Officer Foxall obtained defendant's consent for a search of both defendant's car and his apartment and then conducted those searches. Defendant rode with police officers to his apartment for the search. During the search, certain items were seized by the officers.

Defendant was asked if he would voluntarily accompany the police officers to a police station for further questioning. There is no dispute as to the voluntary nature of this arrangement. Defendant arrived at the station house at approximately 11 p.m. and was taken to a small room with no windows, located on the fourth floor.

Defendant remained in the interview room for some time until the questioning began. There is conflicting evidence as to whether he was locked in the interview room. Officer Butler and the defendant himself testified at the suppression hearing that the door was locked. Officer Foxall testified that it was not locked.

About 12:30 a.m. on September 28, 1988, the defendant was questioned by Officers Foxall and Sklenar. Defendant was not notified of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). This period of questioning lasted until about 1:30 a.m., when the officers took a break and consulted with Lieutenant Roberts and Sergeant Fricke. Statements made during this period of questioning were suppressed, the trial court holding that the interview was a custodial interrogation because of a significant deprivation of defendant's freedom and action and that *Miranda* warnings should have been given.

After the discussion with Roberts and Fricke, it was determined that a rights advisory form which advises a person of his or her *Miranda* rights should be obtained.

Those warnings were given the defendant at approximately 1:36 a.m., and Officers Foxall and Sklenar commenced another round of questioning. This round of questioning lasted until about 2:17 a.m., ending when defendant requested a lawyer. Statements made during this stage of questioning were not suppressed.

After requesting a lawyer, the defendant was provided a telephone book and access to a telephone. About an hour later, he was taken by Investigator Briese to the criminalistics area on the first floor of the police station, where hair samples and fingernail clippings were taken. No permission was obtained from the defendant. Briese knew that Officers Foxall and Sklenar had interviewed defendant earlier and also knew of defendant's request for a lawyer.

In any event, Briese then obtained a written permission to search from defendant after explaining to the defendant his rights in that regard. Apparently, the consent to search was suggested by the police investigator. However, as a condition of signing the consent form, the defendant requested permission to accompany the police on the search, which consent was given.

Officers then transported defendant back to his apartment. The second search of his apartment lasted approximately 3 hours. The police witnesses themselves did not agree as to whether defendant was required to stay in the police car at all times or whether, as testified to by one officer, defendant was allowed to open the door of the apartment. In any event, according to Officer Lenker, the defendant sat with him in the police cruiser during the time the search was made. Lenker said he did not interrogate defendant. It was during this period of time that the defendant spoke to a friend of his by the name of Carolyn White. The police officer also spoke to her.

The substance of the conversations among Officer Lenker, the defendant, and Carolyn White are not found in the record. Therefore, the record is silent as to which comments are in response to questions and not voluntarily made, or which

comments are admissible. However, the district court suppressed the answer to any question asked by Lenker while in the cruiser on the grounds that defendant's request for counsel made earlier that morning was too proximate in time to permit into evidence any statements not freely made.

At some point during the time the defendant was in the cruiser with Officer Lenker, the defendant volunteered to take a polygraph test. According to Officer Lenker, this resulted from a conversation had with the defendant at the time, when the defendant said, "[Y]eah, I would like to clear myself out of this matter," and Lenker then asked if he would be willing to take a polygraph test. After receiving an affirmative answer, Lenker made arrangements to have the test administered at 4 p.m. that day and to have a police officer transport defendant to where the test was to be administered.

Officer Circo conducted the polygraph test, which lasted approximately 2 hours. Prior to the test, the defendant was informed of his constitutional rights and signed a polygraph rights advisory form. The record does not reveal specifically what statements were made during the test; however, during the test Circo asked questions about the victim's disappearance, including questions worded in an accusatory fashion. According to Circo, no inculpatory statements were made.

Although finding no constitutional defects in the voluntary statements made by defendant during the test, the district court ruled the statements were inadmissible. The basis for this holding was stated by the trial court to be that the results of a polygraph test, or even the fact that a polygraph test was taken, are inadmissible, and the probative value of any such evidence would be outweighed by the danger of unfair prejudice or confusion under the provisions of § 27-403.

After the polygraph test, the defendant was turned over to Officer Skanes. At approximately 7:30 p.m. Officer Skanes, pursuant to an assignment received from Sergeant Fricke, began to interview the defendant. At the suppression hearing Officer Skanes stated: "Prior to speaking to him, I asked him if he was aware of his constitutional rights per Miranda and he replied that he was. . . . I didn't read him a form because he had just completed a polygraph examination." The officer also

stated he explained to the defendant that the same rights applied to the questions he was about to ask as applied during the polygraph test. The defendant testified that he did not remember those remarks being made to him.

The district court suppressed any responses to questions asked by Officer Skanes during this interview. With respect to the officer's reference to the fact that defendant had earlier received *Miranda* warnings, the district court determined that in light of the totality of circumstances such a casual reference to the defendant's critical rights was unacceptable.

Later, the defendant was arrested and charged with first degree murder. This suppression hearing resulted.

The State assigns as error (1) the finding that the initial interview at the station house before *Miranda* rights were given was a custodial interrogation; (2) the holding that statements made to Officer Lenker or made to others in the presence of Officer Lenker while the defendant was in the cruiser during the search were not voluntary or were in response to custodial interrogation; (3) the holding that statements made during the polygraph test were to be suppressed; and (4) the holding that following the polygraph examination, Officer Skanes was required to again give the defendant his *Miranda* warnings.

The first, second, and fourth errors assigned challenge the district court's application of fifth amendment self-incrimination analysis to the facts at hand. The third error assigned relates to a statutory issue, is not a question of constitutional dimension, and will be discussed later.

*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), forbids the introduction into evidence of a defendant's statement made during a "custodial interrogation" unless appropriate warnings are first given. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). The record is clear that *Miranda* warnings were not given to the defendant prior to the round of station house questioning beginning at about 12:30 a.m. on September 28, 1988, and lasting for approximately 1 hour.

Therefore, the question becomes one of whether this was a custodial interrogation. *Miranda* defined custodial interrogation as "questioning initiated by law enforcement

officers after a person has been taken into custody or *otherwise deprived of his freedom of action in any significant way.*" (Emphasis supplied.) 384 U.S. at 444.

The district court determined that the defendant was deprived of his freedom of action in a significant way. The State contends that this finding of fact is clearly erroneous.

This court, in considering custodial status, has noted that the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest. *State v. Bowersmith*, 224 Neb. 6, 395 N.W.2d 527 (1986); *State v. Saylor*, 223 Neb. 694, 392 N.W.2d 789 (1986), *cert. denied* 481 U.S. 1038, 107 S. Ct. 1975, 95 L. Ed. 2d 815 (1987).

At a hearing to suppress evidence, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless clearly wrong. *State v. Davis*, 231 Neb. 878, 438 N.W.2d 772 (1989).

There is conflicting evidence as to whether the defendant was in custody at this period of time. It is sufficient to note that there is ample testimony to support the finding of a custodial status. Under our standard of review, and given the circumstances that existed, it cannot be said that the district court was clearly wrong in deciding that the interview was custodial.

As to whether an interrogation was conducted, the record does not disclose the questions and answers complained of. Therefore, it is sufficient for us to note that if answers were given as a result of questions propounded during the period defendant was in custody, the district court was not clearly wrong in suppressing them.

We deal next with the statements made by the defendant in the presence of and to Officer Lenker following a request for counsel. In its order, the district court held: "The motion to suppress the Defendant's statements is sustained as to any response to questions by Officer Lenker while he and the

Defendant were in a police cruiser in front of the Defendant's apartment during the course of the second search . . . ." The court went on to say in an explanatory memorandum that "the request for counsel is too proximate in time to the visit in the squad car to permit into evidence any statements of the Defendant except those voluntarily made." The court then cited *Arizona v. Roberson,* 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), and *State v. Joy,* 218 Neb. 310, 353 N.W.2d 23 (1984).

In *Arizona v. Roberson, supra,* the Supreme Court reaffirmed its prior holding in *Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), wherein it held that a suspect, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." The Court observed in *Roberson* that if after a request for counsel is made the interrogation continues, then " 'a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' " 486 U.S. at 680 (quoting *Miranda, supra*). The holding of *State v. Joy, supra,* is consistent with the above discussion in *Roberson.*

Again we are handicapped by the failure of the record to specify what was said to whom and when. From this void of essential facts the State, in its opening brief, is asking us to draw the conclusion that the entire conversation was initiated by the defendant and every statement made therein was voluntary and admissible.

In its reply brief, the State specifically mentions only the statements made by defendant to Carolyn White and statements concerning the polygraph. With respect to the statements concerning the polygraph, the brief states: "The State agrees that any conversation relating to the polygraph test would not be admissible at trial and does not intend to offer such evidence." Reply brief for appellant at 2. The reply brief then went on to assert that statements made to White should

not be suppressed.

During oral argument, the State said that the only statements it sought to admit into evidence were those made by the defendant to White. The order nunc pro tunc entered by the district court, as well as its memorandum, appears to limit suppression to statements made by the defendant in response to questions asked by Officer Lenker. Consequently, it is apparent that the statements made to White were not suppressed, and the State has abandoned its assertion of error as to the other statements. The end result is that there is no error to correct—the statements made to White are not suppressed, and the State has elected not to pursue the admissibility of other statements made to the officer.

The fourth assignment of error relates to the suppression of statements given by the defendant during an interview by Officer Skanes following the polygraph examination. Defendant stated that after the polygraph he was under the impression he could go home. Instead, he was taken to an interrogation room and was left by himself. When defendant asked why he could not go home, Officer Skanes simply walked away. Defendant said Skanes eventually told him that he was to remain in the room until Sergeant Fricke returned. Officer Skanes also admitted that pursuant to Sergeant Fricke's instructions, the defendant was not to leave the police station.

By this time the defendant was a murder suspect. In comparison to the polygraph test, this interrogation took place in a different room and was conducted by a different officer. Defendant did not initiate this interrogation. He was not read the *Miranda* warnings, although Officer Skanes made reference to the warnings which were given to the defendant before the polygraph and told defendant that they still applied.

The question is not whether additional warnings must be given a defendant every time a different officer begins to question such defendant. Rather, the issue is whether the defendant's desire to have counsel present as expressed the day before must be "scrupulously honored." *In re Interest of Durand. State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980). Even assuming for the sake of argument that defendant did initiate the discussion regarding the polygraph

examination, it was not his idea to engage in a separate and additional interrogation by a different officer. The continuation of uncounseled custodial interrogation after a defendant has invoked the right to counsel would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning that would undermine the will of the person being questioned. *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). The district court was correct in suppressing the statements resulting from that last interrogation.

Finally, the third assignment of error relates to the action of the trial court in suppressing any statements made by the defendant during the polygraph examination. The district court found no constitutional defects, but as noted earlier excluded the statements under § 27-403.

There is no question that under the decisions of this court, the results of a polygraph test are inadmissible. See, *State v. Beach*, 215 Neb. 213, 337 N.W.2d 772 (1983); *State v. Vrchota*, 212 Neb. 567, 324 N.W.2d 394 (1982); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981).

In all three of these cases, the mention of a polygraph test was inadvertent and unrequested; the results of the tests were not disclosed; the references were properly objected to; and the trial court instructed the jury to disregard the references to the polygraph tests. In none of these cases was the reference to the polygraph test found to be prejudicial.

*Wyrick v. Fields*, 459 U.S. 42, 48, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982), in an unnumbered footnote stated: "Although the results of the polygraph examination might not have been admissible evidence, the statements . . . made in response to questioning during the course of the polygraph examination surely would have been."

It would appear that the district court should not have suppressed statements made during the polygraph examination based on its reasoning given, and to that extent its order is reversed. The balance of the suppression order is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLANT, V. DIANE M. WILMART, ALSO KNOWN AS DIANE M. CUNNINGHAM, APPELLEE.

450 N.W.2d 703

Filed January 26, 1990. No. 89-1358.

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

Larry J. Karel, Colfax County Attorney, for appellant.

David J. Warnemunde, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellee.

CAPORALE, J.

This is an interlocutory appeal to a single judge of this court taken by the plaintiff State pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1989). The State assigns as error the district court's sustainment of defendant-appellee Diane M. Wilmart's motion to suppress certain evidence as hereinafter described. The decision of the district court is affirmed.

At 9:30 p.m. on December 29, 1988, two armed plainclothes officers and two armed uniformed officers presented themselves at Wilmart's place of employment in Colfax County. One of the officers and a representative of the employer summoned Wilmart from the production line on which she was working. Upon leaving the production line, Wilmart and the four officers convened in one of the employer's rooms.

One of the officers told Wilmart that a search warrant executed at her home in Washington County had resulted in the seizure of controlled substances and asked whether they might search her, her property, and her vehicle. Wilmart responded by inquiring whether she could speak with an attorney prior to giving her consent. Notwithstanding that one of the officers testified Wilmart was not free to leave from the moment she was summoned from the production line, she was told that she was not under arrest and that she did not then have the right to an attorney. Wilmart thereupon asked what would happen if she did not give her consent and was informed that "she did not have to give her consent, it was not required, and if she didn't, then we would obtain a search warrant."

In fact, the testifying officer had in his possession either the original or a copy of a warrant issued by the district court for Washington County, which authorized any Nebraska law enforcement officer to search, inter alia, Wilmart's person, clothing, and purse. The officer did not know whether the document in his possession was the warrant which had been executed in Washington County. In any event, after she asked a number of times what would happen if she did not sign the consent form and was given the same answer, Wilmart finally orally agreed to be searched and then, at 9:45 p.m., signed a form reciting in part:

> I AM GIVING THIS WRITTEN PERMISSION to these [officers] freely and voluntarily, without any threats or promises having been made to me, and after having been informed by these officers that I have the right to refuse to permit this search and seizure, and that any property seized may be used against me in the event of prosecution.

Wilmart and the four officers next proceeded to the employer's locker room. The testifying officer guessed this occurred an hour after Wilmart had first been approached. There, Wilmart unlocked and opened a locker, reached in and grabbed a purse, put her arms around it, and began yelling that the purse was hers and that the officers could not have it. According to the testifying officer, Wilmart was at that point "grabbed on either side by two of the other officers and I then reached and grabbed her purse and took it away from her." According to the testifying officer, this was done because of, "number one, the possibility of controlled substances, which was why we were there, and also the possibility of a weapon." After the purse was taken from her, Wilmart was asked if she was withdrawing her consent to the search. Wilmart initially refused to answer, and the question was therefore repeated a number of times. Wilmart finally asked what would happen if she withdrew her consent, and the testifying officer told her that "she did not have to give her consent, but if she didn't then we would get a search warrant." According to the testifying officer, the situation during this exchange "was very tense," but after a time "things had calmed down," and Wilmart

eventually said they still had her consent to search.

The testifying officer then looked in the purse and found a vial containing a white powder which he believed to be a controlled substance. After searching the locker and finding nothing of interest, he next "[o]fficially informed [Wilmart] that she was under arrest" and had her empty her pockets. He observed that in the process Wilmart "roll[ed] something into her left-hand front pants pocket." The testifying officer thereupon "reached over and unrolled the pocket and took another vial."

Subsequent laboratory analysis of two vials, presumably those removed from Wilmart's purse and person, revealed they contained methamphetamine, a controlled substance as defined by Neb. Rev. Stat. § 28-405 [Schedule II(c)(3)] (Reissue 1989). Wilmart was subsequently charged with, among other things, possessing methamphetamine with the intent to distribute it in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1988).

When asked why the warrant was not executed, the testifying officer replied: "Simply because we had her consent and the warrant was unnecessary."

Although in the mind of the testifying officer Wilmart was not under arrest until she was "officially" told she was, the reality is that she was in the officers' custody and thereby deprived of her freedom from the moment she was summoned from her employer's production line; she was thus under arrest from and after that instant. *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981).

While the State correctly argues that whether under arrest or not Wilmart was not entitled to the *Miranda* warnings because she was being searched, not interrogated, *State v. Packett*, 207 Neb. 202, 297 N.W.2d 762 (1980), and *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), that is not the question. Rather, the question is how the officers' refusal to permit Wilmart to consult an attorney bears on the voluntariness of her consent to be searched. See, *Schneckloth v. Bustamonte, supra*; *Scott v. State*, 253 Ga. 147, 317 S.E.2d 830 (1984).

The first inquiry therefore becomes whether the officers'

search was authorized by Wilmart's consent. In order for a consent to a search or seizure to be effective, it must be a free and unconstrained choice and not the product of an overborne will. *State v. Horn*, 218 Neb. 524, 357 N.W.2d 437 (1984). Whether a consent to search was given voluntarily is to be determined from the totality of the circumstances surrounding it. *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989). Therefore, resolution of the question as to whether Wilmart's consent was voluntary depends upon the interpretation given the facts surrounding such consent. The applicable canon in that regard is that a trial court's ruling on a motion to suppress will be upheld unless its findings of fact are clearly wrong. *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989). This is so because the trial court has observed the witnesses and made an assessment as to their credibility based in part on that observation. See *State v. Marcotte*, 233 Neb. 533, 446 N.W.2d 228 (1989).

Implicit in the district court's ruling is the factual finding that Wilmart's consent was the result of an overborne will and thus not voluntary. Given the combination of facts that Wilmart was confronted by four armed officers at premises she did not control, that she was not permitted to consult an attorney, that she vacillated as to whether to permit the officers to search, and that her purse was forcibly taken from her while she was held by two of the officers, it cannot be said the district court's finding in this regard is clearly wrong.

The State argues, however, that the foregoing determination does not end the matter, for discovery of the questioned vials was inevitable in any event. The inevitable discovery doctrine furnishes an exception to the exclusionary rule by providing that material obtained as the result of police misconduct is nonetheless admissible if the prosecution shows by a preponderance of the evidence that the challenged material would have been produced or obtained by proper police investigation entirely independent of the misconduct. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

The State argues that the officers in this case at all relevant

times had in their possession a warrant which empowered them to conduct precisely the same search they accomplished on the basis of a consent which proves to have been invalid. The State concludes from that circumstance that the offending vials would ultimately have been properly discovered and lawfully seized from Wilmart's person and purse entirely independent of the officers' misconduct.

What the State necessarily assumes in reaching its conclusion is that but for the invalid consent, the officers would have executed the warrant and would have done so in a manner which would have precluded Wilmart from dispossessing herself of the vials before they were lawfully discovered and seized. The dispositive question, however, is whether the district court was obligated to find as a matter of fact that which the State supposes. The district court was not so obligated.

The testifying officer explained only that the warrant was not executed because Wilmart consented to a search and that the execution of the warrant was therefore unnecessary. No officer testified that if Wilmart had withheld her consent, or having once given it withdrew it before the controlled substance was found, the warrant would in fact have been executed. It is significant that in answering Wilmart's inquiries as to what would happen if she refused to consent to a search, and after having given it, what would happen if she withdrew it, she was told not that it would make no difference because the officers had a search warrant in their possession and they would proceed to execute it but, rather, that it would make no difference because they would obtain a warrant. The record does not explain why Wilmart was told a warrant would be obtained rather than the truth, that one existed.

The explanation may rest in the officers' propensity to obscure the facts in an effort to obtain some perceived investigatory advantage, or may lie in the officers' belief, mistaken or otherwise, that something more was required before the warrant in their possession could be executed, just as the testifying officer was mistaken in his belief that Wilmart was not under arrest until she had been told that she was. Indeed, the very fact the officers sought Wilmart's consent to search rather than simply executing the warrant in their

possession raises a question as to exactly what they thought their authority was, particularly in view of the facts that the warrant recites it was based on information received at 11:45 p.m. of the very day the officers presented themselves at 9:30 p.m. to begin the search and that it did not specifically authorize a search of the locker assigned to Wilmart.

Under the circumstances, the district court's implied factual finding that absent the invalid consent, the search warrant in the officers' possession would not have been executed in such a manner as to discover and seize the vials in question cannot be said to be clearly wrong.

Accordingly, the ruling of the district court must be, and hereby is, affirmed.

AFFIRMED.

---

## CORAL LEE FORMANACK, APPELLEE, V. THOMAS JOSEPH FORMANACK, APPELLANT.

451 N.W.2d 250

Filed February 2, 1990. No. 88-268.

1. **Foreign Judgments.** The Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988), provides two civil remedies. Under the first, the procedure for which is outlined in the civil enforcement sections contained in part III of the act, the party claiming support, the obligee, may bring suit in the obligee's home state, or initiating state; under the second, the procedure for which is outlined in the registration of foreign support orders sections contained in part IV of the act, the beneficiary of an outstanding support judgment of another state may register that judgment in the state where the obligor is present and the remedy provides a summary procedure for enforcing that judgment in the obligor's state as if the registered judgment were one rendered by a court of that state.
2. _____. Neb. Rev. Stat. § 42-7,101 (Reissue 1988) applies only when a party has already obtained a support order in another state and is merely seeking to enforce in this state the money obligations accrued under the foreign support order.
3. **Foreign Judgments: Jurisdiction: Courts.** The courts of Nebraska have jurisdiction to enter a support order under part III of the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq.

(Reissue 1988), even though no such order was entered in the state dissolving the marriage or in any other state.

4. **Foreign Judgments: Child Support: Appeal and Error.** Fixing the amount of child support is equitable in nature; thus, such determinations under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988), are reviewable in the same manner as are orders fixing child support in dissolution of marriage proceedings.
5. _____: _____: _____. The decision whether to grant child support under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988), is one within the discretion of the trial court, and, although reviewed de novo by the Nebraska Supreme Court on the record, the trial court's decision will be upheld absent an abuse of discretion.
6. **Foreign Judgments: Child Support.** In determining the amount of child support to be awarded under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988), the trial court must take into consideration the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children.
7. **Rules of the Supreme Court: Child Support.** The Nebraska Supreme Court's Child Support Guidelines, promulgated pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1988), apply to any child support matter adjudicated from and after October 1, 1987.
8. **Foreign Judgments: Attorney Fees.** The awarding of attorney fees in an action under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988), is a matter within the trial court's discretion.
9. _____: _____. Factors to be considered in awarding an attorney fee in an action under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988), are the amount of alimony awarded, if any, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded with direction.

James E. Bachman, of Bachman & Blunk, P.C., for appellant.

Donald R. Witt, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

CAPORALE, J.

## I. INTRODUCTION

A South Dakota court dissolved the marriage between petitioner mother, Coral Lee Formanack, the appellee in this court, and respondent father, Thomas Joseph Formanack, the appellant in this court, and later awarded custody of the two minor children of the parties to the father without obligating the mother for child support. Following other proceedings, the father brought this action pursuant to the provisions of the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), found at Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988), asking the court below to modify the South Dakota decree so as to require the mother to pay child support. The court below dismissed the father's action and awarded the mother an attorney fee. The father's three assignments of error consolidate to assert the court below abused its discretion in (1) failing to order the mother to pay child support and (2) awarding her a $500 attorney fee. We affirm the attorney fee award, but reverse the denial of child support and remand the cause with the direction that the court below order the mother to pay child support in the sum of $10 per month per child.

## II. FACTS

The initial 1980 South Dakota decree granted sole legal and physical custody of the parties' two sons, Marcus William, who was born on May 31, 1971, and Matthew Joseph, who was born on October 18, 1975, to the mother and ordered the father to pay child support for both children in the amount of $550 per month.

Each of the parties later moved to Nebraska; at the time of the hearing below, the father lived in Douglas County and the mother in Lancaster County. Eventually, the father became delinquent in his child support obligation. In an attempt to collect the claimed $8,725 arrearage, the mother registered the South Dakota judgment in the respective district courts for Lancaster and Douglas Counties. In the autumn of 1985, the parties reached a settlement agreement concerning the amount the mother would accept in satisfaction of the child support arrearage.

It appears that in August of 1985, the South Dakota court, in accordance with the stipulation of the parties precipitated by the children's request to live with their father, modified its initial decree by placing physical custody of the children with the father and terminating the father's child support obligation. At that time the father did not request that the mother be required to pay child support.

In December of that same year, the father petitioned the district court for Douglas County, Nebraska, pursuant to the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 et seq. (Reissue 1984 & Cum. Supp. 1986), for full legal custody of the children and reasonable child support from the mother. The court, pursuant to the mother's motion for partial summary judgment on the basis that the court lacked jurisdiction to modify the support portion of the South Dakota decree, struck that portion of the father's petition. However, pursuant to the parties' stipulation, the Douglas County District Court, in January 1987, granted joint legal custody of the children to both parents. No appeal was taken from those orders.

Less than a month later, the father filed this action, alleging the conclusion that there had been "material changes in circumstance" since the entry of the decree of dissolution and the mother's subsequent registration of the child support judgment in her favor which justified a modification of the South Dakota decree so as to require the mother to pay reasonable child support.

At the September 17, 1987, hearing below, the father adduced evidence establishing that until March 1986, he practiced dentistry as an employee of a group of dentists, earning $35,480 in 1985 and $13,970 until March 1986. Under its agreement with the father, the dental group was, at the end of 2 years, required to allow the father "to buy 25 percent of the business," but "it was decided that [he] would not buy in."

After he was unable to secure other employment, the father established his own practice, organizing it as a professional corporation in July 1986. According to him, the practice has lost money since its inception, yielding a gross income for the months of January through August 1987 of $44,965.60, but

generating during those same months expenses of $53,246.28. He did not itemize those expenses and admitted on cross-examination that they included at least six checks he had written himself in the amounts of $700 in April, $400 in May, $900 in June, $1,300 in July, $1,900 in August, and $700 in September. The testimony does not make clear whether these payments constituted loans from the practice to himself or whether the practice was repaying him for a loan he had previously made to the practice. The father expressed the hope that the practice would show a profit in 1988, although it had not done so in 1987.

The father also introduced into evidence a summary of his personal expenses, assets, and debts at the time of "the two . . . modifications of the Decree" and at the time of the hearing. According to the summary, the father's personal expenses at the time of the hearing were approximately the same as they had been when he obtained possession and thereafter joint custody of the children. The summary shows that his debts have increased from several hundred dollars owed to credit card companies and $5,000 owed to the Internal Revenue Service to his current debts consisting of $55,000 owing to Security Pacific, $740 to Contel Credit, $3,070 to Visa, $2,190 to Mastercard, $4,400 to Noddle Development, $1,000 to the Internal Revenue Service, $1,200 to the mother for past alimony, and amounts owing to his family. The debt to Security Pacific relates to moneys he borrowed to establish and operate his practice. The father also borrowed moneys to pay the mother the amount owed her under the settlement agreement reached between them concerning the past child support arrearage. His assets have also increased from household furnishings and "several hundred dollars" in bank accounts to "[a]ssets of $57,931.00" and accounts receivable of $8,000.

According to the father, his average monthly expenses, including rent, food, utilities and telephone, clothing, credit card payments, transportation expenses, insurance, alimony, entertainment, and miscellaneous, amount to $2,110.

The mother is employed with an insurance company as an underwriter correspondent, earning a gross income of $610 every 2 weeks and a net income of $421 every 2 weeks. The

South Dakota decree ordered the father to pay the mother $100 in alimony, but by the time of the hearing below, the father owed the mother $1,200 in alimony. According to the mother, she has $4,000 left from a $30,000 cash settlement she received at the time of the divorce, the rest of the moneys having been spent for the support of the children. Her other assets include furniture worth $500 and an automobile. Her monthly expenses, including rent, gas, electricity, telephone, cable television service, newspaper subscriptions, automobile expenses, groceries, credit card bills, attorney fees, medical bills, life and home insurance, expenses for the children, and miscellaneous, amount to $872.71.

In ruling as stated earlier, the court below concluded that it had jurisdiction under RURESA to order the mother to pay child support but found that the father did not come to court with "the clean hands required" because of his failure to pay alimony and child support during the period of time the mother had custody of the children and his subsequent failure to pay alimony, that he had not been "completely truthful" in representing his current financial condition, and that his earning capacity was "far greater" than the mother's. The court awarded a $500 attorney fee to the mother.

## III. ANALYSIS

### 1. Purpose of and Remedies Under RURESA

The purpose of RURESA is to provide an economical and expedient means of enforcing duties and orders of support for parties located in different states. § 42-762; *Johns v. Johns*, 5 Va. App. 494, 364 S.E.2d 775 (1988). As stated in Annot., 31 A.L.R.4th 347 at 350 (1984):

> Prior to the creation and adoption of the Uniform Reciprocal Enforcement of Support Act . . . the problem of interstate enforcement of duties of support became acute with the increasing mobility of the American population. A deserting spouse was beyond the reach of process in the state where he had abandoned his family, which often had no means to follow him, and welfare departments, saddled with the burden of supporting destitute families, were often prevented from enforcing

the duty of support in the state where the deserting spouse could be found, by decisions holding that the duty existed only as to obligees within the state.

RURESA provides two civil remedies. Under the first, the procedure for which is outlined in the civil enforcement sections contained in part III of the act, the party claiming support, the obligee, may bring suit in the obligee's home state, the initiating state (not necessarily the same state which entered the dissolution decree), and obtain a judgment for support in the state in which the obligor is present, the responding state. 1 H. Clark, The Law of Domestic Relations in the United States § 7.6 (2d ed. 1987); §§ 42-763(f) and 42-768 to 42-795. This part of the act contemplates that the obligee file in the initiating state a petition for support; if the initiating state court determines that the petition "sets forth facts from which it may be determined that the obligor owes a duty of support, and that a court of the responding state may obtain jurisdiction of the obligor or his property," then the initiating state court shall forward the petition to the responding state. § 42-775. Thus, the initiating state court only determines whether further proceedings are warranted. *Pfueller v. Pfueller*, 37 N.J. Super. 106, 117 A.2d 30 (1955). See, also, *Matter of Burke v Adams*, 130 A.D.2d 100, 518 N.Y.S.2d 148 (1987); *Prager v. Smith*, 195 A.2d 257 (D.C. 1963); *State Ex Rel. Lyon v. Lyon*, 75 Nev. 495, 346 P.2d 709 (1959); *State v. Perry*, 198 Tenn. 389, 280 S.W.2d 919 (1955). Upon receipt of the petition, the responding state court notifies the prosecuting attorney, who "shall take all action necessary . . . to enable the court to obtain jurisdiction over the obligor or his property and shall request . . . a hearing and give notice thereof to the obligor . . . ." § 42-779. The responding state court then holds a hearing and must reach a determination as to whether the obligor owes a duty of support; if it so finds, "it may order the obligor to furnish support or reimbursement therefor and subject the property of the obligor to the order." § 42-785. The same procedure may be used when the obligee and obligor are in different counties of the same state. 1 H. Clark, *supra*; § 42-794.

The second remedy, the procedure for which is outlined in the registration of foreign support orders sections contained in part

IV of the act, allows the beneficiary of an outstanding support judgment of another state to register that judgment in the state where the obligor is present and provides a summary procedure for enforcing that judgment in the obligor's state as if the registered judgment were one rendered by a court of that state. 1 H. Clark, *supra*; §§ 42-763(f) and 42-796 to 42-7,104. See *Wilson v. Ransom*, 233 Neb. 427, 446 N.W.2d 6 (1989).

**2. Jurisdiction**

While the court below correctly ruled it had jurisdiction over the subject matter of this action, such jurisdiction does not rest on the ground asserted by the father. He postulates that the court acquired jurisdiction because of the mother's registration of the South Dakota support judgment in her favor in Lancaster County pursuant to § 42-7,101, a component of part IV of the act. Although the mother's petition for registration in Lancaster County does not appear in the record, we assume for purposes of our analysis that such petition was, as the father claims, filed pursuant to RURESA.

Part IV relates to the registration of foreign support orders for the purpose of seeking enforcement in this state of money obligations accrued under a foreign support order. Thus, § 42-7,101 applies only when a party has already obtained a support order in another state and is merely seeking to enforce in this state the money obligations accrued under the foreign support order. See *Wilson v. Ransom, supra*. See, also, *Riedy v. Riedy*, 222 Neb. 310, 383 N.W.2d 742 (1986), in which we held that under a registration scheme contained in the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), which is similar to that contained in part IV of RURESA, the courts of this state are empowered to enforce money obligations accrued under a foreign alimony decree but are not empowered to enforce or modify foreign alimony decrees with respect to unaccrued money obligations.

The father is also incorrect in characterizing this proceeding as an action to modify a prior support order. There is no prior support order requiring the mother to pay child support. Thus, the action is one to determine whether the mother owes a duty

to support the children now that they are in the father's physical custody. Accordingly, the proceeding is to be treated as an original action under part III of the act.

It is clear that the courts of Nebraska have jurisdiction to enter a support order under part III of RURESA even though no such order was entered in the state dissolving the marriage or in any other state. In the case of *State of Iowa ex rel. Petersen v. Miner*, 226 Neb. 551, 412 N.W.2d 832 (1987), the parties were divorced in Iowa. The decree awarded support for two of the parties' children and, although it mentioned a third child, made no provision for that child's support. Thereafter, the mother filed an action in Iowa seeking to enforce the support ordered in the decree for the two children against the father, who was alleged to be living in Douglas County, Nebraska. The Iowa court entered a judgment of support and forwarded the matter to the district court for Douglas County, Nebraska. Because the first child had attained the age of majority, the Douglas County District Court entered judgment only for arrearages in child support attributable to the second child. No appeal was taken from that order. The third child was not mentioned in either the reciprocal petition before the Douglas County District Court or that court's order. The mother then filed another action in the district court for Douglas County, alleging that through oversight the third child's name was omitted from the reciprocal petition and subsequent orders of the Iowa and Nebraska courts. The mother asked that the order of support be modified to include the third child and to order the father to pay support. The district court ordered modification, and the father appealed, urging that the district court lacked jurisdiction to find a duty of support for the third child, as it had not been established by the Iowa court which entered judgment on the reciprocal petition.

In answer to the father's claim, we stated:

> Appellant asserts that URESA was enacted *only* for the purpose of enforcing foreign support orders "and not for modification, increase, or decrease of rights due to a prior decree." Brief for Appellant at 10. This position misstates case law as well as the language of the statutes. This court has previously held that "[u]nder [URESA] the court in

the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state." *Chisholm v. Chisholm*, 197 Neb. 828, 830, 251 N.W.2d 171, 173 (1977). In addition, the act itself provides that its purpose is "to improve and extend by reciprocal legislation the enforcement of *duties of support*." (Emphasis supplied.) § 42-762. These "duties of support" are not limited to duties previously imposed by a sister state. They include duties "imposable by law or by order, decree, or judgment of any court . . . ." § 42-763(b). Finally, "imposable by law" is defined as imposable by both common law and statutory law. § 42-763(e).

It seems clear from the face of the act that not only existing orders of support but also existing duties of support which have not been the subject of adjudication may be enforced under part III of URESA. §§ 42-768 et seq. Secondary authorities, as well as courts in other jurisdictions, are in accord with this proposition. One expert, Professor W.J. Brockelbank, has stated that it is a "misconception" that "only *orders* of support of one state will be enforced in another under the Act. In fact it is 'all duties,' and the duty, of course, may grow out of the order of support or a judgment or decree but is equally a duty if it never has received judicial attention and now is the basis of litigation for the first time under the Act." W. Brockelbank, Interstate Enforcement of Family Support 39 (F. Infausto 2d ed. 1971).

Many other jurisdictions have held, and we agree, that the "[p]rovisions of URESA make clear that its applicability is not dependent on the existence of other proceedings." *England v. England*, 337 N.W.2d 681, 683 (Minn. 1983). URESA has often been interpreted to require application of the act in cases in which a duty to support a child is "imposable" by either common law or statutory law. [Citations omitted.]

In a URESA proceeding, the initiating state need not determine whether a duty of support exists. Ordinarily, the duty of a parent to support his or her child is imposable by the responding state, even though no previous order of

support exists. [Citations omitted.]

Appellant is concerned that URESA is being used to *create* a duty of support rather than merely *enforcing* such duty. He is correct that URESA "itself creates no duties of family support but leaves this to the legislatures of the several states." Unif. Reciprocal Enforcement of Support Act, Prefatory Note, 9B U.L.A. 382 (rev. 1968). Appellant's obligation to support his minor children was not created by URESA. The common law and statutory laws of most states, including Nebraska and Iowa, provide that parents have an obligation to support their minor children. [Citations omitted.] In this case, URESA was used only to enforce appellant's legal obligation to contribute to the support of his children. The act did not independently create this obligation.

(Emphasis in original.) *State of Iowa ex rel. Petersen v. Miner* at 553-54, 412 N.W.2d at 833-34. See, also, *Glickman v. Mesigh*, 200 Colo. 320, 615 P.2d 23 (1980); *Ainbender v. Ainbender*, 344 A.2d 263 (Del. Super. 1975); *Hall v. Hall*, 585 S.W.2d 384 (Ky. 1979).

### 3. Mother's Child Support Duty

Having determined that the courts of this state possess jurisdiction to grant the relief the father seeks, we turn our attention to his claim that the court below abused its discretion by failing to order the mother to pay child support.

#### (a) Choice of Law

Before proceeding further, however, we note that § 42-768 specifies that the duties of support enforced by RURESA are those imposed by the law of any state in which the obligor was present during the period for which support is sought and that the obligor is presumed to have been present in the responding state unless otherwise proved. Thus, the law of Nebraska is controlling in this case. See, *State of Iowa ex rel. Petersen v. Miner*, 226 Neb. 551, 412 N.W.2d 832 (1987); *Koon v. Boulder Cty., Dept. of Soc. Serv.*, 494 So. 2d 1126 (Fla. 1986); *Rosenberg vs. Rosenberg*, 152 Me. 161, 125 A.2d 863 (1956); *Ratcliffe v. Ratcliffe*, 709 S.W.2d 609 (Tenn. App. 1986); *Davidson v. Davidson*, 66 Wash. 2d 780, 405 P.2d 261 (1965).

(b) Father's Conduct

We must next consider whether the court below was correct in finding that, in any event, the father was not entitled to relief because of his "unclean hands."

The mother argues that under *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983), *appeal after remand* 219 Neb. 670, 365 N.W.2d 467 (1985), the father's failure to pay child support in the past bars him from now seeking support from her. In *Voichoskie,* the former husband sought to reduce the amount of support he had been previously ordered to pay. At the time he sought modification, he was in arrears on his child support payments. We determined that the doctrine of unclean hands could be invoked to bar the former husband's claim for relief only if the evidence showed that he was able to pay the arrearages but nevertheless failed to or was unable to pay through some intentional conduct on his part. *Voichoskie* is inapposite. In the present case, the father is not currently delinquent in child support payments; he paid the arrearage as required by the parties' settlement agreement. Moreover, it was not shown that the father's failure to pay alimony for the past year was intentional. Unlike the situation in *Voichoskie*, wherein the former husband sought a reduction in the amount of child support he was required to pay, the father here seeks child support from the mother not for his own benefit but for the benefit of the children. There is no question but that child support payments are to be used for the benefit of the child on whose behalf they are paid. *Gordon v. Gordon*, 231 Neb. 857, 438 N.W.2d 762 (1989). Thus, the important consideration is not whether the father is at fault but, instead, the needs and best interests of the children. See *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986).

(c) Scope of Review

Fixing the amount of child support is equitable in nature, and, thus, such determinations under RURESA are reviewable in the same manner as are orders fixing child support in dissolution of marriage proceedings. See *Reynolds v. Reynolds*, 86 Cal. App. 3d 732, 150 Cal. Rptr. 423 (1978). The decision whether to grant child support under RURESA is therefore one

within the discretion of the trial court, and, although reviewed de novo on the record, the trial court's decision will be upheld absent an abuse of discretion. See *Dabbs v. Dabbs*, 230 Neb. 368, 431 N.W.2d 640 (1988). In determining the amount of child support to be awarded under RURESA, the trial court must take into consideration the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children. See, *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988); *Hamm v. Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988).

(d) Extent of Mother's Obligation

While not a bar to his ability to recover child support from the mother, the father's past failures to pay child support and alimony do affect the mother's current financial situation. The depletion of her cash dissolution settlement is the result of moneys she had to spend to support the children when the father was failing to make payments. Conversely, the father, although he has debts amounting to about $67,000, most of which relate to his practice, has "assets of $57,931" and accounts receivable of $8,000. Nor does the father testify that the children are in need of financial support from the mother. All he says is:

> I haven't been able to take the children places that I would like to and do things with them that I would like to strictly because of the lack of the finances.
>
> . . . .
>
> . . . I would like to go out for dinner a couple times a month, but anymore, that's just hamburgers or pizza.

It is clear that the father's potential earning capacity, based on his education and experience, is far greater than the mother's. She currently earns a gross income of approximately $16,000 each year, while he has earned in the past, and has the potential of earning in the future, more than twice that amount.

This court's child support guidelines, promulgated pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1988), came into existence on October 1, 1987, *Hamm v. Hamm, supra*, and apply to any award made from and after that date. Those guidelines recommend that even in low income cases, minimum

support be set. Accordingly, we hold that the court below abused its discretion in not requiring the mother to pay support in the sum of $10 per month per child.

### 4. Attorney Fee

Left for resolution is the matter of the attorney fee the court below awarded the mother. The awarding of attorney fees expended for a hearing on a modification of a dissolution decree is a matter within the trial court's discretion. *Shada v. Shada*, 232 Neb. 805, 442 N.W.2d 386 (1989); *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987); *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987); *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). Factors to be considered in awarding such fee are the amount of alimony awarded, if any, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. See *Ritchie v. Ritchie, supra*. We apply the same rules and considerations to RURESA actions concerning the fixing of child support.

This case presented unsettled questions of law, and there exists a significant disparity between the economic positions of the parties. Thus, we cannot say that the court below abused its discretion in awarding the mother a $500 attorney fee notwithstanding that her defense to the father's claim has proved not to be entirely successful.

## IV. DECISION

For the foregoing reasons we rule as stated in part I of this opinion. Neither party is entitled to an attorney fee in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

FAHRNBRUCH, J., not participating.

# HELEN MARIE STARR, APPELLEE, V. JAMES KING, APPELLANT.

451 N.W.2d 82

Filed February 2, 1990. No. 88-342.

1. **Motions to Vacate: Default Judgments: Appeal and Error.** The Supreme Court, in reviewing a trial court's action in vacating or refusing to vacate a default judgment, will uphold and affirm the trial court's action in the absence of an abuse of discretion.
2. **Service of Process: Pleadings: Notice: Default Judgments.** Where a party is served personally with a summons and a copy of the petition in the case, and that party does not file any pleading nor enter an appearance in the case, and has not otherwise requested notice of hearing, notice of default hearing need not be given to such party.

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

Christopher I. Hansen, of Healey, Wieland, Kluender, Atwood, Jacobs & Geier, for appellant.

Paul M. Conley for appellee.

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

WHITE, J.

This is an appeal from the district court's refusal to vacate a default judgment entered against James King in a paternity suit in which King contends that he did not receive service of process or a 3-day notice of the default judgment hearing. We affirm.

Appellant, King, assigns error to the district court in finding (1) that there was sufficient evidence to show that a summons was properly served on him, (2) that King had not established sufficient grounds to warrant vacating a default judgment pursuant to Neb. Rev. Stat. § 25-2001 (Reissue 1989), and (3) that appellee, Helen Marie Starr, used reasonable efforts to give notice of a default hearing as required by Lancaster County District Court rules of practice and procedure Nos. X and IV(D).

Starr filed a petition on October 22, 1984, to establish paternity and for a judgment of child support against King. A summons was issued and directed to the sheriff of Pawnee County, who made a return of service showing personal service

upon King on October 29, 1984. King disputes that he was served with notice of this lawsuit. He made no appearance in the suit, nor were any pleadings filed on his behalf.

Notice of the default hearing was subsequently sent to King on July 31, 1985, by general delivery mail to Amarillo, Texas. King claims that he never received the notice and that he has never lived in Amarillo, but he apparently did have contacts there. He admits to stopping there for fuel and staying there overnight in his truck during his cross-country hauls as a truckdriver. It appears that Starr sent the notice to Amarillo because other attempts at finding a residence or address for King were unsuccessful.

The default hearing was held on August 6, 1985, and on August 8, the district court found in favor of Starr, established King as the father of the child, and awarded Starr expenses incurred in the course of her pregnancy and permanent child support.

King claims that he had no notice of this suit or the default hearing until he was contacted by the child support enforcement agency in May 1987. King later filed a petition, on October 14, 1987, to vacate the judgment, which petition was denied by the district court for Lancaster County on March 31, 1988. King appeals from this ruling.

In reviewing a trial court's action in vacating or refusing to vacate a default judgment, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion. See *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987). See, also, *Commercial Fed. Sav. & Loan Assn. v. Matt*, 232 Neb. 26, 439 N.W.2d 463 (1989).

Appellant first assigns error to the district court in finding that there was sufficient evidence to show that a summons was properly served upon appellant. A return of service showing that the summons and a copy of the petition were personally served upon appellant was made by the Pawnee County sheriff and is in the record. The sheriff was not called to testify in the proceedings. Appellant testified that he was never served with notice of this case, but on cross-examination could not state this definitely:

Q. You might have received them [summons and

petition]?

A. If I did I sure don't remember when it was. I remember receiving papers for other things but not this.

Q. It's possible that you received them and you don't remember.

. . . .

A. It's possible that they were served at my house but I think I would remember if I received papers concerning a child custody case or support case or anything like that.

The trial court found that there was not sufficient evidence to show that the summons was not properly served. The trial court's finding is based on evidence and is not an abuse of discretion, and therefore is not erroneous.

Appellant next assigns error to the district court in finding that appellant had not established sufficient grounds to warrant vacating a default judgment pursuant to § 25-2001. Although the grounds to vacate the judgment were not specifically set out in appellant's petition, the reference made at trial by appellant's counsel that "there were some irregularities and that a judgment was entered due to the warrants of an attorney subsequent to those irregularities and that the service of process is one of the issues that were raised" alludes to the following subsections of § 25-2001:

> A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . (3) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order . . . and (9) for taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

Regarding subsection (3), the issue of service upon appellant has been resolved, and there appears to be no other issue of irregularity in obtaining the judgment on which appellant could predicate vacating the same. Appellant also fails to qualify for relief under subsection (9). As there was proper service, the only way for appellant to come under this subsection would be a failure to legally notify him of the default hearing, which will be

discussed in appellant's final assignment of error.

Appellant lastly assigns error to the district court in finding that appellee used reasonable efforts to give notice of a default hearing as required by Lancaster County District Court rules of practice and procedure Nos. X and IV(D). Regardless of whether appellee's efforts were reasonable, notice of the default hearing was not required in this case. We said in *Joyce v. Joyce*, 229 Neb. 831, 834, 429 N.W.2d 355, 357-58 (1988):

> This court held in *Tejral v. Tejral*, 220 Neb. 264, 267, 369 N.W.2d 359, 361 (1985) that "where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of default hearing need not be given to such party. We further hold that it is an abuse of the trial court's discretion under § 42-372 to set aside a dissolution decree, properly entered, on the sole basis that notice of hearing was not sent to the party in default of filing any pleading or entering an appearance in the case." The same rule is applicable in a URESA [Revised Uniform Reciprocal Enforcement of Support Act] case.

The same rule is also applicable in this case. Appellant failed to file an appearance or a pleading in this case. Local court rules do not supersede the common law of this state. Notice of the default hearing was not required, and therefore appellant's third assignment of error is without merit.

In reviewing the trial court's refusal to vacate the default judgment, we find no abuse of discretion, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

# S.N. MART, LTD., A CALIFORNIA LIMITED PARTNERSHIP, ET AL., APPELLANTS, V. MAURICES INCORPORATED, A DELAWARE CORPORATION, APPELLEE.

451 N.W.2d 259

Filed February 2, 1990. No. 88-363.

1. **Declaratory Judgments: Appeal and Error.** The trial court's determination of factual issues in a declaratory judgment action, which would otherwise be an action at law in which a jury has been waived, has the same effect as a jury verdict and will not be set aside unless clearly wrong.
2. **Judgments: Appeal and Error.** In considering whether the evidence is sufficient to sustain the trial court's judgment, this court examines the evidence in the light most favorable to the successful party, resolving any controverted fact in favor of the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
3. **Landlord and Tenant: Damages: Abandonment.** A landlord has a duty to relet the premises in order to mitigate damages when the tenant abandons the premises prior to the expiration of the lease.
4. **Landlord and Tenant: Damages.** The duty to mitigate requires the landlord to take all reasonable steps to reduce his damages.
5. **Landlord and Tenant: Damages: Abandonment: Proof.** In the landlord's action to recover rent upon the tenant's abandonment of the leased premises, the tenant has the burden to show that the landlord unreasonably failed to relet the premises and mitigate damages.
6. **Damages.** A failure to take reasonable steps to mitigate damages does not totally bar a recovery, but only bars recovery of damages that could have been avoided by reasonable efforts.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John A. Selzer, of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellants.

Leland K. Kovarik, of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee.

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

BOSLAUGH, J.

On July 28, 1978, the plaintiff S.N. Mart, Ltd., leased a 2,800-square-foot store space in the K Mart shopping center in Scottsbluff, Nebraska, to Maurices Nebraska, Inc. The lease

was to expire on January 31, 1990. S.N. Mart, Ltd., has since conveyed the property to the plaintiff U.S. Realty 86 Associates. The defendant, Maurices Incorporated, is the successor to Maurices Nebraska, Inc.

The lease provided for a minimum rent of $1,225 per month ($5.25-per-square-foot annual rent), payment of the proportionate share of the maintenance and taxes, and a percentage rent based upon 4 percent of annual gross sales over $426,250. The lease further provided that the premises were to be used for the retail sale of women's clothing and other related items and that the premises should not be sublet or the lease assigned without the consent of the lessor, but that consent "shall not unreasonably be withheld."

The plaintiffs commenced this action on January 5, 1987, for a judgment declaring that the lease was still in effect and the defendant was in default, that the defendant was liable for performance of all of its obligations under the lease, and that the plaintiffs had not unreasonably withheld consent to a proposed assignment of the lease to a new tenant.

The trial court found that the plaintiffs were not unreasonable in withholding consent to the proposed assignment; that the defendant was in default under the terms of the lease by abandoning the premises and failing to perform its obligations under the lease; that the lease was still in effect and the defendant was liable for the performance of all its obligations under the lease up to August 1, 1987; that the plaintiffs failed to mitigate damages by not leasing the property to Gene Wisner, a prospective tenant; and that plaintiffs were not entitled to recover any amount under the lease after August 1, 1987, because of their failure to mitigate damages.

The plaintiffs have appealed and have assigned as errors: (1) the court's finding that plaintiffs had a duty to mitigate damages; (2) the court's determination that plaintiffs breached their duty to mitigate damages and failed to mitigate damages; (3) the court's limiting Maurices' obligations under the lease to the payment of the amount owing under the lease up to August 1, 1987; and (4) the court's failure to enter a judgment in favor of plaintiffs for the total amount owing under the lease as of the time of trial, and its failure to retain jurisdiction to grant

further relief as necessary.

The trial court's determination of factual issues in a declaratory judgment action, which would otherwise be an action at law in which a jury has been waived, has the same effect as a jury verdict and will not be set aside unless clearly wrong. *Occidental S. & L. v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984). In considering whether the evidence is sufficient to sustain the trial court's judgment, this court examines the evidence in the light most favorable to the successful party, resolving any controverted fact in favor of the successful party, "and the successful party will have the benefit of every inference reasonably deducible from the evidence." *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 56, 382 N.W.2d 303, 305 (1986).

When Monument Mall, a new major shopping mall, was under construction in Scottsbluff, Maurices decided to return the leased space in the K Mart shopping center to the plaintiffs, and attempted to provide a new tenant to be assigned the remaining portion of the lease. The plaintiffs refused to consent to the assignment because of the financial condition of the new tenant and the proposed use of the space.

When the plaintiffs refused to consent to the assignment, Maurices ceased performance of its obligations under the lease, claiming the plaintiffs had materially breached the terms of the lease by unreasonably refusing to consent to the assignment. Maurices vacated and abandoned the premises on October 1, 1986.

When the defendant vacated the premises, it gave the keys to the premises to Dan Dickinson, an employee of Dial Enterprises. Dial Enterprises was the managing agent for Monument Mall, which is owned by Dial Reit. Dickinson had no authority to lease the space the defendant had occupied, but was authorized to show the premises to interested parties. The plaintiff U.S. Realty had arranged for Roebling Management to represent it as managing agent, and Dickinson had only an informal, verbal arrangement with Roebling.

In May 1987, Wisner contacted Maurices because he was interested in leasing the vacant space. Maurices informed him that he should contact Dickinson.

At this time, the store space adjacent to that which the defendant had occupied was vacant. The former tenant, Payless Shoes, had relocated to Monument Mall, as had the defendant. Dial Enterprises had assumed the obligation of Payless Shoes under its lease and was paying the rent on the Payless space. Dickinson had been instructed to give the Payless space priority. Dickinson did not do anything regarding Maurices' space other than show it to Wisner and give him Roebling's telephone number.

When Dickinson showed Wisner Maurices' space as well as the Payless space, Wisner expressed his preference for Maurices' space. Dickinson told Wisner to contact Roebling or Michael Weiner, an employee of Roebling's, directly and gave him their telephone numbers. Several times Wisner left messages for Weiner regarding his interest in Maurices' space, but never received any response.

The trial court found that the plaintiffs failed to mitigate their damages by failing to lease the property to Wisner. In *Bernstein v. Seglin*, 184 Neb. 673, 171 N.W.2d 247 (1969), this court held a landlord has a duty to relet the premises in order to mitigate damages when the tenant abandons the premises prior to the expiration of the lease. The duty to mitigate requires the landlord to take all reasonable steps to reduce his damages. See *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982). In the landlord's action to recover rent upon the tenant's abandonment of the leased premises, the tenant has the burden to show that the landlord "unreasonably failed to relet the premises and mitigate damages." *Bernstein* at 677, 171 N.W.2d at 250.

The plaintiffs argue that based on *Bernstein*, their duty was only to not "unreasonably refuse to accept a qualified and suitable substitute tenant for the purpose of mitigating the damages recoverable" from Maurices. *Id.* Plaintiffs assert that Maurices did not present any evidence that the plaintiffs unreasonably refused to accept a qualified and suitable tenant.

The evidence supports a finding that the plaintiffs made no serious or diligent effort to relet the premises. They had no representative in Scottsbluff who had authority to lease the premises, and they never contacted Wisner after he expressed

his interest in Maurices' space. Wisner eventually leased the Payless space from Dial Enterprises. It was not clearly wrong for the trial court to find that the plaintiffs failed to mitigate their damages.

The plaintiffs argue that they had no duty to mitigate because § 25.5 of the lease provides:

> If Landlord shall elect to re-enter as above provided or shall take possession of said premises pursuant to legal proceedings or pursuant to any notice provided by law, and if Landlord has not elected to terminate this Lease, Landlord may either recover all rental as it becomes due or relet the Premises or any part or parts thereof for such term or terms and upon such provisions as Landlord, in its sole judgment, may deem advisable and shall have the right to make repairs to and alterations of the Premises. No re-entry or taking possession of the Premises by Landlord under this Section shall be construed as an election to terminate this Lease unless a written notice of such intention be given to Tenant or unless the termination thereof be adjudged by a court of competent jurisdiction.

We think § 25.5 merely provides that reentry does not terminate the lessee's obligations under the lease and does not absolve the lessor from the duty to mitigate the damages.

The plaintiffs argue that the trial court erred in not awarding them percentage rent pursuant to § 7.3 of the lease, which provides:

> For the purpose of computing the percentage rent under Section 5.2, the Gross Sales in any Lease Year in which Tenant does not continuously and uninterruptedly conduct its business as required by Section 7.2 shall be deemed to be the greater of the Gross Sales (i) during such Lease Year; and (ii) during such earlier Lease Year in which Gross Sales were the highest.

The evidence shows that the gross sales for the lease year ending January 31, 1986, were $629,763.29, which was the lease year in which the gross sales were the highest. The percentage rent for that lease year was $8,140.53. The lease also provides that Maurices was entitled to recover from the percentage rent on a noncumulative basis its contribution toward real estate

taxes and assessments in excess of 25 cents per square foot of the premises. Since the premises totaled 2,800 square feet, Maurices would be entitled to deduct from the percentage rent the amount of real estate taxes paid in excess of $700 per year. Taking this into account, the amount of percentage rent owing under the lease would be $8,140.53, less the amount of real estate taxes exceeding $700 for each year remaining on the lease.

Plaintiffs are correct in asserting that a failure to take reasonable steps to mitigate damages does not totally bar a recovery, but only bars recovery of damages that could have been avoided by reasonable efforts. See *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988).

The record shows Wisner subleased the Payless space from Dial Enterprises for $5.50-per-square-foot annual rent. Wisner testified that his new lease with U.S. Realty for the space provides for $5-per-square-foot annual rent; payment of his proportionate share of the maintenance, taxes, and insurance; and percentage rent based upon gross sales over $300,000.

Although Wisner's lease for the Payless space is similar to the lease Maurices made with the plaintiffs, the evidence does not show what percentage Wisner is to pay for gross sales over $300,000, and Wisner testified he did not expect his sales to reach that mark.

If the plaintiffs had acted reasonably to mitigate their damages and had obtained a lease such as that which Wisner has for the Payless space, they would have been entitled to the percentage rent as provided under § 7.3 of their lease with Maurices. The evidence does not sustain the trial court's finding that the plaintiffs were entitled to no percentage rent due under the lease after August 1, 1987.

The trial court was correct in its finding that the plaintiffs failed to take reasonable steps to mitigate their damages when Maurices abandoned the premises; however, it was error to deny the plaintiffs any recovery for percentage rent under the lease after August 1, 1987.

The amounts of percentage rent due under the lease depend from year to year on the amount of real estate tax over $700. The trial court has the power to retain jurisdiction in order to grant further relief for the amounts of percentage rent as they

may be determined each year until the expiration of the lease. See, Neb. Rev. Stat. § 25-21,156 (Reissue 1989); *First Nat. Bank v. Omaha Nat. Bank*, 191 Neb. 249, 214 N.W.2d 483 (1974).

The judgment of the district court is affirmed except as to the plaintiffs' right to recover percentage rent after August 1, 1987. The cause is remanded to the district court for further proceedings to determine the percentage rent to which the plaintiffs are entitled after August 1, 1987.

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

---

STATE OF NEBRASKA, APPELLEE, V. MYRON KEITH WYATT, APPELLANT.

451 N.W.2d 84

Filed February 2, 1990. No. 89-061.

1. **Verdicts: Evidence: Appeal and Error.** On appeal, the Nebraska Supreme Court will reverse a verdict of guilty when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Habitual Criminals: Prior Convictions: Time.** In order to warrant the enhancement of a penalty under the Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1989), the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense.
4. **Habitual Criminals: Prior Convictions: Time: Indictments and Informations.** The exact time of the commission of an alleged prior felony is not of the essence of a charge under the habitual criminal statutes, and the failure of the

information to accurately state the time of a prior felony does not render the information insufficient.

5. **Habitual Criminals: Sentences: Time.** It is the term of a defendant's prior sentences and not the time actually served which controls the applicability of the habitual criminal penalty.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Robert P. Lindemeier, Lincoln County Public Defender's Office, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

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

CAPORALE, J.

Pursuant to verdict, defendant-appellant Myron Keith Wyatt was adjudged guilty of, among other offenses, first degree false imprisonment, in violation of Neb. Rev. Stat. § 28-314 (Reissue 1989). The trial court also found him to be a habitual criminal, as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1989). Wyatt assigns as error the trial court's (1) conclusion that the evidence is sufficient to support that conviction and (2) finding that he is a habitual criminal. We affirm.

On July 21, 1988, Wyatt and his fiancee, Barbara Norman, also known as Bobbie Williams, were partying with friends Kori Bancroft, Trent Simonson, Paul Basile, and Peggy Gastineau at a North Platte, Nebraska, trailer house. Norman appears to have been married but separated from her husband and was living with Wyatt, to whom she was engaged to marry.

Wyatt and Norman arrived at the trailer at approximately 10 p.m. They had been drinking beer prior to their arrival, each having consumed about five or six beers between 5 and 10 p.m. Later that evening, apparently around midnight, Wyatt, who had to work the next morning, decided to leave and asked Norman to leave with him. She, however, decided to remain at the trailer.

Wyatt left but returned 10 to 15 minutes later, at which time

he was noticeably angry. While Wyatt was away, four of the five persons remaining in the trailer had played a drinking game, during the course of which Norman "chugged" five additional glasses of beer. Norman testified that she was intoxicated and did not have complete recollection of the events which transpired that night. Wyatt asked Norman if she was going to leave with him; she indicated that she wished to stay at the trailer. There is testimony that Wyatt then called Norman a "bitch" and stated that he should "pop [her] in the mouth." Wyatt testified that he tried to "coax" Norman out the door, but she would not move her feet, so he "was a little rough" and "pushed" her out the door. According to witnesses, Wyatt grabbed Norman, carried her to the door of the trailer, and threw her out the door. In throwing Norman out the trailer door, Wyatt forced her off the small porch by the trailer door, down three steps, and onto a concrete sidewalk, as the result of which fall she suffered minor injuries. In addition, Norman testified that she was frightened by the events surrounding her forcible removal from the trailer. Sixteen-year-old Bancroft also testified that she was "scared for" Norman.

After throwing Norman out the door, Wyatt picked her up from the concrete and threw her onto the hood of Basile's pickup truck. Norman testified she remembered being "held up to the truck and hit a couple of times there." Wyatt's testimony is that when he placed Norman on the hood of the pickup, he thought that she was feigning unconsciousness and that he slapped her and "blew in her eye" to determine whether she was conscious.

Meanwhile, Bancroft was telling Wyatt to leave Norman alone while Wyatt yelled at Norman, telling her not to "play her games." At one point, Wyatt told Bancroft's boyfriend, Simonson, that "he better take his woman in the house before she ended up getting hurt." Wyatt then placed Norman on his motorcycle and drove to the motel they occupied. Norman rode on the front part of the motorcycle seat while Wyatt drove to the motel, apparently at a high rate of speed.

Norman testified that after Wyatt placed her on the front of his motorcycle, her "head got hit," and after that she did not remember anything else until after the two were at the motel. The testimony suggests that Norman's head struck the

handlebars of the motorcycle.

The four other persons who had been at the trailer followed Wyatt to the motel. Referring to Wyatt and Norman, Simonson testified, "We saw him pick her up off the bike and carry her into the motel room. . . . He closed the door and turned the lights off and closed the curtains and we heard them yelling, and I ran over and called the police."

Basile then began pounding on the door and yelling at Wyatt to open it. Although Wyatt did not do so, Bancroft was able to summon the motel manager, who then unlocked and opened the door. Wyatt then walked toward the door and indicated that someone should call an ambulance.

When the manager opened the door of the motel room, those present found that Norman had a 4-inch-long, 1/2-inch-deep cut to her abdomen. Wyatt told Norman to "tell them it was an accident." Norman's testimony was that she did not recall how she suffered the cut to her abdomen. Wyatt testified that the cut suffered by Norman was the result of an accident.

Shortly after the manager opened the door of the motel room, the police and an ambulance arrived. The ambulance then transported Norman to the hospital.

At a hearing held after his convictions, the trial court conducted an enhancement hearing to determine whether Wyatt was a habitual criminal. During the course thereof, the prosecutor introduced into evidence, inter alia, two exhibits consisting of copies of the court files regarding Wyatt's previous felony convictions. One exhibit relates to 1983 convictions, upon counseled pleas of guilty, on three counts of burglary. The other exhibit relates to 1985 convictions, pursuant to verdicts, for attempted burglary and possession of burglar's tools.

In the 1983 case Wyatt was sentenced to concurrent terms of 1 to 3 years on each of the three burglary convictions. In the 1985 case Wyatt was sentenced to concurrent terms of 1 to 4 years and 1 year, but these terms were to be served consecutively to the sentences imposed in the 1983 case. (Wyatt was apparently on parole when he committed the crimes resulting in his prosecution in the 1985 case; thus, after his convictions in that case, he still had time remaining on his earlier convictions

in the 1983 case.)

At the enhancement hearing the trial court found that Wyatt had been convicted of felonies in both the 1983 and 1985 cases and that Wyatt had been sentenced and committed to prison for periods of at least 1 year on each of those convictions. Consequently, the trial court found that Wyatt was a habitual criminal pursuant to § 29-2221. The trial court then sentenced Wyatt as a habitual criminal to imprisonment for a period of 10 to 11 years on the conviction at issue in this case, a Class IV felony.

While the trial court found at the enhancement hearing that Wyatt had been convicted of felonies in both the 1983 and 1985 cases, it did not specifically state its findings regarding the *dates* of those prior convictions. However, a review of the two exhibits makes it clear that Wyatt committed the felonies which resulted in the 1985 case almost a year after sentencing for the felonies resulting in the 1983 case.

It is also noted that the trial court's journal entry regarding the enhancement hearing fails to set forth any finding with respect to the 1985 case and fails to detail a finding as to the date of the conviction in the 1983 case.

As his first assignment of error, Wyatt argues that the evidence adduced by the State was insufficient to permit the jury to find him guilty beyond a reasonable doubt of first degree false imprisonment.

On appeal, the Nebraska Supreme Court will reverse a verdict of guilty when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. *State v. Frazier, ante* p. 107, 449 N.W.2d 230 (1989); *State v. Auman,* 232 Neb. 341, 440 N.W.2d 254 (1989).

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Frazier, supra*; *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989);

*State v. Wokoma*, 233 Neb. 351, 445 N.W.2d 608 (1989).

The statute under which Wyatt was charged is § 28-314, which states in relevant part:

> (1) A person commits false imprisonment in the first degree if he knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury . . . .
>
> (2) False imprisonment in the first degree is a Class IV felony.

Neb. Rev. Stat. § 28-312 (Reissue 1989) defines the terms "abduct" and "restrain" as they apply to § 28-314:

> (1) Restrain shall mean to restrict a person's movement in such a manner as to interfere substantially with his liberty:
>
> (a) By means of force, threat, or deception . . .
>
> . . .
>
> (2) Abduct shall mean to restrain a person with intent to prevent his liberation by:
>
> (a) Secreting or holding him in a place where he is not likely to be found; or
>
> (b) Endangering or threatening to endanger the safety of any human being.

Wyatt argues that there exists nothing in the record to show that Norman's movement was ever restricted in such a manner as to substantially interfere with her liberty and that she never testified to any restraint of her movement nor any interference with her liberty. Wyatt further argues that the State failed to prove the occurrence of an abduction as defined by the statute or the existence of "terrorizing circumstances or under circumstances which exposed Barbara Norman to the risk of serious bodily injury." Brief for appellant at 8.

Despite Wyatt's arguments, the fact is that Norman testified that she did not want to leave the trailer. When Wyatt angrily returned to the trailer to ask Norman to leave with him, she expressed her desire to remain. In response, Wyatt picked her up, carried her to the door, and threw her out the door, forcing her off the porch and onto a concrete sidewalk. Norman testified that she suffered injuries from the fall and that she was

frightened. Bancroft testified that she was "scared for Bobbi," indicating that she feared for Norman's safety.

After throwing Norman out the trailer door, Wyatt picked her up from the concrete, threw her onto a pickup truck, and then carried her to a motorcycle, on which he drove her away from the trailer and back to the motel room. The events invoked enough fear and apprehension for Norman's safety as to cause the four other persons who had been at the trailer to follow Wyatt to the motel and summon the motel manager to unlock the door in an effort to rescue Norman from potential harm.

The evidence presented at trial provides ample support for a jury to conclude that Wyatt, by means of force and under terrorizing circumstances or circumstances which exposed Norman to the risk of serious bodily injury, knowingly restricted Norman's movement in such a manner as to interfere substantially with her liberty.

While it seems that no citation of case law is needed to dispose of Wyatt's first assignment of error, we nonetheless note that this court has previously considered appeals of first degree false imprisonment convictions. In *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988), we found sufficient evidence to support a conviction for first degree false imprisonment when the victim had been restrained in her own home.

Although not directly addressing a sufficiency of evidence question, *State v. Schwartz*, 219 Neb. 833, 366 N.W.2d 766 (1985), held that the appellant in that case was not entitled to a second degree false imprisonment jury instruction when he had abducted his victim at knife point. The *Schwartz* court stated:

> There was no evidence contradicting the fact that a knife was held against the victim's throat during the entire time defendant was transporting her, and no evidence contradicting the fact that such conduct exposed the victim to the risk of serious bodily injury, and that such conduct constituted "terrorizing circumstances."

*Id.* at 838, 366 N.W.2d at 770.

Wyatt's second assignment of error claims that the trial court erred in finding him to be a habitual criminal. With respect to this assignment of error, Wyatt first asserts that the trial court made no finding as to the dates of Wyatt's prior convictions and

that because of this omission, Wyatt cannot be determined to be a habitual criminal.

Section 29-2221 states:

> (1) Whoever has been twice convicted of crime, sentenced and committed to prison . . . for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the Department of Correctional Services adult correctional facility for a term of not less than ten nor more than sixty years . . . .
>
> (2) . . . At the hearing [held to determine whether the accused is an habitual criminal], if the court shall find from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state, or by the United States, the court shall sentence such person so convicted as an habitual criminal.

Wyatt cites *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983), for the proposition that absent a finding as to the dates of his two prior convictions, Wyatt cannot be determined to be a habitual criminal. In *Ellis*, this court decided that "in order to warrant the enhancement of the penalty under the Nebraska habitual criminal statute, § 29-2221, the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense." 214 Neb. at 176, 333 N.W.2d at 394. See, also, *State v. Lieberman*, 222 Neb. 95, 382 N.W.2d 330 (1986).

The record clearly establishes that the trial court based its finding that Wyatt was a habitual criminal upon his aforedescribed previous convictions. However, Wyatt argues that *Ellis* required the trial court to specifically state that it found that Wyatt's commission of the felonies which precipitated the 1985 case occurred after his conviction in the 1983 case and that each of those convictions occurred prior to his commission of a felony in the present case.

Contrary to Wyatt's analysis, *Ellis* does not require the trial court to follow such technical steps in order to determine that

Wyatt was a habitual criminal. In applicable part, § 29-2221 states only that "if the court shall find from the evidence submitted that the accused has been convicted two or more times of felonies and sentences [have been] imposed therefor . . . the court shall sentence such person so convicted as an habitual criminal." *Ellis* merely requires that each of the applicable felonies being considered, other than the first felony, must occur after a conviction for the previous felony in order for such crimes to serve as a basis for sentencing under the habitual criminal statute.

In the present case the trial court did find that Wyatt had been convicted in the 1983 and 1985 cases and that Wyatt was sentenced and committed to prison for terms of not less than 1 year in each of those cases. The record clearly shows that on May 3, 1983, Wyatt pled guilty to the felony charges against him in the first, or 1983, case and that sentencing occurred on October 11, 1983. The record further shows that in the second, or 1985, case Wyatt was convicted on January 16, 1985, of felonies he committed on or about October 4, 1984, and that sentencing occurred on January 21, 1985. In the present case the jury determined that Wyatt committed first degree false imprisonment on July 21, 1988. Thus, each of Wyatt's felonious acts, other than the first, occurred after his conviction for the immediately preceding felony, and the trial court correctly determined Wyatt to be a habitual criminal under § 29-2221.

Next, with respect to his second assignment of error, Wyatt argues that the State failed to prove he was twice previously convicted on the dates alleged in the information. Wyatt asserts that the evidence offered by the State does not prove convictions on January 21, 1985, and October 11, 1983, the dates alleged in the information as the dates on which Wyatt was previously convicted.

The portion of the information charging Wyatt with being a habitual criminal states in part that "defendant has been twice convicted of crime, sentenced and committed to prison . . . and is therefore an habitual criminal, to wit: 1. January 21, 1985, Lincoln County 2. October 11, 1983, Lincoln County . . . ." The record clearly shows that the dates which were alleged in the information are the sentencing dates for Wyatt's two prior

convictions. Thus, it cannot be said that Wyatt was not adequately informed of the basis for charging him as a habitual criminal.

Moreover, even if the information had contained a minor discrepancy with respect to the dates of the prior convictions, the exact time of the commission of an alleged prior felony is not of the essence of a charge under the habitual criminal statutes, and the failure of the information to accurately state the time of a prior felony does not render the information insufficient. *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). Furthermore, Wyatt fails to indicate how he may have been misled or prejudiced by the manner in which the information referenced his prior convictions. See, *State v. Jameson*, 224 Neb. 38, 395 N.W.2d 744 (1986); *State v. Juhl, ante* p. 33, 449 N.W.2d 202 (1989). The State adequately referenced Wyatt's prior convictions in the information, and the State presented ample proof for the trial court to determine that Wyatt should be convicted as a habitual criminal.

Finally, with respect to his second assignment of error, Wyatt argues that the State failed to prove that he was twice previously committed to prison for a period of not less than 1 year. Wyatt points out that the two exhibits from the enhancement hearing show that Wyatt was sentenced to prison on October 11, 1983, and that he was then charged with a crime which occurred in Lincoln County on October 4, 1984; Wyatt asserts that this indicates that he could not have been committed to prison for a period of 1 year with respect to his first conviction. The essence of Wyatt's argument is that in order for him to be sentenced as a habitual criminal, he must have twice *served* at least 1 year in prison.

Contrary to Wyatt's assertion, § 29-2221 requires that in order to convict a person as a habitual criminal, that person must have been "twice convicted of crime, sentenced and committed . . . for terms of not less than one year each . . . ." The statute sets forth no requirement respecting time served. In *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), this court held that it is the term of a defendant's prior sentences and not the time actually served which controls the applicability of the habitual criminal penalty.

Although the trial court's granting of credit for time served in the county jail may have resulted in Wyatt's spending less than 1 year in prison with respect to his first conviction, he was nevertheless convicted, sentenced, and committed to prison for a term of not less than 1 year.

There being no merit to either of Wyatt's assignments of error, the judgment of the trial court is affirmed.

AFFIRMED.

---

WILLIAM A. PERKINS, APPELLEE, V. EQUAL OPPORTUNITY COMMISSION, APPELLEE, AND VIRGINIA YUEILL, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLANT.

451 N.W.2d 91

Filed February 2, 1990. No. 89-200.

1. **Appeal and Error.** In reviewing questions of law, the Nebraska Supreme Court has an obligation to reach its conclusions independent from those reached by the court from which the appeal is taken.
2. **Employment Security: Words and Phrases.** An employee who has engaged in no misconduct and who desires to keep his or her employment but nonetheless resigns because the employer has clearly manifested that the employment will be terminated has not left his or her employment "voluntarily," as that term is used in Neb. Rev. Stat. § 48-628(a)(1) (Reissue 1988).

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Laureen Van Norman and John F. Sheaff for appellant.

Margene M. Timm, of Legal Services of Southeast Nebraska, for appellee Perkins.

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

CAPORALE, J.

Appellee William A. Perkins filed for unemployment compensation benefits under the Nebraska Employment

Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1988). Both the claims deputy and the Nebraska Appeal Tribunal determined that Perkins voluntarily left his employment with appellee Nebraska Equal Opportunity Commission without good cause, and disqualified him from receiving benefits for a period of 8 weeks. Upon appeal of the tribunal's decision, the district court agreed that Perkins voluntarily left his employment but determined he did so for good cause, and therefore reversed the decision of the appeal tribunal. Appellant, Commissioner of Labor, assigns the district court's ruling as error. We hold Perkins did not leave his employment voluntarily, and on that basis affirm the judgment of the district court.

There is no dispute as to the material facts. Thus, only questions of law are presented, in the reviewing of which this court has an obligation to reach its conclusions independent from those reached by the district court. *State v. Wren, ante* p. 291, 450 N.W.2d 684 (1990); *Knox v. Cook,* 233 Neb. 387, 446 N.W.2d 1 (1989).

Perkins' duties as a Field Representative I were to investigate claims of discrimination. During his initial 9-month period of probationary employment, Perkins proved to be incapable of making as many investigations as his employer expected. In order to allow him more time to achieve the required level of performance, the employer extended Perkins' period of probationary employment by 3 months, the maximum extension allowable under the employer's rules. At the time it granted the extension, the employer told Perkins that if his production did not increase to meet the employer's standards, he would be discharged. There is no claim Perkins had engaged in any misconduct and no claim that he had prior to this time indicated a desire to leave his employment.

Perkins remained unable to meet the expected level of production and, shortly before the end of his extended probationary period, realized that he could not improve his performance. He thereupon concluded that quitting was preferable to being discharged, and resigned before his extended period of probationary employment would have ended. The employer's director testified he did not think that

"in three weeks [Perkins] could accomplish what had not been accomplished. . . . [I]f he had stayed with things being as they were, we would have no other choice, but to follow the personnel rules and regulations." In plain English, Perkins would be fired at the end of his extended period of probationary employment.

Section 48-628(a)(1) provides in relevant part that an employee shall be disqualified for benefits for "the week in which he or she has left work voluntarily without good cause . . . and for not less than seven weeks nor more than ten weeks which immediately follow such week . . . ."

The first question presented is whether Perkins left his employment "voluntarily," for if he did not, the question of whether he resigned for "good cause" does not arise. *School Dist. No. 20 v. Commissioner of Labor*, 208 Neb. 663, 305 N.W.2d 367 (1981).

There is no doubt but that Perkins intentionally severed his employment relationship with the Equal Opportunity Commission with the objective of not returning. In that general sense Perkins resigned voluntarily. *Montclair Nursing Center v. Wills*, 220 Neb. 547, 371 N.W.2d 121 (1985). It is equally clear, however, that had Perkins not resigned, he would have been discharged because he could not do the work required. That circumstance cannot be ignored when determining whether one has left his or her employment voluntarily, as the term is used in § 48-628(a)(1). This precise issue was considered in *School Dist. No. 20 v. Commissioner of Labor, supra*. Therein, the president of the employer school board made the employee superintendent aware it was doubtful that the board would renew his employment for the upcoming year. The superintendent advised the president and other board members present that he wanted to stay employed for another year, but received no indication that the board would change its mind. As requested, the president later gave the superintendent a letter stating it appeared doubtful that he would "secure a majority vote to be re-elected" for another term. *Id.* at 666, 305 N.W.2d at 369. The superintendent then resigned. There was no evidence that the superintendent had engaged in any misconduct. In refusing to disqualify the superintendent from

benefits for any period, this court observed that the superintendent resigned only because the board members who had the power to reelect him intended not to do so, and concluded that under such a circumstance the superintendent did not voluntarily leave his employment. Thus, *School Dist. No. 20* teaches that an employee who has engaged in no misconduct and who desires to keep his or her employment but nonetheless resigns because the employer has clearly manifested that the employment will be terminated has not left his or her employment "voluntarily," as that term is used in § 48-628(a)(1).

It is true that unlike the superintendent in *School Dist. No. 20*, Perkins made no plea for reconsideration and continuation of his employment. That, however, is not a distinguishing factor, for it is clear that because the employer's rules prevented a further extension of Perkins' probationary employment, any supplication for continued employment by Perkins would have had no more effect than did the superintendent's plea. It is also true that in *School Dist. No. 20*, improvement of the superintendent's performance was not an issue, whereas Perkins would not have been discharged if his performance had been brought to the employer's requirements. Neither, however, is this circumstance a distinguishing factor, for the evidence shows not that Perkins refused to try to improve his performance but that he tried and found he could not do what was required. Just as the superintendent was not shown to have engaged in misconduct, Perkins was not shown to have engaged in misconduct. Just as the superintendent would have been discharged at the end of the school year had he not resigned, Perkins would have been discharged upon the expiration of his extended period of probationary employment had he not resigned, not because he would not do the work, but because he could not do the work. Thus, the circumstances compel the conclusion that Perkins did not leave his employment voluntarily within the meaning of the relevant statute.

AFFIRMED.

# H.H.N.H., INC., APPELLANT, V. DEPARTMENT OF SOCIAL SERVICES, STATE OF NEBRASKA, ET AL., APPELLEES.

451 N.W.2d 374

Filed February 9, 1990. No. 88-388.

1. **Declaratory Judgments.** An action for declaratory judgment may not be maintained in the absence of a case or controversy.
2. **Actions: Standing: Proof.** In order to maintain an action to enforce private rights, the plaintiff must show that he or she will be benefited by the relief to be granted.
3. **Administrative Law: Declaratory Judgments: Proof: Standing.** A plaintiff in a declaratory judgment action challenging the validity of a regulation must prove that he or she is a person whose legal rights and privileges are or may be impaired by the challenged regulation. Neb. Rev. Stat. § 25-21,150 (Reissue 1989); Neb. Rev. Stat. § 84-911 (Reissue 1987).

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded with direction to dismiss.

Donald H. Bowman and Mark J. Krieger for appellant.

Robert M. Spire, Attorney General, Royce N. Harper, and Melanie J. Whittamore, and Terry Schmitt for appellees.

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

CAPORALE, J.

Pursuant to Neb. Rev. Stat. § 84-911 (Reissue 1987), plaintiff-appellant H.H.N.H., Inc., sought a declaratory judgment to negate the effect of regulations allowing defendant-appellee Nebraska Department of Social Services to recapture certain depreciation payments the department had made to plaintiff as the operator of a nursing home facility. Plaintiff asserts the district court erred in refusing to declare these regulations unconstitutional as applied to it. We reverse the judgment of the district court and remand with direction the action be dismissed for lack of a justiciable issue.

The department is responsible for the administration of the medical assistance program (medicaid) in the State of Nebraska. See Neb. Rev. Stat. §§ 68-1018 et seq. (Reissue 1986). In administering the program, the department

reimburses nursing home facilities for the cost of care to medicaid-eligible patients. The department determines payment or reimbursement rates for a nursing home in the medicaid program based on reasonable costs incurred by the facility. The expenses for which a nursing home can be reimbursed include, among other things, reasonable depreciation costs with respect to a facility's real property.

Plaintiff purchased a nursing home in Kenesaw, Nebraska, on July 1, 1976, and operated the facility from that time until selling it 9 years 9 months later on March 31, 1986. Throughout this period, plaintiff was enrolled as a certified provider under the medicaid program.

Effective October 17, 1977, the department, which at that time was known as the Nebraska Department of Public Welfare, adopted regulations providing for the recapture of depreciation expenses which were being paid, i.e., "reimbursed," to nursing homes. These regulations allowed medicaid providers to claim, as a reimbursable expense, straight-line depreciation on a nursing home's real property, but the regulation also allowed the department to recapture at least a portion of reimbursed depreciation expenses if the facility realized a gain on the sale of real property within 1 year of termination as a participant in the medicaid program. An exemption to the recapture rule provided that if a health care provider left the medicaid program for a period of 1 year and later disposed of real property, no depreciation would be recaptured under the October 17, 1977, regulation. See Nebraska Department of Public Welfare State Plan and Manual, part IX-6000, supp. A, § 1500 (October 17, 1977).

Effective July 1, 1980, the department revised its regulations dealing with the recapture of depreciation expenses by eliminating the ability of a provider to leave the medicaid program for a 1-year period and thereby avoid the department's recapture of the depreciation expenses previously paid to the provider. Inserted instead into the recapture provision was the following exemption:

> The provisions of this section [i.e., the section providing for recapture of depreciation expenses] shall not apply if: (1) the same person, partnership or corporation has

> owned the same long term care facility as a Title XIX certified provider, for a period of ten (10) or more consecutive years . . . .

Nebraska Public Welfare Manual, part IX-6000, supp. A, § 1500 at 7 (July 1, 1980).

Effective December 1, 1984, the department again revised its regulations, eliminating all exemptions to the recapture of depreciation provisions. See 471 Neb. Admin. Code, ch. 12, § 011.08D (1984). This final revision was effective through the time that plaintiff sold its Kenesaw nursing home, and provided no avenues for a health care provider to avoid the recapture of depreciation reimbursements in the event of a gain on the sale of real property. The department's long-term-care audit manager testified that the 1984 revision in the regulation was prompted by Congress' passage of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984). He also testified that the department determined that it was necessary to discontinue the 10-year exemption in the recapture of depreciation regulation in order to comply with Pub. L. No. 98-369. The parties stipulated that each of the regulations discussed above was properly promulgated as required by Neb. Rev. Stat. § 84-907 (Reissue 1987).

When it sold its Kenesaw nursing home, plaintiff and the department entered into a settlement agreement with respect to $133,216 in recaptured depreciation which the department claimed as a result of the sale. As part of this settlement agreement, plaintiff paid $133,216 into an escrow account. The agreement which governs this account provides the following within a paragraph entitled "Reason for Escrow":

> Pursuant to [471 Neb. Admin. Code, ch. 12, § 011.16 (1984)], the Department has demanded that [plaintiff] either pay or make arrangements to pay all sums claimed to be due for recapture of depreciation . . . . [Plaintiff] disputes the amounts claimed to be due and disputes whether the Department has a valid legal claim for such recapture. [Plaintiff] and the Department shall deposit such sums into escrow pending resolution of such disputes.

By stipulation, the parties agree that the $133,216 figure

represents recaptured depreciation for the period from October 17, 1977, the effective date of the department's initial depreciation recapture regulations, through the date of the sale of the nursing home. While plaintiff had owned the Kenesaw nursing home for only 9 years 9 months, the parties further stipulated that even if plaintiff had maintained ownership of the Kenesaw nursing home for an additional 3 months, that is, through July 1, 1986, the department would not have allowed the 10-year exemption which had been available under the 1980 regulation because that exemption had been repealed on December 1, 1984.

At the trial level, plaintiff sought a declaration that the recapture of depreciation regulations as originally promulgated in 1977 and as revised in 1984 were unconstitutional due to their alleged retroactive effect. The district court determined that plaintiff had no vested interest in the continuance of regulations which would have allowed it to avoid repaying the $133,216 claimed by the department. See, *Alcoholic Resocialization Conditioning Help, Inc. v. State*, 206 Neb. 788, 295 N.W.2d 281 (1980); *Hodges v. Fitle*, 332 F. Supp. 504 (D. Neb. 1971). See, also, *Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1081 (1st Cir. 1977), where, in a somewhat similar case, the court noted that "any expectation [medicare] providers had must have been discounted by an awareness that they were joining a new government program, subject to ongoing regulation . . . ."

The recapture of depreciation rules which were promulgated on October 17, 1977, operated from that date forward and thus did not have a retroactive effect and therefore could not violate plaintiff's right to due process. Apparently realizing this, plaintiff has appropriately abandoned its attack on the department's initial adoption of depreciation recapture rules. Plaintiff's assigned errors instead assert only that the department's elimination of all exemptions to the depreciation recapture rules deprived plaintiff of a property interest without due process of law. Thus, in this appeal, plaintiff asks this court to strike down the 1984 revision to the department's depreciation recapture regulations as applied to it and thereby implicitly declare that plaintiff is entitled to the exemption from

the depreciation recapture rule which had previously been available to a party owning a nursing home for at least 10 years. However, a review of applicable case law along with the facts of this case elucidates that the issue presented is one we may not decide.

In *Mullendore v. Nuernberger*, 230 Neb. 921, 925-27, 434 N.W.2d 511, 515-16 (1989), this court stated:

> While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska (cf. U.S. Const. art. III, § 2), existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska. . . .
>
> The "case or controversy" prerequisite to maintain litigation applies with equal, if not stronger, force to an action for a declaratory judgment, since the right to maintain the action is expressly granted only to those "person[s] . . . whose rights, status or other legal relations are affected by a statute." [Neb. Rev. Stat. § 25-21,150 (Reissue 1989).]
>
> . . . .
>
> . . . "In order to maintain an action to enforce private rights the plaintiff must show that he will be benefited by the relief to be granted." *Stahmer v. Marsh*, 202 Neb. 281, 284, 275 N.W.2d 64, 66 (1979). . . . "Clearly, the plaintiff must show that conditions exist which justify the court's exercise of its discretionary power to grant declaratory relief. . . ." . . . Thus . . . a plaintiff has the burden to prove the existence of a justiciable controversy and an interest in the subject matter of the action.
>
> Therefore, a plaintiff in a declaratory judgment action challenging the validity of a statute must prove that the plaintiff is a person "whose rights, status or other legal relations are affected" by the challenged statute. See § 25-21,150.

Similarly, a plaintiff in a declaratory judgment action challenging the validity of a regulation must prove that he or she is a person whose legal rights and privileges are or may be impaired by the challenged regulation. See § 84-911.

Thus, while *Mullendore* involved a challenge to a statutory

provision pursuant to Neb. Rev. Stat. § 25-21,150 (Reissue 1989), the quoted language applies equally to a challenge to a regulatory provision pursuant to § 84-911. With that premise in mind, we now examine the substance of plaintiff's appeal.

Assuming that this court were to grant the relief sought by plaintiff and thereby hold that plaintiff is entitled to the previously available 10-year exemption, plaintiff would still not benefit from the granting of such relief. To qualify for the exemption under which plaintiff seeks to benefit, plaintiff is required to have owned the Kenesaw nursing home for 10 consecutive years, not 9 years 9 months. Consequently, even if this court were to strike down the 1984 revision to the department's depreciation recapture rules and thereby make the prior exemption to those rules available to plaintiff, plaintiff would not qualify for the exemption. Thus, plaintiff could not benefit from a favorable ruling by this court.

It is true that the parties have stipulated that "[e]ven if the plaintiff maintained ownership through July 1, 1986, the ten-year exemption would not have been allowed by the [department] due to this regulation's repeal effective December 1, 1984." Plaintiff apparently believes that this stipulation entitles it to the 10-year exemption without complying with the requirement that plaintiff own the facility for 10 years. However, even assuming that the department could legally make such a concession, it clearly has not done so. The stipulation merely states that the department's position was that the 10-year exemption would not be available to plaintiff even if plaintiff had held the property for 10 years. Plaintiff fails to bridge the logical gap between the stipulation and the conclusion that it is entitled to the benefit of the 10-year exemption without complying with the requirements of the 10-year exemption.

Because plaintiff cannot benefit from the relief it seeks, it has failed to prove the existence of an actual controversy, and thereby fails to present a justiciable issue in this appeal.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

# STATE OF NEBRASKA, APPELLEE, V. ELMER CHAPMAN, APPELLANT.

451 N.W.2d 263

Filed February 9, 1990. No. 88-1072.

1. **Trial: Evidence: Waiver: Appeal and Error.** If a party does not make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection.
2. **Trial: Evidence: 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. **Criminal Law: Evidence: Other Acts.** The prosecution may put into 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 tend to prove that the defendant committed other crimes.
4. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant.
5. **Trial: Evidence: Convictions: Appeal and Error.** Improper admission of evidence constitutes nonreversible harmless error where the evidence is cumulative and there is other competent evidence to support the conviction.
6. **Appeal and Error.** An issue not properly presented and passed upon by the trial court may not be raised on appeal.
7. **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 or article I, § 11, of the Nebraska 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.
8. **Criminal Law.** The defense of diminished capacity does not exist in Nebraska.
9. **Trial: Judges.** Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury.
10. **Trial: Proof: Appeal and Error.** A defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.

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

Rodney W. Smith for appellant.

Elmer Chapman, pro se.

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

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

FAHRNBRUCH, J.

Elmer Chapman appeals his Knox County felony jury conviction for intentionally, knowingly, or recklessly causing bodily injury to a deputy sheriff while the officer was performing his official duties. The defendant was sentenced to an indeterminate prison term of 20 months to 5 years for violating Neb. Rev. Stat. § 28-931(1) (Reissue 1989). We affirm.

On appeal, through counsel, the defendant contends that the trial court erred in (1) allowing testimony about an outstanding arrest warrant for the defendant and admitting the warrant into evidence; (2) allowing Chief Deputy Sheriff James F. Janecek to testify he had, in the past, observed the defendant in an intoxicated condition; (3) allowing Deputy Sheriff Don Henery to testify about a prior prison term served by the defendant; (4) admitting testimony about an experiment Janecek conducted with a female jailer, and the admission into evidence of two photographs taken during the experiment; and (5) failing to give an expert witness jury instruction in regard to testimony concerning the Janecek experiment.

In his pro se brief, the defendant claims (1) that his counsel was ineffective and (2) that the trial court erred in making prejudicial statements to the jury.

To prove the defendant guilty under § 28-931(1), it was necessary for the State to prove beyond a reasonable doubt each of the following elements of the crime charged: (1) that Janecek was a peace officer; (2) that at the time of the alleged offense, Janecek was engaged in the performance of his official duties as a peace officer; (3) that the defendant intentionally, knowingly, or recklessly caused bodily injury to Janecek while he was engaged in the performance of his official duties as a peace officer; and (4) that the foregoing acts occurred in Knox County, Nebraska, on or about March 12, 1988.

The defendant does not contest the sufficiency of the evidence or the sentence imposed. There was evidence from which a jury could find beyond a reasonable doubt the following. Around 1:15 a.m., March 12, 1988, Knox County

Chief Deputy Sheriff Janecek and Knox County Deputy Sheriff Henery responded to a complaint that the defendant was trespassing on a farm and that a vehicle had left the road at that location. The complainant named Chapman as the trespasser. At the time, there was an outstanding warrant for the defendant's arrest.

Upon the deputies' arrival at the farm, the temperature was dropping rapidly, and the onset of a blizzard was producing snow and blowing snow. The deputy sheriffs found that a vehicle had left the road, entered a ditch, gone through a fence, and come to rest down by a creek which ran through a cattle yard on the farm. The vehicle was stuck in the mud.

The sheriff's deputies found a brother of the defendant asleep in the front seat of the car. Footprints in the mud led across the creek, away from the vehicle. There was no mud on the feet of the defendant's brother when he was found. The defendant's brother was arrested for driving while intoxicated and placed in Janecek's cruiser. The owner of the farm confirmed that he had seen the defendant earlier on the farm. Thereupon, the two deputy sheriffs and the owner of the farm searched for the defendant. The search eventually led to a neighboring farmstead. The defendant was found attempting to light a cigarette inside a house. He was arrested on the outstanding arrest warrant and for trespassing, a misdemeanor committed in the officers' presence. Chief Deputy Janecek testified that Chapman was intoxicated and that the deputies believed they were protecting the defendant from the heavy snow, severe winds, and freezing temperatures of the blizzard.

After he was arrested, the defendant was placed in the back seat of Janecek's cruiser and was seated on the passenger side. His brother was seated behind Janecek, who was driving the cruiser. Deputy Henery was seated on the passenger side of the front seat.

In the cruiser, the defendant became verbally abusive and threatened Janecek. As the cruiser was being driven into Center, Nebraska, the defendant put his leg over the back of the front seat and kicked Janecek in the right temple. Janecek's eyeglasses were bent, his nose was scratched, and mud and manure covered his face. Janecek's right temple became

swollen, and his head began to ache. Subsequently, Chapman was charged with assault on a peace officer while the officer was in the performance of his official duties.

Defendant's first assignment of error claims the trial court erred in admitting testimony in regard to the outstanding arrest warrant for the defendant and in allowing the arrest warrant to be admitted into evidence. At trial, Deputy Janecek testified that his duties as a peace officer included making arrests pursuant to warrants. The record does not reflect that Chapman objected to this testimony. If a party does not make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. *State v. Welsh*, 232 Neb. 219, 440 N.W.2d 225 (1989); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989).

The arrest warrant was received over a relevancy objection by the defendant. 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. Thomas*, 232 Neb. 490, 441 N.W.2d 186 (1989); *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989). The prosecution may put into 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 tend to prove that the defendant committed other crimes. *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983). The arrest warrant was relevant to prove that Janecek was engaged in the performance of one of his official duties. There was no abuse of discretion in admitting the arrest warrant into evidence. Defendant's first assignment of error is meritless.

Defendant's second assignment of error contends the trial court erred in allowing the testimony of Janecek when he stated that he had observed Chapman in an intoxicated condition in the past. Janecek testified that the defendant was intoxicated when they found him in the early morning hours of March 12, 1988. The witness was asked by the prosecutor if he had seen the defendant when he appeared to be under the influence of alcohol. Defendant objected on grounds of relevancy. The court overruled defendant's objection. Janecek answered affirmatively.

Janecek had testified that it was one of his duties to act as a safekeeper of intoxicated persons. It was apparently on that basis that the trial court found that evidence of defendant's prior intoxication was relevant to determine Janecek's ability to assess whether Chapman was so intoxicated that he was dangerous to himself or others. Neb. Rev. Stat. § 53-1,121 (Reissue 1988) provides that law enforcement officers may take an intoxicated person from any public or quasi-public property and place that person in civil protective custody when in the judgment of the officer the intoxicated person is dangerous to himself or others. Chapman was found on private property. Therefore, § 53-1,121 did not apply in this case. Consequently, evidence that Janecek had previously observed the defendant when he appeared to be under the influence of alcohol was irrelevant.

It is well established that a conviction will not be set aside in the absence of a showing that an error prejudiced the defendant. *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987). Although the issue is not specifically addressed in his brief, Chapman apparently argues that evidence of defendant's prior intoxication was used for the impermissible purpose of proving the defendant's character and that he acted in conformity therewith. See Neb. Rev. Stat. § 27-404(2) (Reissue 1989). However, defendant fails to demonstrate that this evidence was used for that impermissible purpose or that he was otherwise prejudiced by the admission of this evidence.

Disregarding this evidence, there is overwhelming evidence upon which Chapman could be convicted beyond a reasonable doubt. Any error the trial court committed in admitting the evidence of defendant's prior intoxication was harmless beyond a reasonable doubt and provides no basis for reversing defendant's conviction. See *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989) (error must be harmless beyond a reasonable doubt). Defendant's second assignment of error is meritless.

The third assignment of error cited by the defendant alleges the trial court erred in allowing the testimony of Deputy Henery in regard to a prior prison term served by Chapman. Henery was asked to recount the conversation which took place between the deputies and the defendant as they were returning

to Center. Defendant objected that such a recount would be cumulative. Henery testified that Chapman was verbally abusive and stated, among other things, that the defendant wanted to kill Janecek and the chief of police because the defendant felt that the chief had been responsible for sending him to prison.

Overruling of defendant's objection was proper. The evidence corroborated Janecek's testimony and was relevant to prove Chapman's motive and intent to intentionally, knowingly, or recklessly cause bodily injury to Janecek.

The record further discloses that the defendant did not object to this testimony once it came to light, nor did he move to strike the testimony from the record. If a party does not make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. *State v. Welsh*, 232 Neb. 219, 440 N.W.2d 225 (1989). Defendant's third assignment of error is meritless.

Defendant next claims that the trial court erred in admitting the testimony of Janecek in regard to an experiment which was conducted to show that it was physically possible for Chapman to have kicked Janecek from the back seat of the cruiser. Defendant also cites as error the admission of photographs of the experiment.

The State introduced two photos showing a female jailer similar in height to the defendant, with her arms placed behind her back and wrists touching as if handcuffed, seated in the rear of Janecek's cruiser. The jailer placed her feet over the front seat in the area of the driver's head. Defendant objected to the methodology of the experiment and to its foundation, which objections were overruled. Defendant then conducted a foundational voir dire and renewed his objections, but the photographs were received.

Improper admission of evidence constitutes nonreversible harmless error where the evidence is cumulative and there is other competent evidence to support the conviction. *State v. Sheridan*, 230 Neb. 979, 434 N.W.2d 338 (1989). The events surrounding the kicking of Janecek were testified to by both Janecek and Henery. Henery testified that he saw the defendant kick Janecek. Janecek testified that he grabbed the foot that

struck him and turned to find that the foot belonged to the defendant. The photographs of the experiment were cumulative. They merely corroborated the testimony of the deputies that Janecek could be kicked by a prisoner in the position in which the defendant was seated.

Defense counsel's final assignment of error claims the trial court erred in failing to give a jury instruction with regard to expert testimony concerning the experiment. A review of the record reveals that a proposed set of jury instructions was supplied to the defendant for review and was not objected to by counsel. Nothing in the record indicates that defendant requested an expert witness instruction. The failure to give such an instruction was not raised in the trial court. An issue not properly presented and passed upon by the trial court may not be raised on appeal. *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989).

Chapman's pro se brief raises two additional assignments of error. Defendant alleges (1) that his counsel was ineffective and (2) that the trial court made prejudicial statements to the jury.

To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution or article I, § 11, of the Nebraska 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. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989).

In arguing ineffectiveness of counsel, defendant first contends that counsel failed to investigate or present his theory of defense. Chapman's defense would have been that of diminished capacity on account of an illness and his use of "mind altering medication" at the time of the offense. Chapman's contention is without merit. The defense of diminished capacity does not exist in Nebraska. See *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982).

Defendant further contends, however, that by reason of being on medication "he did not (and could not have had) have

the mental capacity (intent, and or willfulness) to commit or form the intent to assault anyone." Pro se brief for appellant at 3. Not only was the issue of the defendant's being on medication never presented to the trial court, but also nothing in the record indicates that defendant's counsel failed to consider Chapman's position. In addition, the defendant fails to demonstrate that he suffered prejudice by this alleged dereliction on the part of counsel. On the contrary, the abusive language and physical threat directed at Janecek just prior to the kicking provides ample evidence that the defendant acted intentionally, knowingly, or recklessly in kicking Janecek.

Chapman's second example cited in alleging ineffectiveness of counsel contends that counsel failed to utilize police reports regarding alleged inconsistencies between the actions and the testimony of Deputies Janecek and Henery. As an example, defendant points out that there were no attempts to photograph the chief deputy's injury or to seek medical attention. The record, however, reflects that defendant's counsel cross-examined both deputies and specifically inquired about Janecek's failure to receive medical treatment for the injury. More significantly, Chapman fails to set forth how the police reports could have been utilized or how he was prejudiced by counsel's alleged failure to use the police reports. A criminal defendant must demonstrate prejudice was suffered from ineffectiveness of counsel. *State v. Nearhood, supra.* Defendant's first pro se assignment of error is without merit.

Chapman's second pro se assignment of error claims that the trial court made prejudicial statements to the jury. Chapman further alleges that counsel's failure to object to those statements constituted ineffectiveness of counsel. After defendant rested, the trial court stated: "Ladies and gentlemen, that's got to be a record. Next February I'll be saying I've been a judge for 20 years and this has got to be the record for the shortest trial, so far as the evidence is concerned, I've had in that time."

We have stated that trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. See *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985).

However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *State v. Juhl, ante* p. 33, 449 N.W.2d 202 (1989).

Chapman asserts that the trial court's statement can only be construed negatively against him because the only evidence the defense offered was the testimony of the defendant. The comments made by the trial court were neutral in that they favored neither the defendant nor the State. They were not prejudicial, and defense counsel's failure to object to the comments did not amount to ineffective assistance of counsel. Chapman's final assignment of error is meritless.

AFFIRMED.

---

DAVID ENSRUD, APPELLEE, V. ALICIA ANN ENSRUD, APPELLANT.
451 N.W.2d 270

Filed February 9, 1990. No. 89-221.

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

Robert M. Harris, of Harris & Lippstreu, for appellant.

Thomas W. Tye II, of Tye, Hopkins & Tye, for appellee.

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

PER CURIAM.

Alicia Ann Ensrud appeals from the judgment of the district court for Buffalo County entered in a proceeding to dissolve the marriage of Alicia Ensrud and David Ensrud.

The district court granted custody of Sara Marie Ensrud, the parties' minor child, to David Ensrud, subject to Alicia

Ensrud's right of reasonable visitation of Sara Marie Ensrud. The district court also ordered that Alicia Ensrud pay $127 monthly as child support for Sara Marie Ensrud.

Under our standard of review in dissolution cases, we have completed a de novo review of the record to determine if the district court abused its discretion in the matters of child custody and child support. See *King v. King*, 231 Neb. 990, 438 N.W.2d 796 (1989). We find no abuse of discretion and, therefore, affirm the district court's orders on child custody and child support for Sara Marie Ensrud.

Alicia Ensrud also assigns as error the district court's failure to transfer the proceedings to the district court for Scotts Bluff County, Nebraska. However, Alicia Ensrud fails to point out any prejudice from the refusal to transfer the proceedings, and we find no abuse of discretion in the district court's not transferring the proceedings as requested by Alicia Ensrud. See *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987).

The judgment of the district court is affirmed.

AFFIRMED.

---

STATE OF NEBRASKA, APPELLEE, V. ARTHUR C. CARTER, APPELLANT.

451 N.W.2d 271

Filed February 9, 1990. No. 89-239.

1. **Convictions: Appeal and Error.** A criminal conviction will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Sentences: Appeal and Error.** A sentence will not be set aside absent an abuse of discretion by the trial court.

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

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

Robert M. Spire, Attorney General, and Alfonzo Whitaker for appellee.

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

WHITE, J.

This is an appeal from a judgment of conviction and sentence for the crime of attempted robbery. Appellant was sentenced to a term of from 4⅔ to 18 years' imprisonment in the penal complex, with credit for 197 days spent in jail awaiting disposition. This appeal follows. We affirm.

Two errors are assigned: (1) The evidence is insufficient to sustain the conviction, and (2) the sentence is excessive.

Attempted robbery is a Class III felony and is punishable by a term of from 1 to 20 years' imprisonment, up to a $25,000 fine, or both.

To consider the first assignment, we set forth the factual sequence in some detail. We observe that if, under a consideration of the facts in a view most favorable to the State, the evidence sustains the verdict, we will affirm. *State v. Anderson*, 229 Neb. 427, 427 N.W.2d 764 (1988).

A person is guilty of robbery "if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another . . . ." Neb. Rev. Stat. § 28-324(1) (Reissue 1989). Neb. Rev. Stat. § 28-201(1) (Reissue 1989) states:

> A person shall be guilty of an attempt to commit a crime if he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

In the early morning hours of August 11, 1988, Thomas Powers was on duty as a clerk in the Town & Country store at 24th and Farnam Streets in Omaha, Douglas County, Nebraska. Powers was the only clerk on duty. After returning from attending to personal needs, Powers observed a black male at the door of the temporarily locked front door. Powers opened the door, and the person followed him into the store.

After taking his place behind the counter, Powers was asked for change for a dollar. Powers secured four quarters from the register, and the person did not immediately come to the counter to receive the quarters. The person instead asked if the store was taking applications and received no as the answer.

Thereupon, the person stated, "[T]his is a stickup," while reaching into his beltline as if trying to pull something from that area. Powers testified that he impulsively replied, "Fuck that," and reached for a tire iron in a box below him. Powers never saw a weapon. The person retreated, paused at the outside door for a moment, and then fled. Powers testified that he observed the man for the entire 1 1/2 minutes the incident lasted, a substantial part of the time from 3 feet away. The store was well lighted.

Powers testified he was shaken and frightened by this incident. Subsequently, the incident was reported to the Omaha police, and a description of the person was given. Powers identified the appellant as the robber at trial and previously at a photo showup conducted by the Omaha Police Division. The photo showup is not challenged in this court.

The crux of appellant's argument seems to be that since Powers resisted the robbery, he was therefore not "put in fear," and the State has failed to prove an essential element of its case. The point is interesting, but not persuasive. On reflection, Powers, and a victim of any crime, might unwisely resist, yet the fact exists that Powers did testify that he was frightened by the implied threat of violence. The State established a prima facie case, and the assignment is without merit.

A sentence will not be set aside absent an abuse of discretion by the trial court. *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

In its sentencing dialogue, the court elicited from the appellant that he had received a juvenile commitment for the offense of robbery in 1976; an adult conviction for burglary in 1978, with a 2- to 4-year sentence; a jail sentence for theft in 1982; convictions and jail sentences in 1983 and 1984 for shoplifting (four times), gambling, disorderly conduct (twice), and giving false information (twice). In 1988, a conviction of possession of drug paraphernalia resulted in only a fine.

We are not persuaded that the trial court abused its discretion. The assigned errors are without merit.

AFFIRMED.

---

## IN RE INTEREST OF J.L.M., D.M.M., D.J.M., J.J.M., AND M.J.M., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. K.M., APPELLANT.

451 N.W.2d 377

Filed February 9, 1990. No. 89-341.

1. **Appeal and Error: Words and Phrases.** In appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for some further action in accordance with the remanding order.
2. **Trial: Appeal and Error.** At a hearing or trial after remand from an appellate court, the parties stand in the same position as if there had been no prior disposition of the question, issue, or matter for which a remanded proceeding has been ordered.
3. **Courts: Judgments: Appeal and Error.** As a result of an order for remand and mandate from an appellate court, a trial court is obligated to adhere to the mandate and render judgment within the mandate's purview.
4. **Indian Child Welfare Act: Proof.** A party to a proceeding who seeks to invoke a provision of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. (1982), has the burden to show that the act applies in the proceedings.
5. **Indian Child Welfare Act: Parental Rights.** For application of the Indian Child Welfare Act to proceedings for termination of parental rights, the proceedings must involve an Indian child within the purview of the act.
6. **Parental Rights.** A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
7. **Parental Rights: Abandonment: Words and Phrases.** "Abandonment," for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 1988), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for displaying parental affection for the child.
8. **Parental Rights: Abandonment.** If a parent voluntarily, but unreasonably or unjustifiably, departs from the state of residence of the parent's child or children, such departure may constitute parental abandonment of the child or children and cannot be used as an excuse for noncompliance with a court-ordered plan for parental rehabilitation.

9. **Parental Rights.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation presents an independent reason justifying termination of parental rights.
10. **Parental Rights: Proof.** Termination of parental rights under the Nebraska Juvenile Code requires evidence which is clear and convincing.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Gregory M. Thomas and Clark J. VanSkiver, of Sodoro, Daly & Sodoro, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

SHANAHAN, J.

Pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 et seq. (Reissue 1988), the separate juvenile court of Douglas County terminated parental rights of K.M. in her five children because she failed to comply with a court-ordered rehabilitation program to correct conditions which led to the adjudication that K.M.'s children were juveniles within the meaning of § 43-247(3)(a) of the Nebraska Juvenile Code, and because she abandoned her children for a period in excess of 6 months immediately prior to filing of the termination petition.

K.M. appeals and among her assignments of error raises questions of first impression concerning the U.S. Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. (1982) (ICWA) and the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. §§ 43-1501 et seq. (Reissue 1988) (NICWA).

## INDIAN CHILDREN WELFARE ACTS

In 1978, Congress passed the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., which embodies specific congressional findings:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian

tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901.

ICWA contains an express congressional delcaration of policy:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902.

Under ICWA, " 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). " 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village . . . ." 25 U.S.C. § 1903(8).

ICWA also provides:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an

> Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b).

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1911(c).

Regarding evidence and the burden of persuasion ICWA states:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f).

Pursuant to authority delegated by the Secretary of the Interior of the United States, the Bureau of Indian Affairs promulgated "Guidelines for State Courts; Indian Child Custody Proceedings," 44 Fed. Reg. 67584 to 67595 (1979) (Guidelines).

As noted in the Guidelines, through ICWA Congress has expressed a preference for keeping Indian families together, granting deference to tribal judgment on custody matters and child placement with Indian families when Indian children have been removed from their homes. In subpart (2) of the "Policy" section of the Guidelines, there is the following provision:

> In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the

> protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

44 Fed. Reg. at 67586.

The Guidelines further provide:

> (a) When a state court has reason to believe a child in a custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. . . .
>
> (b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.
>
> . . . .
>
> (c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include . . .
>
> (i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

*Id.* The "commentary" for the foregoing excerpt from the Guidelines states: "This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria." *Id.*

Section 43-1502 of the Nebraska Indian Child Welfare Act, enacted in 1985, expresses the purpose of the state act:

> The purpose of the Nebraska Indian Child Welfare Act is to clarify state policies and procedures regarding the implementation by the State of Nebraska of the Federal Indian Child Welfare Act, 25 U.S.C. 1901 et seq. It shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the Federal Indian Child Welfare Act are enforced.

Sections 43-1503(4) (definitions for NICWA) and 43-1504(2) (jurisdiction and transfer of proceedings to a tribal court) are

verbatim reiterations of their respective counterparts in the federal act, ICWA. Section 43-1505(6) of NICWA, as does § 1912(f) of ICWA, requires "evidence beyond a reasonable doubt" for termination of parental rights. In contrast with the "reasonable doubt" standard expressed in the Indian Child Welfare Act, the evidential standard for the burden of persuasion in termination of parental rights cases under the Nebraska Juvenile Code is "clear and convincing" evidence. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

## STANDARD OF REVIEW

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. [Citations omitted.] In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence. [Citations omitted.] A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.

*In re Interest of T.C.*, 226 Neb. 116, 117-18, 409 N.W.2d 607, 609 (1987). See, also, *In re Interest of J.S., A.C., and C.S., supra*.

## FACTUAL BACKGROUND

On February 6, 1984, four of K.M.'s five children were placed in foster care after police had found the children unattended in their residence. On February 16, the State filed a petition in the juvenile court and alleged that K.M.'s five children—J.L.M. (born June 29, 1973), D.M.M. (born March 7, 1975), D.J.M. (born March 12, 1980), J.J.M. (born August

8, 1981), and M.J.M. (born March 2, 1983)—lacked proper parental care by reason of the fault or habits of their mother and, therefore, were juveniles under the Nebraska Juvenile Code. See § 43-247(3)(a) (bases for jurisdiction of a juvenile court). The State specifically alleged, inter alia, that K.M. had frequently left the children unattended for prolonged periods without adult supervision or protection and that on several occasions K.M.'s children were inappropriately attired and needed bathing. The State also alleged that K.M.'s residence was in disarray, namely, throughout the residence were dirty clothes and diapers, cigarette butts, beer cans, garbage, food particles, dirt, and human feces; dirty dishes covered the dining table and filled the sink; and a putrid odor permeated the entire residence. Further, the State alleged that K.M. suffered a dependence on alcoholic beverages, which impaired her ability to provide the necessary protection, supervision, and parental care required for the children.

## ADJUDICATION UNDER THE NEBRASKA JUVENILE CODE

At the adjudication hearing on February 27, 1984, K.M., accompanied by her lawyer, appeared before the court. The guardian ad litem for K.M.'s children also appeared at the adjudication hearing. After K.M. had "stipulated" that the factual allegations in the State's petition were "true," the court found that the children were juveniles within the provision of § 43-247(3)(a) of the Nebraska Juvenile Code and ordered that the children remain in the custody of the Nebraska Department of Social Services (DSS) for foster care placement, subject to K.M.'s reasonable visitation of her children.

## DISPOSITIONAL AND REVIEW HEARINGS

On April 2, 1984, K.M. appeared before the court with her attorney for a dispositional hearing. Also present were the guardian ad litem for the children, a representative of DSS, and a court service officer. Also, P.M.'s attorney appeared at the dispositional hearing. P.M. is the father of three of K.M.'s children. K.M. was living with her husband, who is not the father of any of K.M.'s children, in a one-bedroom unit at a downtown hotel with no kitchen facilities. For over 10 years

K.M. had been unemployed, but at the time of the hearing derived income by supplying her blood biweekly to a blood bank. K.M.'s husband, also unemployed, supplied a blood bank with his blood as a source of income. K.M. had been married to, but was divorced from, P.M., the father of K.M.'s three oldest children. Through his lawyer, P.M. indicated an intention to seek custody of his three children. The two youngest of K.M.'s children have different fathers, who never married K.M. and who are not parties to these proceedings.

At the conclusion of the dispositional hearing, the court ordered that the children remain in the custody of DSS, subject to K.M.'s reasonable visitation. The court also ordered a "home study" regarding P.M.'s residence. The court further ordered K.M. to obtain suitable and stable employment and to participate in psychological and psychiatric evaluations. Also, the court ordered that K.M. undergo a chemical dependency evaluation, adhere to any recommendations based on the evaluation, and obtain a permanent residence. The court required interim reports before a review hearing concerning the rehabilitative program ordered at the dispositional hearing.

Although notified of the review hearing set for July 30, 1984, K.M. failed to appear at the hearing. The State's evidence established that K.M. had missed several scheduled visitations with her children, that she and her husband remained unemployed, and that the couple still relied on income from selling their plasma. K.M. had completed psychological and psychiatric evaluations, but had failed to undergo a chemical dependency evaluation. K.M. and her husband were residing in a studio apartment suitable only for two adults. Meanwhile, K.M.'s children were in three separate foster homes and, with the exception of J.L.M., were doing fairly well in foster care. J.L.M., the oldest child of the five, exhibited emotional problems and, after treatment at St. Joseph Center for Mental Health, was placed in a group home.

A lawyer for the Yankton Sioux Tribe and Judge Albert Joseph, chief judge of the Yankton Sioux tribal court, appeared at the July 30 review hearing. Through Judge Joseph, the tribe indicated its intention to request that jurisdiction over K.M.'s children be transferred to the tribal court of the Yankton Sioux

Tribe. See 25 U.S.C. § 1911(b) and § 43-1504(2). Apparently, the tribe and Judge Joseph believed that K.M.'s children were Indian children under the federal and state acts. However, at the time of the review hearing, no pleadings had been filed for transfer of the proceedings to the Yankton Sioux Tribe and its tribal court.

As a result of the July 30 review hearing, the court reaffirmed its previous order for DSS' custody of K.M.'s children, again ordered that K.M. maintain consistent visitation with her children, and retained its order that K.M. undergo evaluation for chemical dependency and obtain a stable source of income and suitable housing.

On August 15, the Yankton Sioux Tribe filed a petition in the juvenile court and alleged that K.M.'s children were Indian children under the federal Indian Child Welfare Act and that the tribe "accepted" jurisdiction over the children. The Yankton Sioux Tribe requested that the juvenile court transfer the proceedings to the tribe's jurisdiction pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1911(b). On October 15 and through his attorney, P.M. objected to any transfer of proceedings to the Yankton Sioux Tribe.

On February 21, 1985, the juvenile court held another review hearing, at which evidence disclosed that K.M. had successfully completed a 60-day alcoholism treatment program in Omaha, but had moved to Lincoln despite an assigned social worker's admonitions against such move. Although K.M. had not visited her children since September 1984, she did eventually see her children three times in February 1985. K.M. planned to divorce her husband, from whom she had separated. At the conclusion of the review hearing, the court renewed its previous orders and further ordered K.M. to attend biweekly Alcoholics Anonymous meetings and notify the court of any significant changes in her lifestyle. Shortly after the review hearing and against the advice of DSS, K.M. moved to South Dakota to live with her mother.

On November 14, 1985, K.M. filed a motion for transfer of the proceedings to the jurisdiction of the Yankton Sioux Tribe pursuant to ICWA, the federal act.

Regarding the requests to transfer jurisdiction to the

Yankton Sioux Tribe, the juvenile court held a hearing on November 25, 1985, and hearings on March 3, April 30, September 16, and October 29 during 1986. Evidence at those hearings showed that K.M.'s father was a fullblooded Ponca and that her mother was one-half Yankton Sioux and one-half Caucasian. Although the method of calculating K.M.'s Indian blood degree is unclear, K.M. maintained that she was five-eighths Yankton Sioux. Each father of K.M.'s five children had no Indian blood. Although K.M. was an enrolled member of the Yankton Sioux Tribe, her children were not enrolled with the tribe. None of K.M.'s children have been raised in the traditional Indian culture of the Yankton Sioux or have ever resided on a reservation. When K.M. applied for her children's enrollment with the Yankton Sioux Tribe, the tribe rejected the applications. Judge Joseph testified that to qualify for membership in the Yankton Sioux Tribe, the applicant must be "one fourth Indian. Of that one fourth, [one] must be one eighth Yankton Sioux." Judge Joseph acknowledged that K.M.'s children must be eligible for membership in the Yankton Sioux Tribe before the tribal court could accept jurisdiction.

In May 1986, the juvenile court declined to transfer the proceedings to the Yankton Sioux Tribe. Later, after a hearing on K.M.'s motion that the federal Indian Child Welfare Act govern the proceedings, the juvenile court, on December 3, 1986, determined that

> the children that are the subject of this action are in fact eligible for membership in the Yankton Sioux Tribe and the Federal Indian Child Welfare Act and its State counterpart, the Nebraska Indian Child Welfare Act should be the controlling statutory law for the hearings and proceedings involving these children.

After additional review hearings in March and July of 1987, the State, in September 1987, filed a motion to terminate K.M.'s parental rights. At the hearing in December 1987 concerning the termination motion, the State presented evidence that K.M. had failed to comply with the court-ordered program for K.M.'s rehabilitation, although DSS personnel had fully explained the plan to K.M., who understood the plan and had agreed to comply with the court's directives. In particular, K.M. failed to

comply with rehabilitative recommendations received at the alcohol treatment center and did not inform the court whether she was attending Alcoholics Anonymous meetings. Also, K.M. failed to achieve the following: obtain employment; maintain contact with court service officers, who had made several attempts to contact her; attend parenting classes as recommended by a court service officer; and acquire adequate and stable housing. Although DSS made special efforts for K.M.'s visitation of her children, such as supplying bus tickets for K.M.'s travel from Lincoln to Omaha for visitation and making special arrangements with the American Indian Center of Omaha for K.M.'s child visitation at the center, the special efforts were of no avail for K.M.'s visitation of her children. Notwithstanding the order to maintain consistent visitation with her children, K.M.'s last contact with any of her children was in March 1986, when she visited her two oldest children. After March 1986, K.M. made no attempts to contact the children at all, whether through letters, telephone calls, or personal visits. A report on K.M.'s home in South Dakota reflected that K.M. was unable to provide a stable and adequate home for her children in view of her unstable financial condition, unsatisfactory housing, and unresolved alcohol problems.

On the basis of the evidence adduced at the termination hearing, the court found that reasonable efforts had been made to reunite K.M. with her family, but that return of the children to K.M. would not be in the children's best interests. Further, the court found that, "by evidence beyond a reasonable doubt," K.M. had abandoned her children for more than 6 months before the State filed its termination motion. See § 43-292(1) (termination of parental rights; abandonment for 6 months before filing of petition to terminate parental rights). Also, "by evidence beyond a reasonable doubt," the court found that K.M. had failed to comply with the court-ordered rehabilitative program to correct the conditions which led to the determination that K.M.'s children were juveniles under the Nebraska Juvenile Code. See § 43-292(6) (termination of parental rights; failure to correct conditions resulting in adjudication that a child is a juvenile within § 43-247(3)(a) of

the Nebraska Juvenile Code). For those reasons, on December 10, 1987, the juvenile court terminated K.M.'s parental rights in her children. K.M. appealed to this court.

During pendency of K.M.'s appeal, the State filed a motion in this court for remand on the limited question of applicability of the U.S. Indian Child Welfare Act and the Nebraska Indian Child Welfare Act, since documentation obtained showed that none of K.M.'s children was an "Indian child" within the state or federal act. Without written opinion, this court ordered a remand of the proceedings to the juvenile court for additional evidence on the issue concerning applicability of ICWA and NICWA to the proceedings. On September 7, 1988, this court's mandate was issued concerning the order for remand of proceedings in the juvenile court.

Pursuant to the remanding order and the mandate from this court, the juvenile court held a hearing on March 13, 1989. Applicable to that hearing are federal statutes, Pub. L. No. 87-629, 76 Stat. 429, enacted in 1962 and later codified as 25 U.S.C. §§ 971 to 980 (1982), which related to the "Ponca Tribe of Native Americans of Nebraska" and in part provided:

> When the distribution of tribal assets in accordance with the provisions of this subchapter has been completed, the Secretary of the Interior shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such tribe and its members has terminated. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians or Indian tribes because of their Indian status, all statutes of the United States that affect Indians or Indian tribes because of their Indian status shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of any Indian as a citizen of the United States.

25 U.S.C. § 980.

At the March 13 hearing, the State presented documentary evidence—a letter from the Yankton Sioux Tribe and a letter from the Tribal Government Services of the Bureau of Indian

Affairs, Department of the Interior.

The letter from the Yankton Sioux Tribe contained a statement that "[a]ll of [K.M.'s] children are not eligible for membership [in the Yankton Sioux Tribe] because they do not meet the membership criteria" contained in the "Enrollment Ordinance of the Yankton Sioux Tribe's constitution . . . ." Also, the letter stated that the Yankton Sioux Tribe would not consider the "Indian blood" of K.M.'s father because the Ponca Tribe had been dissolved pursuant to federal law, namely, 76 Stat. 429. Consequently, none of the former Ponca Tribe was recognized as a member of an Indian tribe. The Yankton Sioux Tribe concluded that K.M.'s "children do not meet the total Indian blood requirement" for membership in the tribe.

The letter from Tribal Government Services also referred to federal law, namely, "P.L. 87-629, 76 Stat. 429, which established termination of the Federal trust relationship to the Ponca Tribe of Native Americans of Nebraska and its members." According to the Bureau of Indian Affairs' enrollment manual: "The tribe may decide for itself that it is permissible to count the blood of a terminated Indian tribe in fulfilling requirements for membership for tribal purposes only." The letter from Tribal Government Services also stated that the Yankton Sioux Tribe "chose not to include the Ponca blood in calculating the degrees of Indian blood for [K.M.'s] children, thus resulting in the rejection of their applications" for membership in the Yankton Sioux Tribe.

After the hearing on applicability of ICWA and NICWA, the court, on March 20, 1989, determined that the federal Indian Child Welfare Act and its Nebraska counterpart were inapplicable to the juvenile proceedings and left intact the previous order which terminated K.M.'s parental rights in her children.

## ASSIGNMENTS OF ERROR

K.M. contends that (1) on March 20, 1989, the juvenile court lacked jurisdiction to review and alter its prior order, entered on December 3, 1986, whereby the court had determined that the Indian Child Welfare Act applied to the proceedings; (2) the juvenile court erred on March 20, 1989, in setting aside its

order, entered December 3, 1986, that the Indian Child Welfare Act applied to the termination proceedings; (3) the juvenile court erred in failing to transfer the proceedings to the Yankton Sioux Tribe; (4) the juvenile court erred in terminating K.M.'s parental rights; and (5) the juvenile court erred in taking judicial notice of certain exhibits received at the hearing to terminate K.M.'s parental rights.

## REMAND TO JUVENILE COURT

K.M.'s first and second assignments of error may be distilled as follows: The juvenile court erred on March 20, 1989, because the court lacked jurisdiction to review and alter its previous order of December 3, 1986, whereby the juvenile court had determined that K.M.'s children were Indian children and that the Indian Child Welfare Acts, both state and federal, applied to the termination proceedings. K.M. argues that the December 1986 order was a final, appealable order and that since the State did not appeal from the order, the juvenile court lacked jurisdiction to review the 1986 order. K.M. refers to *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986), as support for her position. In *In re Interest of L.D. et al., supra*, we held that an adjudication under § 43-247 (Reissue 1984) of the Nebraska Juvenile Code, that is, a factual determination and adjudication concerning the various bases for a juvenile court's acquisition of jurisdiction, is an appealable order. See, also, *In re Interest of L.O. and B.O.*, 229 Neb. 889, 429 N.W.2d 388 (1988).

Within the framework of appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for some further action in accordance with the remanding order. See, *State ex rel. Norfleet v. Swafford*, 184 Tenn. 340, 198 S.W.2d 1007 (1947); *Mid-Ohio Liquid Fertilizers v. Lowe*, 14 Ohio App. 3d 36, 469 N.E.2d 1019 (1984). At a hearing or trial after remand from an appellate court, the parties stand in the same position as if there had been no prior disposition of the question, issue, or matter for which a remanded proceeding has been ordered. See, *Bohmont v. Moore*, 141 Neb. 91, 2 N.W.2d 599 (1942); *Bliss v. Live Stock Nat. Bank*, 124 Neb. 880, 248 N.W. 645 (1933). As a

result of an order for remand and mandate from an appellate court, a trial court is obligated to adhere to the mandate and render judgment within the mandate's purview. See *State ex rel. Hilt Truck Line v. Jensen*, 218 Neb. 591, 357 N.W.2d 455 (1984).

Implicit in the order for remand and mandate was the direction that the juvenile court consider additional evidence relevant to applicability of the Indian Child Welfare Acts, both the federal act and the Nebraska act, which, in the present case, necessarily involved a determination whether any of K.M.'s children was an "Indian child" within ICWA and NICWA. Thus, the juvenile court, pursuant to this court's mandate, had jurisdiction for the hearing on March 13, 1989, and, consequently, had jurisdiction to reconsider and, if warranted by the evidence, alter its previous decision of December 3, 1986, even to the point of setting aside that previous decision and entering a new order or judgment in its place. The juvenile court's jurisdiction after remand from this court, therefore, included authority to determine the applicability of the Indian Child Welfare Acts and the prerequisite finding concerning an "Indian child" for application of the acts, both ICWA and NICWA. We conclude that K.M.'s first and second assignments of error have no merit.

## APPLICABILITY OF INDIAN CHILD WELFARE ACT

In her third assignment of error, K.M. contends that the juvenile court was required to transfer the proceedings to the Yankton Sioux Tribe.

Although a court, after a proper petition for transfer of proceedings, is required to transfer to an Indian tribe's jurisdiction any proceeding to terminate parental rights, see 25 U.S.C. § 1911(b) and § 43-1504(2), availability of the right to transfer is contingent on application of the Indian Child Welfare Act to the proceedings sought to be transferred. In turn, applicability of the Indian Child Welfare Act depends on whether the proceedings to be transferred involve an "Indian child" within the definition utilized in 25 U.S.C. § 1903(4) and § 43-1503(4). " 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an

Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

Thus, a party to a proceeding who seeks to invoke a provision of the Indian Child Welfare Act has the burden to show that the act applies in the proceedings. *Matter of Juvenile Action No. JS-7359*, 159 Ariz. 232, 766 P.2d 105 (1988); *Application of Angus*, 60 Or. App. 546, 655 P.2d 208 (1982). For application of the Indian Child Welfare Act to proceedings for termination of parental rights, the proceedings must involve an Indian child within the purview of the act. *Matter of Juvenile Action No. JS-7359, supra*; *In re Smith*, 46 Wash. App. 647, 731 P.2d 1149 (1987).

As pointed out in *Application of Angus, supra*, ICWA contains no definition of "Indian tribe." However, we agree with the Oregon court's statement, "In the absence of a Congressional definition, an Indian tribe has authority to determine its own membership." 655 P.2d at 212 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). "Formal membership requirements differ from tribe to tribe, as do each tribe's method of keeping track of its own membership. There is thus no one method of proof of membership, but the testimony of a representative of tribal government would be probative evidence of membership." *Application of Angus, supra* at 655 P.2d at 212.

We now summarize the evidence on the issue whether any of K.M.'s children is an "Indian child" within the Indian Child Welfare Act.

Since none of K.M.'s children was a member of the Yankton Sioux Tribe, none of K.M.'s children was an "Indian child" within the definition of 25 U.S.C. § 1903(4)(a) and § 43-1503(1)(a). Although K.M. was a member of the Yankton Sioux Tribe, the further question is whether any of K.M.'s children was eligible for membership in the Yankton Sioux Tribe. See 25 U.S.C. § 1903(4)(b) and § 43-1503(4)(b). None dispute that, as the result of federal law, the "Ponca Tribe of Native Americans of Nebraska" has been dissolved or terminated as an Indian tribe in relation to federally recognized status as an Indian tribe eligible for services from the United

States. See 25 U.S.C. § 1903(8) and § 43-1503(8). The Yankton Sioux Tribe refused to recognize the Ponca blood of K.M.'s children in computing the blood degree of the children for eligibility in membership of the tribe, decided that K.M.'s children did not meet tribal criteria for membership in the Yankton Sioux Tribe, and, hence, concluded that "all of [K.M.'s] children are not eligible for membership" in the Yankton Sioux Tribe. For those reasons, and as a result of our de novo review of the record, we find that K.M.'s children are not eligible for membership in the Yankton Sioux Tribe and, consequently, the Indian Child Welfare Act did not apply to the proceedings to terminate K.M.'s parental rights.

The State urges us to uphold the juvenile court's refusal to transfer the proceedings because P.M., the father of three of K.M.'s children, objected to the requested transfer. See 25 U.S.C. § 1911(b) and § 43-1504(2). Other courts which have examined a parental objection to transfer of proceedings under the federal Indian Child Welfare Act have held that parental objection requires retention of the proceedings in a state court. See, *Matter of Juvenile Action No. JS-7359*, 159 Ariz. 232, 766 P.2d 105 (1988); *Matter of Welfare of R.I.*, 402 N.W.2d 173 (Minn. App. 1987); *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982); *Matter of S.Z.*, 325 N.W.2d 53 (S.D. 1982). However, inasmuch as we have concluded that the Indian Child Welfare Act is inapplicable to the present proceedings, consideration of parental objection is unnecessary.

Hence, K.M.'s third assignment of error is without merit.

## TERMINATION OF K.M.'S PARENTAL RIGHTS

In her fourth assignment of error, K.M. argues that the evidence is insufficient to support termination of parental rights.

The basis for the juvenile court's judgment terminating the parental rights of K.M. is twofold: abandonment and failure to comply with a court-ordered rehabilitative program designed to eliminate or correct the conditions which led to the adjudication that J.M.'s children were juveniles within the Nebraska Juvenile Code.

The Nebraska Juvenile Code provides that parental rights may be terminated when the best interests of a child require the termination of parental rights. See § 43-292. "A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 267, 417 N.W.2d 147, 158 (1987). "In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence." *In re Interest of T.C.*, 226 Neb. 116, 117, 409 N.W.2d 607, 609 (1987).

Among the bases for termination of parental rights, § 43-292 includes:

> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition; [and]
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

"Abandonment," for the purpose of § 43-292(1), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child. See *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988). Further, we have stated that if a parent voluntarily, but unreasonably or unjustifiably, departs from the state of residence of the parent's child or children, such departure may constitute parental abandonment of the child or children and cannot be used as an excuse for noncompliance with a court-ordered plan for parental rehabilitation. See, *In re Interest of A.G.G., supra*; *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

In *In re Interest of L.H.*, 227 Neb. 857, 863, 420 N.W.2d 318, 321 (1988), we stated:

> A juvenile court has the discretionary power to

prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987). See, also, § 43-292 (termination of parental rights; failure to correct conditions leading to adjudication). When a parent fails to make reasonable efforts to comply with the court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights. [Citations omitted.] "When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require that a final disposition be made without delay." *In re Interest of W.*, 217 Neb. 325, 330, 348 N.W.2d 861, 865 (1984).

Regarding parental failure to comply with a court-ordered rehabilitative program, we expressed in *In re Interest of L.O. and B.O.*, 229 Neb. 889, 895, 429 N.W.2d 388, 392 (1988):

> A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation presents an independent reason justifying termination of parental rights. *In re Interest of L.H., supra*; *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). See, also, § 43-292(6) (termination of parental rights; failure to correct conditions leading to adjudication). Regarding termination of parental rights under § 43-292(6): "[I]f a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is 'clear and convincing.'
>
> "Therefore, regarding parental noncompliance with a court-ordered rehabilitative plan, under § 43-292(6) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative

objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child." *In re Interest of J.S., A.C., and C.S., supra* at 267, 417 N.W.2d at 158.

K.M. devoted a substantial part of her brief to the assertion that the evidence fails to satisfy the "evidence beyond a reasonable doubt" standard for termination of parental rights under the Indian Child Welfare Act. See 25 U.S.C. § 1912(f) and § 43-1505(6). As noted, however, termination of parental rights under the Nebraska Juvenile Code requires evidence which is "clear and convincing." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987). Since we have concluded that the Indian Child Welfare Act is inapplicable, the appropriate evidential standard to terminate parental rights under the Nebraska Juvenile Code is evidence which is "clear and convincing." It is unnecessary to reiterate each salient item of evidence produced in the juvenile court. Suffice it to say that, from our de novo review of the record, we conclude that the evidence is clear and convincing that K.M. abandoned her children for a period of 6 months before the State filed its petition or motion for termination of K.M.'s parental rights, and the evidence is clear and convincing that K.M. failed to comply with the court-ordered rehabilitative program for K.M. The State has evidentially established that the best interests of K.M.'s children require termination of K.M.'s parental rights in her children. Thus, the trial court did not err in terminating the parental rights of K.M.

## JUDICIAL NOTICE OF EXHIBITS

For her final assignment of error, K.M. argues that "the juvenile court erred in taking judicial notice of exhibits offered at earlier proceedings in this case." Brief for appellant at 29.

The Nebraska Evidence Rules contain a provision for judicial notice. See Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 1989). However, the Nebraska Evidence Rules are inapplicable to a proceeding to terminate parental rights under the Nebraska Juvenile Code, for, as we stated in *In re Interest of*

*J.S., A.C., and C.S., supra* at 262-63, 417 N.W.2d at 155-56, the Nebraska Juvenile Code contains explicit standards pertaining to the adduction of evidence at adjudication and dispositional hearings. The standard for permissible evidence at an adjudication hearing is stated in Neb. Rev. Stat. § 43-279(1) (Cum. Supp. 1986), as a part of the Nebraska Juvenile Code, which provides that admissibility of evidence shall be governed by "the customary rules of evidence in use in trials without a jury." The Nebraska Juvenile Code also provides: "Strict rules of evidence shall not be applied at any dispositional hearing." Neb. Rev. Stat. § 43-283 (Reissue 1984). Although expressed in loose legislative language, the "rules of evidence" mentioned in §§ 43-279(1) and 43-283 are the Nebraska Evidence Rules, that is, Neb. Evid. R. 101 to 1103 (Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985)). We note that, since adoption of the Nebraska Evidence Rules in 1975, this court has held that the Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code. See, *In re Interest of L.D. et al., supra*; *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985); *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982). Regarding adduction of evidence at a dispositional hearing, we have consistently held that the Nebraska Evidence Rules do not apply at a dispositional hearing, including an action to terminate parental rights, under the Nebraska Juvenile Code. See, *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987); *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979); *State v. Bailey*, 198 Neb. 604, 254 N.W.2d 404 (1977).

Also, in *In re Interest of J.S., A.C., and C.S., supra* at 265, 417 N.W.2d at 157, we stated:

> Therefore, while the Nebraska Evidence Rules . . . are not applicable in a dispositional hearing, including a hearing to terminate parental rights, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be

terminated. See, Neb. Const. art. I, § 3; U.S. Const. amend. XIV.

However, K.M. does not point to any due process deficiency or deprivation concerning the juvenile court's judicial notice or evidence presented at the hearing for termination of K.M.'s parental rights in her children, that is, K.M. fails to show that the juvenile court's judicial notice or any evidence deprived or violated K.M.'s due process rights.

K.M.'s fifth assignment of error is not sustained.

We affirm the juvenile court's judgments concerning inapplicability of the Indian Child Welfare Act and termination of K.M.'s parental rights in her children.

AFFIRMED.

---

STATE OF NEBRASKA, APPELLEE, V. ALLEN J. QUANDT, APPELLANT.
451 N.W.2d 272

Filed February 9, 1990. No. 89-385.

1. **Appeal and Error.** The Nebraska Supreme Court has the obligation to reach an independent conclusion on questions of law irrespective of the determinations made by the courts below.
2. **Statutes.** Statutory language, in the absence of anything indicating to the contrary, is to be given its plain and ordinary meaning.
3. **Criminal Law: Statutes.** A penal statute must be strictly construed; however, such a statute is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
4. **Statutes: Courts.** It is not within the province of the Nebraska Supreme Court or any other tribunal to read a meaning into a statute which is not warranted by its language.

Appeal from the District Court for Valley County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Valley County, KEITH J. KOVANDA, Judge. Judgment of District Court reversed, and cause remanded with direction.

John A. Wolf, of Shamberg & Wolf, for appellant.

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

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

PER CURIAM.

Defendant, Allen J. Quandt, appeals from the district court's affirmance of his conviction in the county court for operating a piece of earthmoving equipment on a state highway in violation of the vehicle width limitations contained in Neb. Rev. Stat. § 39-6,177 (Reissue 1988) and the weight limitations provided in Neb. Rev. Stat. § 39-6,180 (Reissue 1988). Among other assignments of error, Quandt contends that the district court mistakenly concluded the county court correctly found the evidence sufficient to support the charges. That assignment of error being meritorious, we reverse the judgment of the district court and remand the cause with the direction that the district court return the matter to the county court for dismissal of the charges.

Quandt, the owner of an 11-foot-5-inch-wide, 39-ton earthmoving scraper, or Caterpillar, with twin engines and "big rubber tires," had been engaged by C. R. Frederick, Inc., a contractor employed by the Federal Bureau of Reclamation, to remove earthen matter along a river near North Loup, Nebraska, so that a pipe could be placed under the river. Upon completing that task, Quandt needed to move the scraper to another site located more than 40 miles from the Frederick site. Having determined that other routes would have been unsafe, Quandt drove the scraper west from the jobsite about half a mile and then south about 3 miles until reaching Highway 11, a dustless-surfaced state highway.

After traveling on the highway for approximately 1 mile, Quandt was stopped at a little before 1 o'clock in the afternoon by State Patrol Trooper Carroll Harris. Harris determined that Quandt did not have a permit to operate the scraper upon the highway and issued him a citation for operating the scraper in violation of the above-stated statutory provisions.

At trial, the State introduced evidence that Quandt could have taken another nonpaved highway route to reach his

destination. Quandt, however, demonstrated that no route other than the one he took was available to him because along the other possible routes, including the one suggested by the State, there were bridges which the 39-ton scraper could not cross safely. The parties stipulated that the left front single wheel of the scraper carried a weight of 22,200 pounds, that the right front single wheel carried a weight of 24,400 pounds, and that the rear axle carried a weight of 31,500 pounds.

No constitutional issues having been raised, resolution of the case depends solely upon the construction, interpretation, and application of §§ 39-6,177 and 39-6,180 and of a related statute, a matter of law in connection with which this court has the obligation to reach an independent conclusion irrespective of the determinations made by the courts below. *State v. Wren, ante* p. 291, 450 N.W.2d 684 (1990); *Perkins v. Equal Opportunity Comm., ante* p. 359, 451 N.W.2d 91 (1990).

Section 39-6,177 prohibits the presence on any highway of any vehicle which exceeds a total outside width of 102 inches (8.5 feet), including any load but excluding designated safety devices. Exempted from this limitation, however, is the presence on highways which are not a part of the National System of Interstate and Defense Highways of equipment "thirteen feet or less in width to be used in highway or other public construction or in agricultural land treatment in temporary movement during daylight hours on roads other than dustless-surfaced state highways and for necessary access to points on such highways." § 39-6,177(2)(f).

Section 39-6,180 establishes certain statutory weight limitations.

Neb. Rev. Stat. § 39-6,181(1) (Reissue 1988) authorizes the Nebraska Department of Roads or the Nebraska State Patrol, with respect to highways under its jurisdiction, including the National System of Interstate and Defense Highways, to issue special permits for the operation under certain specified circumstances of vehicles which violate the statutory size, weight, or load limitations. It also provides:

> No permit shall be required for the temporary movement on roads other than dustless-surfaced state highways and for necessary access to points on such highways during

> daylight hours of cost-saving equipment to be used in highway or other public construction or in agricultural land treatment when such temporary movement is necessary and for a reasonable distance.

In discerning the meaning of the foregoing permit exemption, it is to be recalled that statutory language, in the absence of anything indicating to the contrary, is to be given its plain and ordinary meaning. *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989). It is also the rule that although a penal statute must be strictly construed, such a statute is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Deets, ante* p. 307, 450 N.W.2d 696 (1990). However, it is not within the province of this court or any other tribunal to read a meaning into a statute which is not warranted by its language. *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989); *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985).

The record implies that Quandt was engaged in public construction and, in the absence of a statutory definition, that by virtue of its use in such activity the scraper was "cost-saving equipment." The controlling question thus becomes: When may qualified overwidth and overweight equipment be moved over "dustless-surfaced state highways" without a permit? The answer provided by § 39-6,181(1) is: when the movement is temporary and necessary for "access to points on such highways." The obvious objective of the exemption is to permit the movement of qualified equipment from one situs to another by the most expeditious route. In that context, "access to points on [dustless-surfaced] highways" means that if there is no other route available, one may move the qualified equipment over a dustless-surfaced highway. The remaining relevant language of the exemption limits the movement to that which is temporary and necessary for a reasonable distance. In the absence of any statutory definition and barring any constitutional infirmity, what is temporary and what constitutes a reasonable distance must be determined from the facts at issue. Here, Quandt demonstrated that no alternative route was available. Therefore, it cannot be said that the evidence proves beyond a

reasonable doubt that Quandt violated either § 39-6,177 or § 39-6,180.

REVERSED AND REMANDED WITH DIRECTION.

---

## IN RE INTEREST OF C.N.S. AND A.I.S., CHILDREN UNDER 18 YEARS OF AGE.
## STATE OF NEBRASKA, APPELLEE, V. J.S., APPELLANT.

451 N.W.2d 275

Filed February 9, 1990. No. 89-395.

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 this court to reach a conclusion independent of the findings of the trial court, but where the evidence is in conflict, this court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another.
2. **Parental Rights: Juvenile Courts.** The 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.
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: Proof: Appeal and Error.** A judgment terminating parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988) will be affirmed where the State has proved by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a material provision of the rehabilitative plan, and (2) termination of parental rights is in the best interests of the children.
5. **Parental Rights.** Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require termination of parental rights.
6. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

James S. Jansen, of Stave, Coffey, Swenson, Jansen & Schatz, P.C., for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

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

HASTINGS, C.J.

The mother appeals from the order of the separate juvenile court of Douglas County terminating her parental rights to her two minor sons, born February 11, 1983, and July 20, 1984. Assigned as error are the finding that the mother failed to comply with the court-ordered rehabilitation plan and the finding that the termination was in the best interests of the minor children. We affirm.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but where the evidence is in conflict, the Supreme Court considers and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989); *In re Interest of J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989).

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. *In re Interest of J.H. et al., supra*; *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (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 J.H. et al., supra*; *In re Interest of P.M.C., supra*.

A judgment terminating parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988) will be affirmed where the State has proved by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a material provision of the rehabilitative plan, and (2) termination of parental rights is in the best interests of the

children. *In re Interest of R.T. and R.T., supra*; *In re Interest of J.H. et al., supra*; *In re Interest of E.B.*, 232 Neb. 653, 441 N.W.2d 637 (1989).

This case presents a documented history of nearly 4 years of a mother's unsuccessful and rather indifferent battle with drug and alcohol abuse, failure to pursue counseling and therapy, persistence in unlawful activities, and disregard for the best interests of her children.

To her credit, on September 25, 1985, the mother, incarcerated for assault and battery, destruction of property, and disorderly conduct, called the Visiting Nurses Association in Omaha and expressed concern about her children's needing someone to look after them. They had been left with a man who did not have a job and was being evicted from his residence and who had no apparent notion as to how to care for these children. The children were picked up by the police and placed in protective custody.

A petition alleging the minor children to be juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) was filed by the county attorney on October 17, 1985. Following a detention hearing on November 6, 1985, the children were ordered to remain in the custody of the Department of Social Services for foster home placement. At a February 5, 1986, hearing, the children were adjudged to be children within § 43-247(3)(a).

On April 25, 1986, a series of court orders began, directing the mother to comply with rehabilitative plans which were from time to time amended. However, generally speaking, all of the plans included provisions for drug and alcohol evaluation and counseling, cooperation with the various caseworkers involved in the mother's case, maintaining adequate and independent housing, participation in parenting programs, and advising the mother's caseworker of changes in her residence.

A review hearing was held on July 25, 1986, at which time the mother was instructed to engage in specific parenting classes, specific therapy sessions, and attendance at Al-Anon meetings, and to submit to drug screenings. Further review hearings with some adjustments in the rehabilitation plans or programs were held on October 27, 1986, April 27, 1987, October 1, 1987,

April 6, 1988, and July 11, 1988.

In the meantime, on January 14, 1987, a chemical abuse assessment was completed on the mother which disclosed, in the opinion of the evaluator, that the mother was chemically dependent. In February 1987, after more than a year in foster care, the children were returned to the mother's home in conjunction with the Family Intervention and Treatment Service (FITS) program. On April 4, 1987, the children were picked up by the police at 2 a.m., wandering the halls of appellant's apartment building. The mother had gone out and left the children with a friend. The mother never disclosed where she had been. The children were returned to the mother a few days later.

At the April 27, 1987, hearing, the mother mentioned her desire to move to Minneapolis to avoid an abusive boyfriend who would soon be getting out of jail. She did move to Minneapolis in May 1987. The court expressed a desire that the authorities in Minnesota become involved in the children's cases.

On June 2, 1987, the mother was arrested in Minneapolis for assault, possession of narcotics, and carrying drug paraphernalia. The children were found alone in the mother's apartment and had been alone for most of the previous 7 days. They were returned to Omaha on July 1 and put back in foster care. The mother did not return to Omaha until the latter part of August or first part of September, after her probation had ended.

Various review hearings and attempts at rehabilitation of the mother continued as previously detailed. The mother never successfully completed chemical dependency treatment because she quit attending sessions after she became angry with the counselor and did not return.

The mother failed to attend the July 11, 1988, review hearing because she was being held on a misdemeanor forgery warrant. Following the termination hearing on March 30, 1989, the termination order being considered on this appeal was entered.

The various rehabilitative plans were reasonable. The State has proved by clear and convincing evidence that the mother has willfully failed to comply with the various plans and that

termination of her parental rights is in the best interests of the children.

Where parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the children require termination of parental rights. *In re Interest of J.H. et al.*, 233 Neb. 338, 445 N.W.2d 599 (1989); *In re Interest of Q.R. and D.R.*, 231 Neb. 791, 438 N.W.2d 146 (1989). A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989); *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989).

The judgment of the separate juvenile court is affirmed.

AFFIRMED.

---

## NAPOLEON J. BRIGGS, APPELLANT, V. CONSOLIDATED FREIGHTWAYS, A CORPORATION, APPELLEE.

451 N.W.2d 278

Filed February 9, 1990. No. 89-478.

1. **Workers' Compensation: Evidence: Appeal and Error.** In determining whether the evidence is sufficient to support an award by the compensation court, the evidence must be considered in the light most favorable to the successful party.
2. **Workers' Compensation: Appeal and Error.** The findings by the compensation court will not be set aside unless clearly wrong.
3. **Workers' Compensation.** A claimant is not entitled to compensation for temporary total disability after he has achieved maximum medical healing.
4. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding upon them.
5. **Workers' Compensation.** As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given testimony.
6. **Workers' Compensation: Proof.** The plaintiff has the burden to prove his claimed disability.
7. **Workers' Compensation.** Following an injury to the body as a whole, the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.
8. **Workers' Compensation: Wages.** Money amounts negotiated between a union and employers based on hours worked by union member employees and to be

paid directly to the union to cover such things as health and welfare and pensions are not to be included within the term "wages," unless the money value of such advantages to the employee has been agreed upon and fixed by the employer and employee at the time of hiring.

9. **Workers' Compensation: Penalties and Forfeitures: Attorney Fees.** Under Neb. Rev. Stat. § 48-125 (Reissue 1988), the 50-percent penalty for waiting time applies only when payments are delinquent after 30 days' notice has been given of disability or there is no reasonable controversy and the employer refuses payment or neglects to pay compensation for 30 days after injury. In the latter situation, a reasonable attorney fee shall be allowed if the employee receives an award after proceedings in the compensation court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

T.J. Hallinan and Gordon D. Ehrlich, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

BOSLAUGH, J.

The plaintiff, Napoleon J. Briggs, has appealed from the award on rehearing of the Nebraska Workers' Compensation Court.

The plaintiff was injured on January 23, 1988, while employed by the defendant, Consolidated Freightways, as a truckdriver. While attempting to install chains on the truck tractor that he was driving, the plaintiff injured his back. The plaintiff did not feel any pain immediately, but by the time he arrived at his destination, Cheyenne, Wyoming, he was cold, and his back and neck were sore and stiff. The next morning his condition was worse, but he was able to make the return trip.

The plaintiff did not report his injury to his supervisor until making two more trips. His last trip was on January 31, 1988, and he has not worked since then.

The plaintiff consulted Dr. William Fulcher, an orthopedic surgeon, on February 1, 1988. Dr. Fulcher examined the plaintiff and determined that he had a spondylolisthesis, described as a grade one, between the fifth lumbar vertebra and

sacrum. This is a developmental condition that is found in about 18 percent of the normal population and is caused by some type of defect in the bones of the spine.

The neurological examination of the plaintiff was negative. Dr. Fulcher concluded that the plaintiff had aggravated the spondylolisthesis and prescribed a conservative course of treatment which consisted of restricted physical activity, medication with anti-inflammatory medicine and muscle relaxants, plaintiff's being fitted with a back brace, physical therapy, and exercises.

The defendant paid the plaintiff compensation for temporary total disability for $17^{2}/_{7}$ weeks from February 1, 1988. The plaintiff filed his petition in the compensation court on June 27, 1988, alleging that he was still totally and temporarily disabled as the result of his injury on January 23, 1988.

The matter was heard by a single judge of the compensation court on November 1, 1988. The court found that the plaintiff was temporarily totally disabled from February 1 to November 1, 1988, that the plaintiff may not have reached maximum medical improvement, and that the plaintiff was entitled to recover his medical expenses.

The plaintiff requested a rehearing, and the matter was reheard on March 6, 1989, by a three-judge panel. On rehearing, the compensation court found that the plaintiff had been temporarily totally disabled from February 1 to April 24, 1988, that the plaintiff thereafter had sustained a 20-percent permanent partial disability to his body as a whole, and that the plaintiff was entitled to recover compensation for his permanent partial disability and his medical and hospital expenses. The court also found that the plaintiff was entitled to be evaluated as to suitability for rehabilitation services. From that award the plaintiff has appealed to this court.

The plaintiff's assignments of error may be summarized as follows. The compensation court erred in (1) finding the plaintiff was no longer temporarily totally disabled after April 24, 1988; (2) finding the plaintiff had suffered a 20-percent loss of earning capacity, when he had not reached maximum medical improvement; (3) finding the plaintiff's loss of earning

capacity, was synonymous with his 20-percent disability rating; (4) finding there is a reasonable probability vocational rehabilitation would increase the plaintiff's earning capacity; (5) finding the plaintiff was entitled to vocational rehabilitation when he had not yet reached maximum medical recovery; (6) not including health and welfare and pension payments of $145.70 per week in its finding of $972.16 per week as the plaintiff's average weekly wage; and (7) not awarding statutory penalties and an attorney fee.

The plaintiff contends the evidence was insufficient to support the finding on rehearing that he was no longer temporarily totally disabled. He alleges the evidence did not show he had reached maximum medical healing. The plaintiff challenges the court's reliance on surveillance videotapes in its determination that he is no longer temporarily totally disabled. He claims to be temporarily totally disabled because he can no longer work as a truckdriver.

In determining whether the evidence is sufficient to support an award by the compensation court, the evidence must be considered in the light most favorable to the successful party. The findings by the compensation court will not be set aside unless clearly wrong. *McDonald v. Lincoln U-Cart Concrete Co.*, 232 Neb. 960, 442 N.W.2d 892 (1989).

A claimant is not entitled to compensation for temporary total disability after he has achieved maximum medical healing. *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *Aldrich v. Asarco, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985). In *Aldrich*, as in this case, the plaintiff had not been released to return to work by the treating physician and had been restricted in his physical activities at the time of the rehearing, but there was evidence that he had a 15-percent permanent partial disability to the body as a whole. We held there was sufficient evidence of maximum recovery. "The fact that the plaintiff was not released by . . . his own physician to return to work does not compel a finding that the plaintiff has not reached his maximum recovery." *Aldrich, supra* at 130, 375 N.W.2d at 153.

On February 2, 1989, Dr. Fulcher testified that the plaintiff had a 20-percent permanent impairment to the body as a whole.

He further testified that objectively the plaintiff's injury had been treated and there was nothing to correct, but subjectively the plaintiff needed improvement in eliminating symptoms of pain in his back and legs.

At the defendant's request, the plaintiff was examined by Dr. Joseph Gross on January 25, 1989. Dr. Gross reported that he found the plaintiff had suffered a lumbosacral strain with left-sided radiculitis. Dr. Gross further stated that the plaintiff had improved under conservative treatment and that it was his opinion that if the plaintiff was fitted with a back support and started on some progressive exercises for his back, he should be able to return to work in the very near future.

Videotapes taken by a private investigator who observed the plaintiff's activities on April 25, 28, 29, and 30, 1988, were received in evidence. These tapes show the plaintiff driving a car and a pickup truck, moving an approximately 25-pound chest of drawers with help from a friend, going to yard sales and test starting lawnmowers, mowing his yard, and engaging in horseplay with his children. His gait appears to be normal, and he is seen bending, pulling, and squatting a number of times.

The compensation court found that the activity level of the plaintiff which was demonstrated on the videotapes established that the plaintiff was not totally disabled. To the extent that the opinions of Drs. Fulcher and Gross were at variance with the conclusions drawn by the court after viewing the videotapes, it disregarded their opinions.

Triers of fact are not required to take the opinions of experts as binding upon them. *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985).

In *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989), the plaintiff alleged the compensation court erred in relying on videotapes to reach its award in light of contradictory testimony from his doctors. As in this case, the tapes were properly admitted as competent evidence of the plaintiff's physical capabilities.

By challenging the court's reliance on the videotapes, plaintiff is challenging the court's evaluation and weighing of the evidence. "As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be

given testimony." *Harpham, supra* at 573, 441 N.W.2d at 604.

The record shows there are no objective medical conditions to be eliminated with treatment regarding plaintiff's injury. He has been given a permanent disability rating. The only further treatment recommended is to reduce subjective pain in plaintiff's back and legs. According to *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982), under these circumstances, there is no uncertainty that plaintiff's injury is permanent and that he is no longer entitled to temporary total disability benefits. See, also, 2 A. Larson, The Law of Workmen's Compensation § 57.12(c) at 10-25 to 10-29 (1989), where the author states:

> The fact that some treatment is still necessary, such as physical therapy or drugs, does not necessarily rule out a finding that the condition has become stabilized, if the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition. . . . The persistence of pain may not of itself prevent a finding that the healing period is over, even if the intensity of the pain fluctuates from time to time, provided again that the underlying condition is stable.

The plaintiff argues that the compensation court was wrong in not finding him to be totally disabled and finding that he had only a 20-percent loss of earning capacity. He contends that he is permanently totally disabled on the basis of the definition of that term in *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 886, 341 N.W.2d 906, 909 (1983), which states: "A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act."

The plaintiff claims that there was no competent evidence his earning capacity was reduced by only 20 percent and that the evidence clearly shows he is totally disabled because he is 61 years old, black, limited in his education and training, and unable to return to work as an over-the-road truckdriver. The record does not show that the plaintiff is unable to obtain employment in any other job for which he is suited.

The plaintiff has the burden to prove his claimed disability. See *Parrish v. Karl Kehm & Sons Contractors*, 186 Neb. 252, 182 N.W.2d 422 (1970). He presented no evidence that he is unable to obtain any employment.

The videotapes convinced the compensation court that the plaintiff is not totally disabled. The 20-percent permanent partial disability rating to the body as a whole was the only expert testimony as to the extent of his permanent disability.

In *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989), the plaintiff claimed that the compensation court had erred in determining his loss of earning capacity to be the same as his functional disability. In that case, the evidence showed that the plaintiff could not return to his former job and that the only jobs he could qualify for with his education would have a low starting pay. The court stated:

> "Earning power is synonymous neither with wages . . . nor with loss of physical function. . . . Nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted. Thus, while there is no numerical formula for determining one's earning power following an injury to the body as a whole . . . the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power."

*Gardner, supra* at 469, 436 N.W.2d at 545 (quoting *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987)).

In this case, the record is sufficient to support the compensation court's finding that the plaintiff's loss of earning capacity was 20 percent.

The compensation court found that since the plaintiff was unable to return to work as a truckdriver because of the nature of that work and his disability, he should be given the opportunity to be evaluated for rehabilitation services.

The right of a worker to receive vocational rehabilitation benefits depends upon his inability to perform work for which he has had previous training and experience. It is a question of

fact as to whether there is a reasonable probability that vocational rehabilitation can benefit the claimant. Neb. Rev. Stat. § 48-162.01(6) (Reissue 1988) provides:

> Whenever the Nebraska Workers' Compensation Court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for total or partial disability which is or is likely to be permanent may be rehabilitated to the extent that he or she will require less care and attendance or to the extent that he or she can become gainfully employed or increase his or her earning capacity and that it is for the best interests of such person to undertake such training, rehabilitation, or education, if the injured employee without reasonable cause refuses to undertake the rehabilitation, training, or educational program determined by the compensation court or judge thereof to be suitable for him or her or refuses to be evaluated under the provisions of subsection (3) of this section, the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

In *Behrens v. Ken Corp.*, 191 Neb. 625, 216 N.W.2d 733 (1974), where the plaintiff had sustained a 10-percent permanent partial disability, we held that the plaintiff was entitled to vocational rehabilitation services as might be reasonably necessary to restore her to suitable employment.

With regard to the remaining assignments of error, in *Schlotfeld v. Mel's Heating & Air Conditioning*, 233 Neb. 488, 445 N.W.2d 918 (1989), we held that under Neb. Rev. Stat. § 48-126 (Reissue 1988), money amounts negotiated between a union and employers based on hours worked by union member employees and to be paid directly to the union to cover such things as health and welfare and pensions are not to be included within the term "wages," unless the money value of such advantages to the employee has been agreed upon and fixed by the employer and employee at the time of hiring.

In *Behrens v. American Stores Packing Co., ante* p. 25, 449 N.W.2d 197 (1989), we held that under Neb. Rev. Stat. § 48-125

(Reissue 1988), the 50-percent penalty for waiting time applies only when payments are delinquent after 30 days' notice has been given of disability or there is no reasonable controversy and the employer refuses payment or neglects to pay compensation for 30 days after injury. In the latter situation, a reasonable attorney fee shall be allowed if the employee receives an award after proceedings in the compensation court.

Under the facts in this case, the plaintiff was not entitled to the penalty for waiting time or an attorney fee.

The judgment is affirmed.

AFFIRMED.

---

CONTRA COSTA COUNTY EX REL. ELEANOR K. PETERSEN, APPELLEE AND CROSS-APPELLANT, V. JAMES LEON PETERSEN, APPELLANT AND CROSS-APPELLEE.

451 N.W.2d 390

Filed February 16, 1990. No. 87-1068.

1. **Divorce: Estoppel.** Generally, one who has by his or her conduct relied upon the validity of a divorce decree is estopped from denying its validity to the prejudice of the other party.
2. **Modification of Decree: Child Support.** Although prospective modification of an ongoing duty to support is permitted in an action under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988), retroactive modification of accrued arrearages in child support which become vested as they accrue is not.
3. _____: _____. Generally, a court may not forgive or modify past-due child support, but may modify the amount of child support becoming due in the future.

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

Kevin V. Schlender for appellant.

Charles W. Campbell, York County Attorney, for appellee.

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

HASTINGS, C.J.

This is an appeal from the order of the district court in a proceeding under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1988) (RURESA). The trial court found the sum of $17,694.30 to be due and owing relator by the respondent as a result of a California divorce decree and ordered the respondent to pay said amount in monthly payments of $150.

The pleadings alleged and the proof supported a duty of support based on a March 14, 1967, interlocutory judgment of divorce and a January 22, 1968, final judgment of divorce entered by the superior court for the County of Los Angeles, California, in favor of the relator and against the respondent herein. Those decrees required the respondent to pay to the relator the sum of $12.50 per week for each of two children, commencing March 18, 1967, and continuing with respect to each child until such child reached the age of 21 or until emancipation. The certificate for support from the California court recited that only $50 had been paid on the judgment and that there was $24,060.50 in arrears of said judgment as of December 19, 1986, with a request that the respondent be ordered to pay a reasonable amount on such arrearage. The answer filed by the respondent was essentially a general denial, with an allegation of the affirmative defense of laches.

The relator testified that but for $50, the respondent had paid her nothing by way of support since the entry of the California decree. The California decree was received in evidence over the objection of the respondent. Relator admitted that respondent's parents, the children's grandparents, had made substantial payments directly to the two children throughout the years, which she claimed generally were in the nature of gifts. She also agreed that she had received monthly payments of $35 or $50 during a 14-year period, totaling $7,500, from respondent's parents. However, although she used that money for support of her children and herself, she denied any agreement or information which would lead her to believe that these payments were being made in behalf of the respondent to apply on the divorce decree. Relator also estimated that she had paid a total of $10,000 on medical

expense during the period of time from the divorce until the children reached the age of 21 or became emancipated.

The trial court in its order determined that there was $24,060.50 accrued but unpaid child support pursuant to the final judgment of divorce entered in the California court; determined that there were accrued and unpaid medical and dental expenses, authorized by that final judgment, in the amount of $5,000; and determined that others had paid on behalf of the respondent for child support and medical and dental expenses the amount of $11,366.20. It was in this manner that the trial court arrived at the amount of the present judgment of $17,694.30.

Appellant's assignments of error may be distilled into one: that the trial court should have made an independent determination of the amount owed for support for the children rather than to have adopted the amount set forth in the California decrees. Appellee has cross-appealed, claiming that the court erred in admitting an affidavit submitted by respondent's parents as to amounts which they paid to relator and the purpose for which the payments were made, that the court erred in giving respondent credit for payments made by his parents, and that the court erred in determining the amount to which relator was entitled for medical expense incurred.

The basic question raised by this appeal is whether in a RURESA action the Nebraska court, as a responding court, is entitled to rely on the prior support decree of another court, here the California court, to establish the duty of support and the extent thereof to the date of filing. Stated another way, must the responding court ignore that decree and the amount of support that has accrued under such decree as of the date of trial and then, based on the evidence received at trial, independent of the foreign decree, determine anew the duty of support and the amount thereof for the period passed?

Respondent objected to the reception into evidence of the California decree on two grounds: first, that the final decree was issued a matter of 9 months after the interlocutory decree, whereas California law requires that it be done after 1 year, and second, the decree was not relevant to the finding by the Nebraska court of the duty and degree of support required of

the respondent.

Addressing the first issue, it is true that the final decree, dated January 22, 1968, states in substance that an interlocutory decree was entered in March 1967 and that "more than one year having expired in accordance with Section 1342 Civil Code" (California), "it is adjudged that plaintiff be and is granted a final judgment of divorce . . . ."

Respondent challenges the validity of both documents by seeking to collaterally attack them on appeal. At no time has the respondent attempted to set aside, modify, or appeal the California support order.

In *Koch v. Koch*, 175 Neb. 737, 123 N.W.2d 642 (1963), and *Attebery v. Attebery*, 172 Neb. 671, 111 N.W.2d 553 (1961), this court held under somewhat similar circumstances that one who has by his or her conduct relied upon the validity of a divorce decree generally is estopped from denying its validity to the prejudice of the other party. In *Attebery*, the former husband was estopped from assailing the validity of the divorce decree because he (1) waited nearly 20 years after his wife obtained the decree to attack it, (2) had timely notice of the proceeding in which it was entered, (3) left his children to be cared for and nurtured by the divorced wife and her second husband, and (4) was himself remarried. All of these factors are present here, and respondent is estopped from assailing the validity of the California divorce decrees. Such a conclusion is also consistent with the California rule. See *Matter of Estate of Birch*, 140 Cal. App. 3d 776, 189 Cal. Rptr. 796 (1983).

As to the relevance of the decrees, § 42-784, a part of the RURESA provisions, provides in part as follows:

> If the action is based on a support order issued by another court, a certified copy of the order shall be received as evidence of the duty of support, subject only to any defenses available to an obligor with respect to paternity as set forth in section 42-788, or to a defendant in an action, or a proceeding to enforce a foreign money judgment.

However, respondent argues that the district court here should have made an independent determination of the amount owed for the support of the children during their minority

instead of adopting the amount set forth in the California decrees.

Respondent cites us to *State of Iowa ex rel. Petersen v. Miner*, 226 Neb. 551, 412 N.W.2d 832 (1987), and *Chisholm v. Chisholm*, 197 Neb. 828, 251 N.W.2d 171 (1977), for the proposition that " '[u]nder [RURESA] the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state.' " 226 Neb. at 553, 412 N.W.2d at 833. See, also, *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988).

All three of these cases involved *prospective* modification of an *ongoing* duty to support. The respondent urges this court to extend the application of these cases to allow district courts to retroactively modify accrued and unpaid child support arrearages.

The respondent cites us to *State on Behalf of McDonnell v. McCutcheon*, 337 N.W.2d 645 (Minn. 1983), for the proposition that under the RURESA provisions existing in Minnesota, the responding court need not grant an award of accrued arrearages under a foreign order except to the extent the petitioner can prove the actual amount he or she had reasonably expended in support of the child. The respondent then argues that the petitioner in the instant case failed to prove the extent or actual amount she reasonably expended in the care of her two children.

It is difficult to color-match cases because each case depends upon the nature of the particular statutory provisions. We dispose of the analogy attempted with *McCutcheon* by pointing out that the statutory provisions found in Minnesota at that time are different from those in effect in Nebraska and that legislative changes made in Minnesota since that time demonstrate that *McCutcheon* probably is no longer the law of that state. Taking the act (RURESA) at face value, it is apparent that its purposes are to "improve and extend by reciprocal legislation the enforcement of duties of support." § 42-762. It is important to remember that this act is procedural in nature rather than substantive. "Duties of support applicable under sections 42-762 to 42-7,104 are those imposed under the laws of any state where the obligor was present for the period during

which support is sought." § 42-768.

Section 42-763 provides in pertinent part as follows:

> (b) Duty of support means a duty of support whether imposed or imposable by law or by order, decree, or judgment of any court, whether interlocutory or final or whether incidental to an action for divorce, separation, separate maintenance, or otherwise and includes the duty to pay arrearages of support past due and unpaid.
>
> . . . .
>
> (n) Support order means any judgment, decree, or order of support in favor of an obligee whether temporary or final, or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

Section 42-770 provides in part as follows: "All duties of support, including the *duty to pay arrearages*, are enforceable by a proceeding under sections 42-762 to 42-7,104 including a proceeding for civil contempt."

It becomes quite apparent from the act itself that a custodial parent has an option of obtaining support by registration of the foreign support order, §§ 42-796 to 42-7,101, or by proceeding under part III of the act to obtain a new support order in the responding state, either by independent evidence where no foreign support order is in existence, or upon the basis of an existing foreign support order. §§ 42-768 to 42-795.

The relator chose in this instance to proceed under part III and used as a basis for the establishment of a duty of support the divorce decree from California containing an order for the support of the children.

As we read § 42-784, the relator, having introduced a certified copy of the California support order in these proceedings, at the very least made out a prima facie case for a finding of a duty of support on the part of the respondent. Respondent did not avail himself of the opportunity to present any defense provided for by § 42-784 and, as a matter of fact, conceded in his own testimony that he had been under order to provide such support. He in fact attempted to prove that such payments had been made.

Not only is the respondent wrong in declaring that under our

statutory framework the Nebraska court should have considered the matter of the duty to support independently of the California order, but because all of the payments previously ordered had accrued and the relator's interest in the California judgment had become vested, this court was bound to give effect to that judgment under the full faith and credit clause of the U.S. Constitution.

The courts of both California and Nebraska interpret this law in the same way, i.e., although prospective modification of an ongoing duty of support is permitted, retroactive modification of accrued arrearages in child support which become vested as they accrue is not. *Gordon v. Gordon*, 231 Neb. 857, 438 N.W.2d 762 (1989); *Ferry v. Ferry*, 201 Neb. 595, 271 N.W.2d 450 (1978); *In re Marriage of Koppelman*, 159 Cal. App. 3d 627, 205 Cal. Rptr. 629 (1984), *overruled on other grounds*, *In re Marriage of Fabian*, 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986).

Finally, in *Voichoskie v. Voichoskie*, 215 Neb. 775, 779, 340 N.W.2d 442, 445 (1983), *appeal after remand* 219 Neb. 670, 365 N.W.2d 467 (1985), this court stated: "The court may not forgive or modify past due child support, but may modify the amount of child support becoming due in the future."

Having determined that the California decree correctly defined the duty of support, i.e., $12.50 per week per child until each such child attains the age of 21 years or is emancipated, it is necessary to calculate the total amount of arrearage. It would appear that the California clerk who did such figuring was incorrect. We know that one of the parties' children, Vickie, attained the age of 21 years on August 7, 1985. We are also informed that the other child, Keith, became emancipated in August 1985. Using as a starting point March 18, 1967, as specified in the California decree, and continuing until August 1, 1985, for Keith, and August 7, 1985, for Vickie, the total arrearage is $23,976.79. When reduced by $50, the amount paid by respondent, the net amount due is $23,926.79.

We now take up relator's cross-appeal. We need not discuss her objection to the use of an affidavit to prove the payments made by respondent's parents. Relator admits in her own testimony that she received $7,500 in monthly payments made

directly to her by respondent's parents, which she used for support of the children. Respondent should receive credit for those payments. Respondent is not entitled to credit for payments made by his parents to the children throughout the years. This could not be considered support. We further find that the record supports the trial court's finding that respondent should reimburse the relator for medical and dental expenses in the amount of $5,000. This leaves a net due from the respondent to the relator of $21,426.79, together with costs of $102 and costs of this action on appeal, payable in the amount of $150 per month. The judgment of the district court is modified accordingly and, as modified, is affirmed.

AFFIRMED AS MODIFIED.

FAHRNBRUCH, J., dissenting in part, and in part concurring.

I dissent from that portion of the majority opinion that gives the appellant credit on child support for the moneys paid by his parents to the appellee.

At the trial court level, it is obvious that in crediting the appellant with the $7,500 paid by his parents to appellee, the trial judge erroneously relied upon an affidavit of the appellant's parents. The affidavit was apparently admitted pursuant to the hearsay exception defined by Neb. Rev. Stat. § 27-803(22) (Reissue 1989), which provides in part:

> A statement not specifically covered by any of the foregoing exceptions [§ 27-803(1) to (21)] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will be served by admission of the statement into evidence.

The proponent of the evidence has the burden of establishing each of the conditions established by § 27-803(22). See *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981). At the trial in this case, there was no showing that the affidavit of appellant's parents had any of the circumstantial guarantees of trustworthiness.

The critical issue to be addressed when considering the admission of evidence under the residual hearsay exception, § 27-803(22), is whether the circumstances surrounding the making of the hearsay statements provide guarantees of trustworthiness comparable to the other specific hearsay exceptions. *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984); *State v. Beam*, 206 Neb. 248, 292 N.W.2d 302 (1980). It is the circumstantial guarantees of trustworthiness of the speaker of the words at the time the affidavit was made which control. *In re Estate of Schoch, supra* (citing *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979)). See, also, *Polansky v. CNA Ins. Co.*, 852 F.2d 626 (1st Cir. 1988). Here, the affidavit was made only after the commencement of these proceedings and not at the time the appellant's parents paid any of the $7,500. The trustworthiness of the affidavit is suspect.

Moreover, the affidavit of appellant's parents was not more probative on the point for which it was offered than any other evidence which the proponent could procure through reasonable efforts. The evidence from appellant's parents could have been produced by deposition or by their testimony at the trial. There was no showing at the trial that the parents were unable to submit to a deposition or appear at the trial. The appellee had no opportunity to cross-examine appellant's parents as to the truth of the statements made in the affidavit.

Foundation for the affidavit's admission into evidence was lacking, and, in my opinion, the affidavit should never have been admitted into evidence.

In giving the appellant credit for the $7,500 paid by his parents to the appellee, the majority of this court bypasses the question of the admissibility of the affidavit of appellant's parents. The majority concludes that since the "[r]elator admits in her own testimony that she received $7,500 in monthly payments made directly to her by respondent's parents, which she used for support of the children," the appellant should receive credit for those payments.

It is submitted that the mere fact that the appellee acknowledged that she received, over a period of time, $7,500 from her ex-husband's parents and used it to support her children does not prove that such money, when given, was either

intended to be or should be credited to the ex-husband's obligation to pay child support.

At no time during the 14 years that she received money from appellant's parents was appellee ever told that those payments were to be considered as child support. During that same period, appellee was never asked nor did she ever agree to accept the money from appellant's parents as payment upon appellant's obligation to pay child support.

I would not allow the appellant credit for the $7,500 paid by his parents to the appellee, but I agree in all other respects with the majority opinion.

CAPORALE and SHANAHAN, JJ., join in this dissent and concurrence.

---

MARK E. DENNIS, DOING BUSINESS AS DENNIS TRUCKING, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLEES AND CROSS-APPELLANTS.

451 N.W.2d 676

Filed February 16, 1990. No. 88-205.

1. **Constitutional Law: Civil Rights: Actions.** There is no cause of action under 42 U.S.C. § 1983 (1982) for violations of the commerce clause.
2. **Constitutional Law: Statutes.** The purpose of the privileges and immunities clause is to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed.
3. _____: _____. Statutes which do not make a distinction based upon residence or citizenship do not violate the privileges and immunities clause.
4. **Attorney Fees.** Where one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.
5. _____. The common fund must be an immediate fund from which attorney fees may be awarded at trial.
6. _____. The common fund theory requires for an award of attorney fees under the common benefit rationale (1) an ascertainable class of beneficiaries, easily identifiable, and (2) a source of funds common to the class from which the award can be made.

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

Richard A. Allen and Richard P. Schweitzer, of Zuckert, Scoutt & Rasenberger, and Richard L. Spangler, of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellant.

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

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

BOSLAUGH, J.

The plaintiff, Mark E. Dennis, doing business as Dennis Trucking, commenced this action to obtain a judgment declaring taxes imposed pursuant to Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984) to be unconstitutional and enjoining the defendants from assessing or collecting such taxes, and to recover the plaintiff's attorney fees and costs of the action. Named as defendants were the State of Nebraska; Holly Jensen, individually and as director of the Nebraska Department of Motor Vehicles; Lou Lamberty, individually and as director of the Nebraska Department of Roads; and Kay Orr, individually and as Nebraska Treasurer.

The plaintiff alleged that the taxes and fees imposed under §§ 60-305.02 and 60-305.03 were an unlawful burden on interstate commerce in violation of U.S. Const. art. I, § 8, cl. 3; constituted a denial of the plaintiff's privileges and immunities in violation of U.S. Const. art. IV, § 2, cl. 1; constituted a grant by the Legislature of special and exclusive privileges, immunities, and franchises in violation of Neb. Const. art. III, § 18; and violated 42 U.S.C. § 1983 (1982) by depriving the plaintiff of rights secured by the U.S. Constitution.

After a trial to the court on stipulated facts, the trial court held that the statutes were in violation of the commerce clause, U.S. Const. art. I, § 8, cl. 3, and permanently enjoined the defendants from assessing, levying, or collecting taxes or fees pursuant to §§ 60-305.02 and 60-305.03. The trial court dismissed the remaining counts, holding that the plaintiff had

failed to prove he was entitled to judgment under U.S. Const. art. IV, § 2, cl. 1; Neb. Const. art. III, § 18; or 42 U.S.C. § 1983.

The order of the trial court further provided:

> The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees. The Court shall determine the amount of any such expenses and fees by subsequent order following the submission of documentation in support thereof and a showing regarding any fund available for payment of said fees and expenses.

The plaintiff's motion for new trial, which was overruled, alleged that the common fund from which his attorneys' costs and fees may be paid was the total amount of taxes available for refunds pursuant to the court's order.

The plaintiff has appealed, contending that the district court erred in denying his claims under 42 U.S.C. § 1983 and in denying his claim that the common fund from which litigation costs and attorney fees may be paid consists of the total amount of taxes subject to refund as a result of the court's holding. The defendants have cross-appealed, claiming that the trial court erred in finding that the plaintiff and his attorneys were entitled under the equitable fund doctrine to payment of their expenses and reasonable fees. The defendants have not appealed the district court's finding that the statutes were in violation of the commerce clause, and there is no issue in that regard on this appeal. Both sections have since been amended. See §§ 60-305.02 and 60-305.03 (Reissue 1988).

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), provides that attorney fees may be

awarded to the prevailing party, other than the United States, in any action to enforce a provision of § 1983. Furthermore, a party who prevails on a ground other than § 1983 is entitled to attorney fees under § 1988 if § 1983 would have been an appropriate basis for relief. *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied* 469 U.S. 834, 105 S. Ct. 126, 83 L. Ed. 2d 68; *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), *cert. denied* 476 U.S. 1129, 106 S. Ct. 1997, 90 L. Ed. 2d 677.

The issues presented by the plaintiff's first assignment of error are, therefore, (1) whether a violation of the commerce clause constitutes a cause of action under § 1983 and (2) whether § 1983 would have been an appropriate basis for relief in this case.

Despite the broad language of § 1983 and the fact that there appears to be a division of authority on the question as to whether there is a cause of action under § 1983 for violations of the commerce clause, we believe the better reasoned cases hold that there is no cause of action under § 1983 for violations of the commerce clause. The leading authority appears to be *Consol. Freightways Corp. of Del. v. Kassel, supra*, in which the court held that "the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments." *Id.* at 1144. Cases involving the supremacy clause and reaching the same result are *Golden State Transit Corp. v. City of Los Angeles*, ____ U.S. ____, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989) (the supremacy clause, of its own force, does not create rights enforceable under § 1983); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1987) (preemption of state law under the supremacy clause does not give rise to a cause of action under § 1983); *Gould, Inc. v. Wisconsin Dept. of Industry, Labor*, 750 F.2d 608 (7th Cir. 1984), *aff'd* 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986) (action brought by corporation alleging that state statutes were preempted by federal labor law, in violation of the supremacy clause, was not cognizable under

§ 1983); and *Maryland Pest Control v. Montgomery County, Md.*, 884 F.2d 160 (4th Cir. 1989) (the supremacy clause does not secure rights within the meaning of § 1983 so as to entitle a successful litigant to attorney fees pursuant to § 1988).

In *Consol. Freightways Corp. of Del. v. Kassel, supra*, Consolidated Freightways sought attorney fees under 42 U.S.C. § 1983 after Iowa's statute restricting Consolidated's use of 65-foot twin trailers was declared invalid as a violation of the commerce clause. The U.S. Court of Appeals for the Eighth Circuit held that a violation of the commerce clause did not constitute a claim under § 1983.

> Iowa contends that the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments. On the basis of the nature of the Commerce power as defined by the case law . . . we must agree with the interpretation of the Commerce Clause as an allocating provision, not one that secures rights cognizable under § 1983.
>
> The Commerce Clause grants to Congress the power to regulate interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). That grant of power has been held to imply a limitation upon the states. [Citations omitted.]
>
> It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and state interests, not the protection of individual rights. These decisions are replete with references to the *national* or *federal interest* in preventing the burdensome state regulation of interstate commerce. [Citations omitted.]
>
> In the Supreme Court's opinion in this very case the emphasis is on the role of the Commerce Clause in preventing state regulation from "trespass[ing] upon *national interests*." *Kassel v. Consolidated Freightways*, 450 U.S. 662, 669, 101 S.Ct. 1309, 1315, 67 L.Ed.2d 580 (1981) (emphasis added). In striking down the Iowa truck-length limitations, the Court stated that Iowa's "regulations impair significantly the *federal interest* in

> efficient and safe interstate transportation . . . ." *Id.* at 671, 101 S.Ct. at 1316 (emphasis added). No where does the Court refer to the impairment, infringement, or protection of the interests or rights of the individual. Throughout the Commerce Clause cases the emphasis is on the relationship between conflicting federal and state interests, not the relationship between the individual and the state. [Citation omitted.]
>
> To support its theory that the Commerce Clause secures rights cognizable under § 1983, Consolidated has cited several Supreme Court cases which refer to a Constitutional "right" to engage in interstate commerce. . . . Although these cases do refer to engaging in interstate commerce as a constitutional right, such cases were not dealing with the question of whether the Commerce Clause secures individual rights within the meaning of § 1983. In *Garrity* [v. *New Jersey,* 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967),] the reference to interstate commerce was mere dictum, and in both *Western Union* [*Tel. Co. v. Kansas,* 216 U.S. 1, 30 S. Ct. 190, 54 L. Ed. 355 (1910),] and *Crutcher* [*v. Kentucky,* 141 U.S. 47, 11 S. Ct. 851, 35 L. Ed. 649 (1891)], the focus of the Court's opinions was on the separation of powers between the national and state legislatures. Despite these references to a right to engage in interstate commerce, we agree with the district court that the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy. [Citation omitted.]
>
> Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of § 1983.

(Emphasis in original.) *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1144-45 (8th Cir. 1984). The court concluded:

> In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5

> L.Ed.2d 492 (1961), Justice Douglas discerned three purposes underlying the original enactment of § 1983: (1) to override discriminatory state laws; (2) to provide a remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice. [Citation omitted.] To hold that an alleged violation of the Commerce Clause constitutes an action cognizable under § 1983 would fail to serve any of these purposes and would be an unwarranted extension of the Civil Rights Act. We do not believe that such a cause of action was within the intent of the Congress that enacted the civil rights statutes, nor do we believe that such an interpretation of the scope of § 1983 is mandated by either the language of § 1983 or the nature of the Commerce Clause. We therefore hold that § 1983 does not provide a remedy for a dormant Commerce Clause claim.

730 F.2d at 1146-47.

In *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989), the plaintiffs brought a § 1983 action against members of the Nevada Gaming Control Board after the board refused to extend further licensing to the plaintiffs when their 1-year limited gaming licenses expired. The plaintiffs alleged their civil rights had been violated because they had been deprived of protected property and liberty interests without due process of law.

The U.S. Court of Appeals for the Ninth Circuit held that the corporate plaintiffs had no protected property interest in further licensing and could not state a claim under § 1983 for an alleged violation of the commerce clause. The plaintiffs also failed to establish a protected interest in reputation. Since they had no protected property or liberty interests, the plaintiffs could not show that their due process rights had been violated. The court further held that the denial of the license application, based partly on individual plaintiff Kraft's personal association with an unsuitable person, did not violate Kraft's free association right.

The plaintiffs in *Kraft* also alleged that the board violated their constitutional rights by issuing a stop order as to an out-of-state sale of corporate securities, contending that the

board's action deprived them of corporate property in violation of the commerce clause and, thus, in violation of § 1983. The court rejected this contention.

> The Commerce Clause places restraints upon the power of the states. *Philadelphia v. New Jersey*, 437 U.S. 617, 623, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). It divides power between the states and the federal government. We have previously stated that "§ 1983 was not intended to encompass those constitutional provisions which allocate power between the state and federal government." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir.1984) (Supremacy Clause, which establishes federal-state priorities, does not secure individual rights under § 1983), *cert. denied*, 479 U.S. 1060, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *see also Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.1984) (The Commerce Clause is "an allocating provision, not one that secures rights cognizable under § 1983."), *cert. denied*, 469 U.S. 834, 105 S.Ct. 126, 83 L.Ed.2d 68 (1984). Thus, assuming that the Board's actions in any way implicated the Commerce Clause, the plaintiffs cannot state a cause of action under § 1983 for violation of the Clause.

872 F.2d at 869.

In *J & J Anderson v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985), the board of trustees of the town of Erie, Colorado, enacted an ordinance prohibiting any ultralight aircraft from landing or taking off within the town. The ordinance was enacted in response to noise complaints. The plaintiffs, an ultralight aircraft company and three pilots, brought a § 1983 action alleging that the ordinance denied them their rights to equal protection and constituted a "taking" of their rights to carry on a lawful occupation, to own and enjoy private property, and of freedom of transit through navigable airspace pursuant to 49 U.S.C. app. § 1304 (1982), in violation of the just compensation clause of the fifth amendment.

Although the issues between the parties were ultimately resolved by the repeal of the ordinance, the plaintiffs requested costs and attorney fees pursuant to 42 U.S.C. § 1988. The

plaintiffs argued that they would have substantially prevailed on their § 1983 claim because certain federal regulations preempted the effect of the ordinance. The U.S. Court of Appeals for the Tenth Circuit stated:

> The Commerce Clause does, by implication, limit state and municipal authority to enact laws regulating interstate commerce. . . . However, it has been recognized that when a compelling public interest, such as community safety, is involved, the states and municipalities have a legitimate local concern which may be regulated by a zoning ordinance, notwithstanding the fact that such ordinance affects interstate commerce. . . .
>
> The Commerce Clause of the Constitution, Art. 1, § 8, cl. 3, is a limitation upon the power of the states to regulate commerce. However, state regulations touching upon safety may be valid if they do not place a substantial burden on interstate commerce. . . . In any event, the Commerce Clause deals with the relationship between national and state interests, and does not deal with the protection of individual rights. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). The Commerce Clause does not secure rights cognizable under 42 U.S.C. § 1983 in that a Commerce Clause violation would not deprive an individual of any right, privilege, or immunity secured by the Constitution. *Consolidated Freightways Corp. of Delaware v. Kassel, supra*, 730 F.2d at 1144. Accordingly, the Court there held that the claim for attorney's fees pursuant to 42 U.S.C. § 1988 was not well taken.

767 F.2d at 1476. The court held:

> The Commerce Clause and the Supremacy Clause, although limiting the power of the states to interfere in areas of national concern, do not secure rights cognizable under § 1983. This section was enacted to insure a "right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted thereto."

> *Chapman v. Houston Welfare Rights Organization, supra*, 441 U.S. at 611, 99 S.Ct. at 913. Thus, § 1983 does not provide a remedy for claims resulting from violations of the Commerce Clause or the Supremacy Clause. It follows that an attorney's fee claim under § 1988, based on a § 1983 action involving an alleged violation of the Commerce Clause and the Supremacy Clause of the Constitution of the United States, can have no merit.

767 F.2d at 1476-77. The court further found that the plaintiffs could not have substantially prevailed on their § 1983 "taking" claim and were not entitled to attorney fees pursuant to § 1988.

In *Pesticide Public Policy v. Village of Wauconda*, 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd* 826 F.2d 1068 (7th Cir. 1987), the plaintiff foundation challenged the validity of an ordinance regulating the use of pesticides in the defendant village. The foundation claimed that the village lacked authority to enact the ordinance and that the ordinance was preempted by Illinois law. The foundation further claimed that the ordinance denied foundation members due process and equal protection of law, constituted special legislation, and violated the commerce clause of the U.S. Constitution. The foundation also contended that the village was liable to individual foundation members for money damages pursuant to § 1983.

The court held that Illinois state law preempted the village's regulation of pesticides. The ordinance, therefore, was invalid under Illinois law.

As to § 1983 liability, the court held that the foundation did not have standing to sue for a declaration that its members were entitled to damages. The court found that, even if the foundation had standing, damages were not available as a matter of law under any of the foundation's § 1983 claims:

> Section 1983 was enacted to override discriminatory state laws and provide a remedy where state law was inadequate or unenforced. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The appellate courts reasoned that the function of both the Supremacy Clause and the Commerce Clause relates not to individual rights, but rather to the distribution of power between the state and federal governments. "Both the Supremacy and

> Commerce Clauses 'limit the power of a state to interfere with areas of national concern.' " *Gould,* [*Inc. v. Wisconsin Dept. of Industry, Labor,* 750 F.2d 608, 616 (7th Cir. 1984), quoting *Consol. Freightways Corp. of Del. v. Kassel,* 730 F.2d 1139 (8th Cir. 1984)]. Thus, the Seventh Circuit declined to award attorneys' fees under 42 U.S.C. § 1988 based solely on Gould's success on its federal preemption claims, just as the Eighth Circuit refused to award attorneys' fees based on a Commerce Clause violation.
>
> Therefore, even if the Foundation succeeded on its federal preemption claim, Count I, that would not entitle it to a declaration that the Village is liable for damages under Section 1983. Likewise, Count V of the complaint, which alleges that the Wauconda ordinance violates the Commerce Clause, does not provide a basis for damages under Section 1983.

622 F. Supp. at 435-36.

The court further held that the ordinance did not deprive foundation members of equal protection of the laws or violate the Illinois Constitution's prohibition against special legislation.

In *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), a class action was brought by and on behalf of out-of-state truckers, contesting the validity of Maine's reciprocal truck taxes. An escrow fund comprised of all moneys collected under the disputed statute after January 2, 1985, was established during the pendency of the action. The trial court found that the statute was in violation of the commerce clause, but refused to order any refund of tax moneys "except to the extent that the plaintiff class had been protected by [the] escrow arrangement . . . ." *Id.* at 216. The trial court also denied the plaintiffs' request for allowance of attorney fees. The State appealed the trial court's action in declaring the statute unconstitutional. The plaintiffs also appealed, contending that their relief should not be limited to reimbursement of the funds in escrow and that they were entitled to recover attorney fees pursuant to § 1988 because they brought their action alternatively under § 1983.

In affirming the decision of the trial court, the Supreme Judicial Court of Maine held that the statute was in violation of the commerce clause and determined that the trial court properly ordered a refund of only the moneys held in escrow. The court further held that the plaintiffs were not entitled to recover attorney fees pursuant to § 1988.

> [P]laintiffs failed . . . to state a claim for relief cognizable under section 1983. We are convinced that Congress never intended to make a violation of the Commerce Clause actionable under that section of the Civil Rights Act. The Eighth Circuit has so held in a well-reasoned opinion in *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, [469 U.S. 834], 105 S.Ct. 126, 83 L.Ed.2d 68 (1984). Although the United States Supreme Court has not addressed this issue so far as the Commerce Clause is concerned, it did hold in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), that the Supremacy Clause does not give rise to a claim of right "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3), a jurisdictional counterpart to section 1983. *Id.* at 615, 99 S.Ct. at 1914. *See also Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations*, 750 F.2d 608, 616 (7th Cir. 1984) (Supremacy Clause violation does not present a cognizable claim under section 1983).

503 A.2d at 221. The court adopted the reasoning of *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), and stated:

> We find unpersuasive, as did the Eighth Circuit, two earlier federal cases stating terse holdings going the other way. *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n. 5 (3d Cir. 1980); *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1304-05, (D.Mont. 1975), *aff'd*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Neither of those cases analyzed the merits of extending section 1983 to encompass violations of the Commerce Clause, but rather merely relied on generalized statements in Supreme Court cases that did not involve the Commerce

Clause issue. *Consolidated Freightways*, 730 F.2d at 1142-43.

503 A.2d at 222.

In *Private Truck Council of America v. State*, 128 N.H. 466, 517 A.2d 1150 (1986), the New Hampshire Supreme Court held that a state statute imposing taxes and fees on motor carriers whose vehicles were registered in nine other states discriminated against interstate commerce, in violation of the commerce clause. The court also determined that the plaintiffs (which were corporations) had not been properly certified as a class and, therefore, could not invoke the protection of the privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1.

The court held that the plaintiffs were not entitled to tax refunds or attorney fees pursuant to § 1988:

> The purposes underlying the original enactment of section 1983 were to override discriminatory state laws, to provide a remedy where state law was inadequate, and to provide a federal remedy where the state remedy, although adequate in theory, was unavailable in practice. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), *overruled on other grounds*, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Although the plaintiffs argue that section 1983 provides redress for "any" violation of constitutional or federal statutory rights, section 1983 has not been so construed. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 615-20 (1979) (supremacy clause violation not redressable under § 1983); *Poirer v. Hodges*, 445 F.Supp. 838, 842 (M.D. Fla. 1978) (contract clause violation not redressable under § 1983).
>
> We do not believe that the purposes of section 1983 would be furthered by a holding that a violation of the commerce clause is redressable through an action under that statute. The United States Court of Appeals for the Eighth Circuit has held that a violation of the commerce clause is not a basis for applying section 1983. *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 105 S.Ct. 126 (1984); *see also Private Truck Council v. Secretary of State*, 503 A.2d at 220-22.

*But see Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980); *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-05 (D. Mont. 1974), *aff'd on other grounds*, 425 U.S. 463 (1976). The Eighth Circuit based its holding on the ground that the commerce clause does not establish individual rights, but rather allocates power between State and federal governments. *Kassel, supra* at 1144.

Both the commerce clause and the supremacy clause "limit the power of a state to interfere with areas of national concern. Just as the Supremacy Clause does not secure rights within the meaning of § 1983, neither does the Commerce Clause." *Kassel*, 730 F.2d at 1144 (footnote omitted). "The Commerce Clause created no rights or privileges; it established no law other than the law of jurisdiction to regulate those engaged in interstate or foreign commerce." *Id.* at 1145 (quoting B. GAVIT, COMMERCE CLAUSE, 32-33 (1932)). The Eighth Circuit concluded that "[a]lthough individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a 'right' secured by the Constitution within the meaning of § 1983." *Id.*

We agree that a commerce clause violation is not redressable under section 1983. We therefore deny the plaintiffs' claims for refunds of taxes paid before the establishment of the escrow fund. The plaintiffs' claims for attorney's fees also must fail. The plaintiffs have not stated a cause of action under section 1983, and thus cannot recover attorney's fees under 42 U.S.C. § 1988 (1982), which provides for attorney's fees in, *inter alia*, section 1983 actions.

128 N.H. at 476-77, 517 A.2d at 1157.

In *Private Truck Council v. State*, 221 N.J. Super. 89, 534 A.2d 13 (1987), *aff'd* 111 N.J. 214, 544 A.2d 33 (1988), the plaintiffs challenged the constitutionality of a retaliatory tax imposed on certain trucking operations, claiming that New Jersey's Counterpart Fee Act violated the commerce clause and

the privileges and immunities clause of the U.S. Constitution. The plaintiffs also contended that they were entitled to refunds of the moneys unlawfully collected, as well as counsel fees and costs under § 1983.

The appellate division of the New Jersey Superior Court determined that the tax was in violation of the commerce clause and found that the plaintiffs were entitled to refunds from the date their complaint was filed. The court did not consider the merits of the plaintiffs' claim that the act was unconstitutional under the privileges and immunities clause. With respect to the plaintiffs' request for counsel fees, the court held:

> [I]t is sufficient to note that 42 *U.S.C.* § 1983 was not intended to apply to this type of action. *See Consol. Freightways Corp. of Del. v. Kassel,* 730 *F.*2d 1139, 1145-1147 (8th Cir.1984), *cert.* den. 469 *U.S.* 834, 105 *S. Ct.* 126, 83 *L.Ed.*2d 68 (1984); *Private Truck Council v. Secretary of State,* [503 A.2d] at 220-222; *Private Truck Council of America v. State,* [128 N.H. at 466,] 517 *A.*2d at 1156-1157.

221 N.J. Super. at 97, 534 A.2d at 18.

Finally, in *State of Ga. v. Private Truck Council &c.*, 258 Ga. 531, 371 S.E.2d 378 (1988), the Supreme Court of Georgia held that state statutes imposing highway user taxes on vehicles registered in certain states unconstitutionally discriminated against interstate commerce. The court, however, held that the plaintiffs were not entitled to attorney fees under § 1988.

> We agree with the state that plaintiffs may not recover attorney fees under 42 USC § 1988 for the Commerce Clause violation in this case. *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F2d 1139 (8th Cir. 1984); *Private Truck Council of America, Inc. v. Secretary of State*, 503 A2d, supra; *Private Truck Council of America, Inc. v. State of New Hampshire*, 517 A2d, supra.

258 Ga. at 535, 371 S.E.2d at 381.

In addition to his commerce clause claim, the plaintiff further alleged that §§ 60-305.02 and 60-305.03 (Reissue 1984) were in violation of the privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of

Citizens in the several States." Section 1983 embodies individual rights cognizable under the privileges and immunities clause. *Intern. Organization of Masters, Etc. v. Andrews*, 831 F.2d 843 (9th Cir. 1987).

In his second amended petition the plaintiff alleged:

> 2. Plaintiff Mark E. Dennis owns and operates Dennis Trucking, a sole proprietorship with its principal place of business in Ohio. He is an owner of a nonresident vehicle for purposes of the taxes and fees imposed under Sections 60-305.02 and 60-305.03, which vehicle is duly authorized to operate in the State of Nebraska.
>
> . . . .
>
> 13. Plaintiff Mark E. Dennis owns one vehicle, which is registered in the State of Ohio. . . .
>
> . . . .
>
> 17. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.03 constitute a denial of the privileges and immunities of the plaintiff, whose vehicle is registered outside the State of Nebraska, because they are imposed based on the taxpayer's residence in another state. No comparable tax is imposed on residents of Nebraska. Accordingly, these taxes discriminate against nonresidents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution.

The trial court resolved this issue against Dennis.

In considering a statute challenged on the basis of the privileges and immunities clause, a distinction must be made based upon residence or citizenship.

The plaintiff operates one tractor and two trailers in interstate commerce. Since his tractor is registered in Ohio, he is subject to taxation under §§ 60-305.02 and 60-305.03 when he operates in Nebraska. Pursuant to a reciprocity agreement between Nebraska and Ohio, owners of vehicles which are registered in Ohio are granted full license reciprocity for interstate movement in Nebraska and pay no registration fees to Nebraska; however, when operating in Nebraska, owners of such vehicles must pay a fee of 1 or 2 cents per mile. This fee mirrors a like charge imposed by Ohio on owners of

Nebraska-registered vehicles which operate in Ohio.

The purpose of the privileges and immunities clause "is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer v. Witsell*, 334 U.S. 385, 398, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). The clause " 'does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.' " *Hicklin v. Orbeck*, 437 U.S. 518, 525, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), quoting *Toomer v. Witsell, supra*. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 383, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978). "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U.S. 656, 662, 95 S. Ct. 1191, 43 L. Ed. 2d 530 (1975).

Section 60-305.02 provided:

> *Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska*, entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks . . . and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks . . . owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, *in which such trucks . . . are domiciled*, grant reciprocity comparable to that extended by the laws of Nebraska.

(Emphasis supplied.)

Section 60-305.03 provided:

> (1) In case a foreign state . . . is not reciprocal as to license fees on commercial trucks . . . the owners of such

> *nonresident vehicles* from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks . . . other than license fees, and the reciprocity law of any other foreign state . . . does not act to exempt Nebraska trucks . . . operating in that state from payment of all fees whatsoever, the owners of such *foreign trucks* . . . shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks . . . .
>
> . . . .
>
> (7) Properly registered shall mean a vehicle licensed or registered in one of the following: . . . (b) *the jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated, or otherwise controlled, and the vehicle is assigned to such principal place of business* . . . .

(Emphasis supplied.)

The plaintiff contends that because § 60-305.03 imposes taxes only upon " 'the owners of . . . nonresident vehicles,' " and not on residents of Nebraska, the challenged taxes and fees "clearly deny the former substantial equality of treatment with the latter." Brief for appellant at 26. The taxation imposed pursuant to §§ 60-305.02 and 60-305.03 is not related to the resident or nonresident status of the motor carrier, but is based upon the state where the particular vehicle is registered. If a citizen of Nebraska owned a vehicle registered in a state which imposed third-structure taxes on vehicles registered in Nebraska (i.e., Arkansas, Arizona, Idaho, Wyoming, New York, Pennsylvania, Oregon, Nevada, or Ohio), the Nebraska citizen would be subject to retaliatory taxation pursuant to §§ 60-305.02 and 60-305.03. In this respect, the owners of foreign-registered vehicles who are not citizens or residents of Nebraska are treated no differently from the owners of foreign-registered vehicles who are citizens of Nebraska. Since the statutes do not make a distinction based upon residence or

citizenship, the statutes do not violate the privileges and immunities clause.

Furthermore, only an out-of-state citizen has standing to bring a challenge under the privileges and immunities clause. See, *Bradwell v. The State,* 83 U.S. (16 Wall.) 130 (1872); *White v. Thomas,* 660 F.2d 680 (5th Cir. 1981), *cert. denied* 455 U.S. 1027, 102 S. Ct. 1731, 72 L. Ed. 2d 148 (1982). The second amended petition does not allege that the plaintiff is a citizen of another state, only that he owns and operates Dennis Trucking, a sole proprietorship with its principal place of business in Ohio, that his truck is registered in Ohio, and that he is subject to taxation because his truck is registered in Ohio.

The case was tried on a stipulated record consisting of two exhibits: a stipulation of facts and the affidavit of the Lancaster County assessor. There was no proof that the plaintiff is a citizen of another state.

There was no error in dismissing the plaintiff's claim based on a violation of the privileges and immunities clause. The statutes do not discriminate on the basis of citizenship or residency, and there was no proof that the plaintiff was a citizen of another state and had standing to pursue a claim under the privileges and immunities clause.

By the cross-appeal the defendants contend that the trial court erred in finding that the plaintiff and his attorneys were entitled to payment of their expenses and reasonable fees under the equitable fund doctrine. This finding was in error for several reasons.

A statement of the common fund doctrine is found in *Summerville v. North Platte Valley Weather Control Dist.*, 171 Neb. 695, 696-97, 107 N.W.2d 425, 427 (1961):

> [W]here one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.

The doctrine presupposes the existence of a fund. As the court in *Crane Towing v. Gorton*, 89 Wash. 2d 161, 176-77, 570 P.2d 428, 437 (1977), said: "As the name implies, the 'common

fund' doctrine requires the prevailing party to have brought suit to preserve or protect a fund which benefits the party and others."

There is no fund in this case, much less a fund within the jurisdiction of the trial court.

> The common fund must be an immediate fund from which attorney's fees may be awarded at trial. *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). The effect of this litigation may well benefit other nursing homes in the state. However, it did not create a presently existing common fund at trial from which reasonable attorney's fees could be awarded.

*United Nursing Homes v. McNutt*, 35 Wash. App. 632, 643, 669 P.2d 476, 483 (1983).

In *Hoffman v. Lehnhausen*, 48 Ill. 2d 323, 329, 269 N.E.2d 465, 469 (1971), the Supreme Court of Illinois said:

> Several considerations set this case apart from the usual situation in which attorneys fees are allowed from a fund brought into court by one who sues as a member of a class. No fund was involved in this case. The attorneys for the plaintiffs say that this circumstance is irrelevant, because the trial judge refused to enter an order which would have created such a fund. Again we think, however, that the ruling of the trial court was correct. We are aware of no authority under which the process of tax collection and distribution could have been interrupted to divert from the governmental bodies that had levied the taxes an amount fixed by the court as fees for the attorneys for the plaintiffs.

In *Lebanks v. Spears*, 417 F. Supp. 169, 174 (E.D. La. 1976), the court said:

> *Mills* [*v. Electric-Auto Lite*, 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970),] and *Hall* [*v. Cole*, 412 U.S. 1, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973)], and the discussion of the common fund theory in *Alyeska* [*Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)], require for an award of attorneys' fees under the common benefit rationale (1) an ascertainable class of beneficiaries, easily identifiable, and (2) a source

> of funds common to the class from which the award can be made. Public interest litigation generally cannot meet these requirements. Actions to vindicate constitutional rights which benefit the public usually can present only the "private attorney general" theory for the award of attorneys' fees. Prevailing parties in public interest litigation ought not to be permitted, by emphasizing the importance of enforcing constitutional rights, to attach the "common benefit" label to what is really the "private attorney general" theory, and ultimately to merge the two theories.

In *Hamer v. Kirk*, 64 Ill. 2d 434, 442, 356 N.E.2d 524, 528 (1976), the court said: "[I]n the absence of a fund, a plaintiff's attorney is not entitled to attorney's fees merely because he has conferred a benefit upon members of a class." The court held that because no fund had been created, nor did the court have the authority to create a fund, the substantial benefit theory did not apply to the facts presented. The court further held that no statutory authority existed on which to base an award of attorney fees under the private attorney general theory. The order of the trial court denying an award of attorney fees to the plaintiffs was affirmed.

In *Hamer v. Kirk, supra*, the Supreme Court of Illinois held that attorney fees could not be awarded under the common fund doctrine where there was no fund within the control of the court. The Supreme Court reviewed its prior decisions in *Rosemont Bldg. Sup. v. Highway T. Auth.*, 51 Ill. 2d 126, 281 N.E.2d 338 (1972), and *The People v. Holten*, 304 Ill. 394, 136 N.E. 738 (1922), in which the court recognized that if a fund is to serve as a source of attorney fees, said fund must be under the control of the court. In *Hamer, supra* at 441, 356 N.E.2d at 527, the court concluded that "[s]ince no fund had been placed under control of the court in the instant case, the trial court was without authority to award attorney's fees to the petitioner." See, also, *Van Emmerik v. Montana Dakota Utilities Co.*, 332 N.W.2d 279 (S.D. 1983), *cert. denied* 464 U.S. 915, 104 S. Ct. 278, 78 L. Ed. 2d 257; *Eckford v. Borough of Atlanta*, 173 Ga. 650, 160 S.E. 773 (1931); *Fitzgerald v. City of Philadelphia*, 87 Pa. Commw. 482, 487 A.2d 485 (1985); *Von Holt v. Izumo*

*Taisha Mission*, 44 Haw. 147, 355 P.2d 40 (1960), *aff'd on rehearing* 44 Haw. 365, 355 P.2d 44; *Satoskar v. Indiana Real Estate Commission*, 517 F.2d 696 (7th Cir. 1975), *cert. denied* 423 U.S. 928, 96 S. Ct. 276, 46 L. Ed. 2d 256 (1975); *Townsend v. Edelman*, 518 F.2d 116 (7th Cir. 1975).

In *Private Truck Council of America v. State*, 128 N.H. 466, 477, 517 A.2d 1150, 1157 (1986), a suit nearly identical to the case at bar, the Supreme Court of New Hampshire found that the plaintiffs had "not demonstrated a common law right to attorney's fees under the theory of a 'common fund' for the benefit of a class because, as we have indicated, this action has not been properly certified as a class action."

Each person who may be entitled to a refund must individually file a separate claim for a refund. Each such claim may be denied for a variety of reasons. The merits of each claim for a refund must be determined on a case-by-case basis. There is no evidence that anyone, including the plaintiff, has filed a claim and is entitled to a tax refund.

The plaintiff argues that the trial court should have found that the common fund consisted of the total amount of taxes subject to refund. Not only was there no evidence of what that amount might be, the trial court had no jurisdiction of other persons who may have paid the invalid taxes or any way of knowing whether such amounts would be subject to a refund if claims were made.

There was no basis upon which an award of attorney fees could have been made against the State of Nebraska because the State has not waived its sovereign immunity as to attorney fees under circumstances such as this case. See, Neb. Const. art. V, § 22; *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962).

The judgment of the district court is affirmed, except as to that part which provides: "The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees." That part of the judgment is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

FAHRNBRUCH, J., not participating.

SHERMAN E. THOMAS, JR., APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, V. OMEGA RE-BAR, INC., APPELLANT AND CROSS-APPELLEE, EMPLOYERS CASUALTY COMPANY AND TEXAS EMPLOYERS INSURANCE ASSOCIATION, APPELLEES, CROSS-APPELLANTS, AND CROSS-APPELLEES.

451 N.W.2d 396

Filed February 16, 1990. No. 89-052.

1. **Workers' Compensation: Insurance: Jurisdiction.** The Workers' Compensation Court has no jurisdiction to determine workers' compensation insurance coverage disputes.
2. **Courts: Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either consent or acquiescence.
3. **Workers' Compensation: Jurisdiction.** The Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part dismissed.

Norman Denenberg for appellant.

Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees Employers Casualty and Texas Employers Insurance.

James E. Harris, of Harris, Feldman Law Offices, for appellee Thomas.

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

PER CURIAM.

Omega Re-Bar, Inc. (Omega), appeals the majority decision of a three-judge Nebraska Workers' Compensation Court panel finding that Omega has no insurance to cover job-related injuries received by one of its employees in Omaha.

Even though the compensation panel majority held for them on the merits, the appellees Employers Casualty Company (Employers Casualty) and Texas Employers Insurance Association (Texas Employers) cross-appeal, claiming that the Workers' Compensation Court lacks jurisdiction under the Nebraska Workers' Compensation Act to determine insurance coverage issues as between insurers and employers.

In his appellee's brief, Sherman E. Thomas, Jr., Omega's injured employee, joins in and adopts the positions set forth in Omega's brief. In his cross-appeal, Thomas, a Nebraska resident, claims he is entitled to attorney fees and a penalty which he claims should be assessed against Texas Employers and Employers Casualty.

In this case of first impression, in which no party has raised any constitutional or common-law rights, we agree that the Workers' Compensation Court has no jurisdiction to determine workers' compensation insurance coverage disputes. We affirm the workers' compensation court panel's judgment against Omega in which Thomas was awarded workers' compensation benefits, attorney fees, and the penalty provided in Neb. Rev. Stat. § 48-125(1) (Reissue 1988). We find that Thomas is also entitled to attorney fees to be paid by Omega for services in this court and interest on the award. In view of our holdings, the appeal by Omega and the cross-appeal by Thomas must be dismissed.

It is undisputed that when Thomas was injured he was employed as an ironworker by Omega, a subcontractor performing re-bar work on a waste water treatment plant in Omaha. It is also undisputed that the injuries Thomas received arose out of and in the course of his employment on August 27, 1987, when he fell and a re-bar he was carrying struck his shoulder and back.

On September 8, 1987, Omega notified Texas Employers of Thomas' accident. Texas Employers denied coverage, claiming Omega's workers' compensation policy covered "Texas employees hired, working and living in Texas only." Omega had its principal place of business in Texas. It hired Thomas in Omaha to work in Nebraska, and that is where Thomas was injured.

As of October 27, 1987, Thomas, having received no compensation for his injuries from Omega, filed a petition in the Workers' Compensation Court against his employer. Upon Omega's request, that court added Employers Casualty as a party defendant. After a hearing, a single judge of the Workers' Compensation Court determined that Thomas was entitled to compensation benefits. The judge also determined that

Employers Casualty provided workers' compensation insurance coverage for the injuries sustained by Thomas.

The case was appealed to a three-judge panel of the Workers' Compensation Court. During the appeal, Texas Employers voluntarily became an additional party defendant. On rehearing, the three-judge panel held that it had jurisdiction to determine whether Employers Casualty or Texas Employers or both provided workers' compensation insurance coverage to Omega for the Omaha project. A majority of the panel ruled that neither Texas Employers nor Employers Casualty provided Omega with workers' compensation coverage in regard to Thomas' accident. At the time of the rehearing, Thomas still was unable to work. The Workers' Compensation Court panel found that Thomas was temporarily totally disabled. It ordered Omega to pay Thomas' past and future medical and hospital bills and provide Thomas workers' compensation benefits from the time of his injuries. Omega was allowed a credit of $3,000 which it had previously paid to Thomas. A waiting time penalty, together with $2,500 in attorney fees, was also awarded Thomas.

We reiterate that none of the parties dispute that Thomas' injuries arose out of and in the course of his employment with Omega. Similarly, none of the parties, including Thomas, contest the extent and amount of the compensation benefits awarded Thomas by the workers' compensation court.

In their cross-appeal, Texas Employers and Employers Casualty challenge whether the Workers' Compensation Court has subject matter jurisdiction to resolve a workers' compensation insurance coverage dispute. They argue that the Workers' Compensation Act only addresses workers' entitlement to benefits and employers' liability for those benefits. They are correct in contending that any potential liability of Texas Employers or Employers Casualty under Omega's workers' compensation policy does not affect the compensability of Thomas' claim or the liability of Omega.

Omega asserts that because the question relating to insurance coverage is ancillary to Thomas' right to compensation, the Workers' Compensation Court has jurisdiction to resolve the coverage dispute. Omega contends that this assertion is in

harmony with the concept that workers' compensation insurance is something more than an independent contractual matter between an employer and its insurance carrier.

It is initially noted that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either consent or acquiescence. *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987).

The Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984). Omega directs this court's attention to a number of statutes within the Nebraska Workers' Compensation Act which Omega contends provide the Workers' Compensation Court with jurisdiction to determine the question at hand, specifically, Neb. Rev. Stat. §§ 48-146, 48-146.02, 48-161, and 48-178.01 (Reissue 1988).

Section 48-146 provides that all policies insuring the payment of compensation under the Nebraska Workers' Compensation Act must contain a clause to the effect that jurisdiction of the insured for the purpose of the act is jurisdiction of the insurer and that the insurer is bound by the awards, judgments, or decrees rendered against its insured. The section merely requires the insertion of such a clause in the insurer's policy. It is not a grant of subject matter jurisdiction over insurance coverage disputes. The section's intent is to bind insurers to judgments rendered against their insureds.

There is nothing in § 48-146.02 which provides authority for the compensation court to resolve insurance coverage disputes. The statute simply authorizes the compensation court to conduct hearings to determine whether an insurance organization has failed to comply with obligations imposed by the Nebraska Workers' Compensation Act.

Section 48-161 provides that "[a]ll disputed claims for workers' compensation shall be submitted to the Nebraska Workers' Compensation Court for a finding, award, order, or judgment." This section begs the instant question, i.e., is a dispute over insurance coverage a "disputed claim for workers' compensation"?

The compensation court relied upon § 48-178.01 in finding

that there was subject matter jurisdiction to resolve insurance coverage issues. That section provides that whenever any petition is filed and the claimant's right to compensation is not in issue, but the issue of liability is raised between an employer and its carrier, the compensation court may order payment of compensation to be made immediately by the employer or carrier. Section 48-178.01 further provides that when the issue is finally resolved, the employer or carrier held not liable shall be reimbursed by the employer or carrier held liable. It appears that the intent of this section is to prevent a situation in which an injured worker or his or her survivors are not compensated for several months or even years due to the length of time it may take to resolve collateral insurance coverage disputes. There is no specific grant of authority to the Workers' Compensation Court to determine insurance coverage disputes.

Each of the statutes upon which Omega relies shares the same infirmity. None of them explicitly provide the compensation court with subject matter jurisdiction to hear insurance coverage disputes. When the right of an employee to an award is not at stake, many tribunals disavow jurisdiction, and this may occur when the insured and the insurer have some dispute entirely between themselves about the validity or coverage of the policy. 4 A. Larson, The Law of Workmen's Compensation § 92.42 (1989). Since there is no express grant of statutory authority, we hold that the Nebraska Workers' Compensation Court does not possess subject matter jurisdiction to resolve insurance coverage disputes.

Our holding in this case does not leave an injured worker without a remedy to collect his award. Thomas could have his judgment against Omega certified to the clerk of the district court and enforced against Omega as any other district court judgment. See Neb. Rev. Stat. § 48-188 (Reissue 1988). Thomas could also garnish the insurance carriers and have their liability determined by the district court. He could also file an action in district court directly against the insurance companies to determine their liability. See § 48-146. See, also, *Ramsey v. Kramer Motors, Inc.*, 155 Neb. 584, 52 N.W.2d 799 (1952).

There remains to be determined the amount of attorney fees and interest to be awarded Thomas for this appeal. The award

to Thomas has not been in dispute on this appeal. The authority for providing attorney fees and interest in workers' compensation cases is found in § 48-125, which provides in pertinent part:

> If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Supreme Court. . . .
>
> . . . When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained, computed from the date compensation was payable, as provided in section 48-119, at a rate equal to the rate of interest allowed per annum under section 45-104.01, as such rate may from time to time be adjusted by the Legislature. Interest shall apply only to those weekly compensation benefits awarded which have accrued at the time payment is made by the employer.

Omega has failed to obtain a reduction in the amount of the award in this appeal. Therefore, an attorney fee of $2,500 should be taxed as costs against Omega for the services of Thomas' attorney in this court. In addition, interest in accordance with § 48-125 should be assessed against Omega.

The determination by the Workers' Compensation Court that it had subject matter jurisdiction to resolve an insurance coverage dispute is reversed. Omega's appeal and Thomas' cross-appeal against the insurance carriers are dismissed. The award of the Workers' Compensation Court panel against Omega and in favor of Thomas is affirmed. Omega is further ordered to pay the sum of $2,500 for the services of Thomas' attorney in this court and interest in accordance with § 48-125.

AFFIRMED IN PART, AND IN PART DISMISSED.

FAHRNBRUCH, J., dissenting.

I respectfully dissent from the majority's conclusion that the

compensation court is without jurisdiction to determine insurance coverage disputes between employers and their workers' compensation insurance carriers.

While it is true that the manner in which the compensation court operates is to be found in the legislation itself, *Shada v. Whitney*, 172 Neb. 220, 109 N.W.2d 167 (1961); *Fidelity & Casualty Co. v. Kennard*, 162 Neb. 220, 75 N.W.2d 553 (1956), I disagree with the majority's narrow focus that the statutes must expressly provide the compensation court with subject matter jurisdiction over insurance coverage disputes. It is implicit in the Nebraska Workers' Compensation Act that the compensation court does possess such subject matter jurisdiction.

I start the analysis by remembering that the Workers' Compensation Act is remedial in nature and its purpose is to do justice to workers without expensive litigation and unnecessary delay. *Gill v. Hrupek*, 184 Neb. 436, 168 N.W.2d 377 (1969).

In establishing the Nebraska Workers' Compensation Court pursuant to article V, § 1, of the Nebraska Constitution, the Legislature granted the court "authority to *administer and enforce all of the provisions* of the Nebraska Workers' Compensation Act . . . except such as are committed to the courts of appellate jurisdiction." (Emphasis supplied.) Neb. Rev. Stat. § 48-152 (Reissue 1988).

Among the provisions that the workers' compensation court must administer and enforce are those imposing duties upon insurance carriers. Neb. Rev. Stat. § 48-146 (Reissue 1988) requires that a workers' compensation policy must contain an agreement that the insurer will promptly pay to the person entitled to the same all benefits conferred by the act. The agreement is to be construed as a direct promise by the insurer to the person entitled to compensation enforceable in the employee's own name. That section also requires that a policy contain a provision that jurisdiction of the insured (employer) shall be jurisdiction of the insurer and that the insurer shall in all things be bound by the awards, judgments, or decrees rendered against such insured. Neb. Rev. Stat. § 48-147 (Reissue 1988) provides that an employee entitled to benefits has the right to recover the same directly from the employer and

the right to enforce in his or her own name pursuant to § 48-146 the liability of any insurer who may, in whole or in part, have insured the liability for such compensation.

This court long ago held that § 48-147 appears clearly to provide that the employer and the insurer shall jointly be held liable for workers' compensation benefits awarded to an employee. *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227, 242 N.W. 457 (1932). We have also held, " 'The provision of the workmen's compensation law which makes the contract of an insurance carrier a direct promise enforceable in the name of one entitled to compensation benefits effectually makes of the carrier a proper party defendant in an action to recover benefits.' " *Peeks v. Ayers Auto Supply*, 157 Neb. 363, 369, 59 N.W.2d 564, 569 (1953).

Neb. Rev. Stat. § 48-178.01 (Reissue 1988) provides:

> Whenever any petition is filed and the claimant's right to compensation is not in issue, but the issue of liability is raised as between an employer, a carrier, or a risk management pool or between two or more employers, carriers, or pools, the Nebraska Workers' Compensation Court may order payment of compensation to be made immediately by one or more of such employers, carriers, or pools. When the issue is finally resolved, an employer, carrier, or pool held not liable shall be reimbursed for any such payments by the employer, carrier, or risk management pool held liable.

It defies logic to interpret this section as providing the compensation court with the authority to order an insurance carrier to make payment to an injured employee, yet, at the same time, construe the section as not providing subject matter jurisdiction to entertain insurance coverage disputes. How can a court order a carrier to make payment unless it has subject matter jurisdiction to determine whether the insurer has a policy to cover the work-related accident being litigated?

While there is no Workers' Compensation Act provision expressly granting the Workers' Compensation Court jurisdiction to determine insurance coverage questions, I interpret the act to grant, by implication, ancillary jurisdiction to the court to determine insurance coverage when the Workers'

Compensation Court grants compensation benefits to an employee and the question of insurance coverage is raised. Without jurisdiction to determine the liability of insurance companies, the compensation court cannot carry out its duties to administer and enforce *all* provisions of the Workers' Compensation Act pertaining to insurance carriers, as mandated in § 48-152. It follows that the compensation court by necessity has ancillary jurisdiction to resolve insurance coverage disputes under limited circumstances. This is in accord with the general rule that "when it is ancillary to the determination of the employee's right, the compensation commission has authority to pass upon a question relating to the insurance policy, including . . . coverage of the policy at the time of injury . . . ." 4 A. Larson, The Law of Workmen's Compensation § 92.41 at 17-44 to 17-51 (1989). See, also, *Travelers Insurance Co. v. Hawaii Roofing, Inc.*, 64 Haw. 380, 641 P.2d 1333 (1982); *Southern Farm Bur. Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980).

From the insurer's standpoint, it seems rather strange that an alleged insurer is a proper party defendant in a workers' compensation action, *Peeks v. Ayers Auto Supply, supra,* and can raise every possible defense against a worker's claim, with the exception that it has no policy covering the accident.

It seems unjust that an employee must overcome any defense, other than insurance coverage, raised in the workers' compensation court by an alleged insurer, after which the employee is required to proceed in the district court to determine whether the alleged insurer has liability. That process frustrates the doctrine in *Gill v. Hrupek*, 184 Neb. 436, 168 N.W.2d 377 (1969), that the Workers' Compensation Act is remedial in nature and its purpose is to do justice to workers without expensive litigation and unnecessary delay.

In the majority opinion, there is mention that no party in this case has raised any constitutional or common-law right issue. I would only note in passing that we have held that the Workers' Compensation Act creates rights which did not exist at common law and the Legislature may place such restrictions thereon as it sees fit. *University of Nebraska at Omaha v. Paustian*, 190 Neb. 840, 212 N.W.2d 704 (1973).

I would hold that subject matter jurisdiction is vested in the Workers' Compensation Court to resolve insurance coverage issues, but only when such determination is *ancillary* to the resolution of the employee's right to compensation benefits.

WHITE and SHANAHAN, JJ., join in this dissent.

---

STATE OF NEBRASKA, APPELLEE, V. ROGER C. LACHAPELLE, APPELLANT.

451 N.W.2d 689

Filed February 16, 1990. No. 89-246.

1. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional.
2. _____: _____: _____. Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
3. **Constitutional Law: Statutes.** Neb. Rev. Stat. § 28-1203(1) (Reissue 1989) is not vitiated by the "Right to Bear Arms" amendment of 1988, is a valid exercise of the State's police power in reasonable regulation of certain firearms, and does not contravene Neb. Const. art. I, § 1.

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

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

Robert M. Spire, Attorney General, and Donald A. Kohtz for appellee.

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

SHANAHAN, J.

In its information, filed in the district court for Douglas County, the State charged Roger C. LaChapelle with possession of a short shotgun in violation of Neb. Rev. Stat. § 28-1203(1)

(Reissue 1989): "Any person or persons who shall transport or possess any machine gun, short rifle, or short shotgun commits a Class IV felony." LaChapelle filed a motion to dismiss the information, asserting that § 28-1203(1) was unconstitutional on account of the "Right to Bear Arms" amendment to article I, § 1, of the Nebraska Constitution, which amendment originated by the initiative process, was adopted at the general election on November 8, 1988, and provides:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

The district court, having found § 28-1203(1) to be constitutional in relation to the Right to Bear Arms amendment, overruled LaChapelle's dismissal motion. In a bench trial, evidence established that LaChapelle used a shotgun, which had a barrel length less than 18 inches, to threaten a woman. The district court found LaChapelle guilty of the crime charged, for which LaChapelle was sentenced to imprisonment.

In his sole assignment of error, LaChapelle claims that the district court erred in overruling his dismissal motion, which challenged the constitutionality of § 28-1203(1) in reference to the Right to Bear Arms amendment to the Nebraska Constitution.

Neb. Rev. Stat. § 28-1201 (Reissue 1989) contains the definitions of "machine gun," "short rifle," and "short shotgun" for the purposes of § 28-1203(1). A machine gun is "any firearm, whatever its size and usual designation, that shoots automatically more than one shot, without manual reloading, by a single function of the trigger." § 28-1201(4). A short rifle is "a rifle having a barrel less than sixteen inches long

or an overall length of less than twenty-six inches." § 28-1201(5). A short shotgun is "a shotgun having a barrel or barrels less than eighteen inches long or an overall length of less than twenty-six inches." § 28-1201(6).

"One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional." *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 265, 445 N.W.2d 284, 288 (1989). See, also, *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989); *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984). Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

*State v. Comeau, supra*, presented this court with the question whether the Right to Bear Arms amendment precludes Nebraska statutes "regulating the possession of firearms." *Id.* at 909, 448 N.W.2d at 596. The statutes involved in *Comeau* were Neb. Rev. Stat. § 28-1206 (Reissue 1989), which prohibits a felon's possession of a firearm with a barrel less than 18 inches in length, and Neb. Rev. Stat. § 28-1207 (Reissue 1989), which prohibits possession of a firearm with the manufacturer's identification marks or serial numbers removed, defaced, altered, or destroyed. In *Comeau* we noted that

> "courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens."

*Id.* at 910, 448 N.W.2d at 597 (quoting *City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988)). Consequently, in *Comeau* we concluded that the Right to Bear Arms amendment does not prohibit the State's reasonable regulation regarding possession of firearms and held that the statutes in question were reasonable regulations enacted pursuant to the State's constitutionally valid exercise of its police power.

Thus, in LaChapelle's case the question is whether § 28-1203(1), which prohibits possession of a machine gun,

short rifle, or short shotgun, is a reasonable regulation concerning possession of a firearm in relation to the Right to Bear Arms amendment, Neb. Const. art. I, § 1.

Courts in other jurisdictions have found that a statute containing language substantially similar to § 28-1203(1) is a valid exercise of state police power regulating firearms so that a state's constitutional provision for a right to bear arms did not prevent prosecution and conviction for a violation of the firearm statute.

In *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976), the court, faced with the issue whether a statute which prohibited ownership or possession of a short, or sawed-off, shotgun was a valid exercise of state police power, rejected a right to bear arms constitutional challenge to the statute and stated:

> Presumptively the statute is valid as a police measure; indeed a sawed-off shotgun seems a most plausible subject of regulation as it may be readily concealed and is especially dangerous because of the wide and nearly indiscriminate scattering of its shot. A Legislature might be justified in concluding that such weapons are associated with violent crime and call for strict licensing if not suppression.

*Id.* at 889-90, 343 N.E.2d at 850.

In *State v. Fennell*, 95 N.C. App. 140, 382 S.E.2d 231 (1989), the court considered the constitutionality of a statute which prohibited possession of a shotgun " 'with a barrel or barrels of less than 18 inches in length.' " 95 N.C. App. at 142, 382 S.E.2d at 232. The constitutional question had arisen in light of the North Carolina Constitution, which had been construed to contain a guarantee of the "broader right to individuals to keep and bear arms." 95 N.C. App. at 143, 382 S.E.2d at 233. Although Fennell argued that the statute absolutely prohibited possession of any "short-barreled shotguns," the court observed that the questioned statute "does not completely ban a class of weapons protected by the Constitution"; rather, the statute allowed possession of any shotgun with a barrel length of 18 inches or greater. *Id.* The *Fennell* court concluded that the assailed statute bore "a fair relation to the preservation of the

public peace and safety" and, therefore, upheld the statute's constitutionality. 95 N.C. App. at 144, 382 S.E.2d at 233.

Still other courts have rejected a right to bear arms attack on a statute which restricted or prohibited the possession of a machine gun, short rifle, or short shotgun; for example, *Carson v. State*, 241 Ga. 622, 628, 247 S.E.2d 68, 73 (1978) (a firearm statute "was not arbitrary or unreasonable to prohibit the keeping and carrying of sawed-off shotguns, which are of a size such as can easily be concealed and which are adapted to and commonly used for criminal purposes"); *State v. Astore*, 258 So. 2d 33 (Fla. App. 1972) (a statute prohibiting the possession of short-barreled rifles did not violate the state constitutional right to bear arms); and *Morrison v. State*, 170 Tex. Crim. 218, 339 S.W.2d 529, 532 (1960) ("the statute making it unlawful to possess a machine gun is not violative of the constitutional right of every citizen to keep and bear arms in the lawful defense of himself or the state, [since] the Legislature [has] the power by law to enact such law with a view to prevent crime").

The foregoing decisions demonstrate that a legislature may properly forbid use or possession of a certain type of weapon, especially a weapon which is used almost exclusively for a criminal purpose, or as the court noted in *People v. Brown*, 253 Mich. 537, 541, 235 N.W. 245, 246-47 (1931):

> Some weapons are adapted and recognized . . . as proper for private defense of person and property. Others are the peculiar tools of the criminal. The police power of the State to preserve public safety and peace and to regulate the bearing of arms cannot fairly be restricted to the mere establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law.

In view of the nature of a machine gun, short rifle, and short shotgun related to criminal purposes which may be achieved through such firearms, we find that § 28-1203(1) is not vitiated by the Right to Bear Arms amendment of 1988, is a valid

exercise of the State's police power in reasonable regulation of certain firearms, and does not contravene Neb. Const. art. I, § 1.

For that reason, we affirm the district court's judgment concerning LaChapelle's conviction and sentence.

AFFIRMED.

---

STATE OF NEBRASKA, APPELLEE, V. BURTON LOVELESS, APPELLANT.
451 N.W.2d 692

Filed February 16, 1990. No. 89-347.

**Convictions: Testimony: Proof.** A defendant's conviction of a crime may be based on uncorroborated testimony of an accomplice.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Chris M. Arps, of Arps & Schirber Law Offices, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller for appellee.

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

SHANAHAN, J.

A jury, in the district court for Sarpy County, convicted Burton "Butch" Loveless of theft by unlawful taking, a Class III felony. See Neb. Rev. Stat. §§ 28-511(1) (Reissue 1985) (theft by unlawful taking) and 28-518(1) (Reissue 1989) (grades of theft offenses; property valued at more than $1,000). Subsequently, the district court sentenced Loveless to imprisonment for a period of not less than $6^2/_3$ nor more than 20 years.

In his sole assignment of error, Loveless contends that as a result of uncorroborated testimony from an accomplice of Loveless, the jury's verdict is not sustained by sufficient evidence.

## STANDARD OF REVIEW

> 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). See, also, *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989).

> 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). See, also, *State v. Swigart, supra.*

## BACKGROUND

During October 1987, Dale Habrock, proprietor of Habrock Construction Company, noticed that Habrock's dump truck, trailer, and tractor which had been situated atop of the trailer were missing from a construction site in Sarpy County. Habrock reported the theft of the truck, trailer, and tractor to the Sarpy County Sheriff's Department.

After Habrock's complaint, Steve Grabowski, a criminal investigator for the Sarpy County Sheriff's Department, was contacted by officers of the Douglas County Sheriff's Department, and they discussed the possibility of an undercover operation, a "sting," involving the purchase of stolen construction equipment. Since the Douglas County Sheriff's Department had no reported thefts of construction equipment, Grabowski mentioned the theft of Habrock's truck, trailer, and tractor. In a sting operation conducted by undercover officers of the Douglas County Sheriff's Department, with assistance from members of the Sarpy

County Sheriff's Department, arrangements were made to "purchase" a truck and trailer from Jeff Steinhauer on December 1, 1987, in Douglas County. After Steinhauer arrived with the truck and trailer for a sale at a prearranged location, he was arrested and taken into custody at the Douglas County sheriff's patrol office. The truck and trailer which Steinhauer had produced were officially impounded. During an interview conducted by sheriff's deputies, Steinhauer implicated himself and other individuals in a series of crimes. Sometime later at the impoundment lot, Habrock identified the truck and trailer connected with Steinhauer as Habrock's property stolen in October 1987.

In 1988, when an Omaha police officer stopped Loveless, an Iowa resident, for a traffic violation in Omaha, the officer learned that there was an unserved warrant for Loveless' arrest in Sarpy County on account of the theft of Habrock's property. Loveless was taken into custody and was eventually delivered to Sarpy County authorities pursuant to the arrest warrant.

Steinhauer, at the time of Loveless' trial, had been convicted of theft in Douglas County, where he was incarcerated, and was awaiting trial in Sarpy County. The prosecutor had not "promised [Steinhauer] any deals in connection with [his] testimony" at Loveless' trial.

At Loveless' trial, Steinhauer testified that Loveless, whom he had known for approximately a year and a half, was involved in the theft of Habrock's truck, trailer, and tractor in October 1987. Steinhauer testified that Loveless drove the perpetrators to the construction site; helped remove Habrock's truck from the Habrock construction site by using a "dent puller" to take the ignition out of the truck; and instructed Steinhauer to drive the truck, with the trailer on which the tractor was loaded, to Council Bluffs, Iowa. According to Steinhauer, the perpetrators, including Loveless, disposed of the tractor, which was sold and apparently never recovered, and took the truck and trailer to a farm owned by a friend of Loveless. On the night before the prospective sale of the truck and trailer in the sting on December 1, 1987, Steinhauer told Mike Buglewicz, who Steinhauer did not know was an undercover officer, that Butch would "get ahold of me in the

morning and let me know where the truck and the trailer was." Buglewicz testified that Steinhauer had mentioned Butch during a phone conversation between Buglewicz and Steinhauer on November 30, 1987.

Steinhauer further testified that Loveless drove the stolen Habrock truck and trailer to a grocery store parking lot in Council Bluffs. Later, the two men met at another location, where Loveless informed Steinhauer that he had replaced the ignition for the truck and painted the truck a different color. At this time, Loveless gave Steinhauer a key to the truck.

Loveless testified that he was not involved in the theft of Habrock's truck, trailer, or tractor; had not painted any truck; and had not given Steinhauer a key to any truck. Loveless claimed that Steinhauer testified against him for the reason that there was "bad blood" between the two men and that Steinhauer had a "[v]endetta" against Loveless.

At the conclusion of the evidence, the court instructed the jury in accordance with present NJI 14.58, namely:

> The State has introduced evidence from a claimed accomplice of the defendant. His testimony should be closely scrutinized for any possible motives for falsification, and if you find that he 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 the defendant unless you are satisfied of his guilt from the evidence beyond a reasonable doubt.

We note that the "Accomplice Testimony" instruction, NJI Crim. 5.6, proposed by the Nebraska Supreme Court Committee on Criminal Practice and Procedure contains:

> There has been testimony from (here insert name), a claimed accomplice of the defendant. You should closely examine (his, her) testimony for any possible motive (he, she) might have to testify falsely. You should hesitate to convict the defendant if you decide that (here insert name) testified falsely about an important matter and that there is no other evidence to support (his, her) testimony.
>
> In any event, you should convict the defendant only if the evidence satisfies you beyond a reasonable doubt of

(his, her) guilt.

Proposed Nebraska Criminal Jury Instructions, A Working Manuscript, NJI Crim. 5.6 at 125 (May 1989).

The jury found Loveless guilty of unlawfully taking Habrock's property in violation of § 28-518(1). The district court sentenced Loveless as previously mentioned.

## CLAIM OF INSUFFICIENT EVIDENCE

Loveless maintains that there is insufficient evidence to support his conviction on the charge of theft by unlawful taking. Specifically, Loveless argues that since "[s]ome corroboration of an accomplice's testimony is required to support a conviction," the jury's verdict was not supported by sufficient evidence because Steinhauer's testimony was uncorroborated. Brief for appellant at 8.

Loveless acknowledges the longstanding Nebraska rule that a defendant's conviction of a crime may be based on uncorroborated testimony 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); *Bartlett v. State*, 115 Neb. 148, 211 N.W. 994 (1927). We affirm the foregoing rule concerning an accomplice's testimony.

Although Loveless' testimony contradicted Steinhauer's testimony regarding perpetration of the theft and disposition of the stolen property, the contradiction resulted in a factual question for the jury, which weighed the evidence, resolved any evidential conflicts, and determined witness credibility. Taken most favorably to the State, the evidence was sufficient for the jury to find, beyond a reasonable doubt, that Loveless was a perpetrator in the theft of Habrock's truck, trailer, and tractor.

Loveless also argues that the evidence is insufficient because "[t]o convict a person as an aider and abettor, the evidence must show the crime was committed by someone, that the defendant incited or instigated its commission and if the evidence is circumstantial only, there is no rational theory which does not include the guilt of the accused." Brief for appellant at 12.

Notwithstanding Loveless' view of circumstantial evidence, "[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).

More important in this appeal, however, is Loveless' apparent misunderstanding of the phrase "circumstantial evidence."

> Circumstantial evidence is defined as the attendant facts and circumstances from which a principal fact may be inferred by the usual processes of reasoning. Where the existence of the attendant facts and circumstances is testified to by witnesses, the evidence of the principal fact is said to be direct or positive. Otherwise stated, direct evidence is proof of facts by witnesses who saw acts done or heard words spoken, while circumstantial evidence is proof of collateral facts and circumstances from which the mind infers the conclusion that the fact sought to be established in fact existed.

*State v. Lewis*, 177 Neb. 173, 177, 128 N.W.2d 610, 613 (1964). See, also, *State v. Betts*, 210 Neb. 348, 314 N.W.2d 257 (1982).

There is nothing circumstantial or circumlocutional about Steinhauer's testimony. If believed by the jury, Steinhauer's testimony, based on his personal knowledge, was direct evidence which established Loveless' participation in the theft of Habrock's property.

## CONCLUSION

Loveless' assignment of error is without merit, since the evidence is sufficient to sustain his conviction. Therefore, the judgment of the district court, entered on the verdict, is affirmed.

AFFIRMED.