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REPORTS OF CASES

DECIDED BETWEEN

AUGUST 3, 1990 and JANUARY 17, 1991

IN THE

Supreme Court of Nebraska

VOLUME CCXXXVI

STEVEN R. SCHROEDER

OFFICIAL REPORTER

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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

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THOMAS M. SHANAHAN, Associate Justice
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DALE E. FAHRNBRUCH, Associate Justice

STEVEN R. SCHROEDER ..... Reporter
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JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

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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. 88-218, filed October 19, 1990: **Federal Land Bank of Omaha v. Olson.** Appeal from the District Court for Knox County: Merritt C. Warren, Judge. Heard before Whitehead, Thompson, and Cheuvront, District Judges.

No. 88-424, filed October 26, 1990: **Rojas v. Nelson & Harding.** Appeal from the District Court for Douglas County: Keith Howard, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-450, filed September 28, 1990: **Beed v. Platte Valley Bank.** Appeal from the District Court for Dodge County: Mark J. Fuhrman, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-542, filed October 26, 1990: **Calloway v. Nelson & Harding.** Appeal from the District Court for Douglas County: Donald J. Hamilton, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-543, filed October 26, 1990: **Loza v. Nelson & Harding.** Appeal from the District Court for Douglas County: Donald J. Hamilton, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-597, filed October 26, 1990: **Chavez v. Nelson & Harding.** Appeal from the District Court for Douglas County: John E. Clark, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-657, filed September 28, 1990: **Brennan v. Brennan.** Appeal from the District Court for Douglas County: Samuel P.

Caniglia, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-681, filed August 10, 1990: **Sibbernsen v. Sibbernsen Farms, Inc.** Appeal from the District Court for Washington County: Darvid D. Quist, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 88-682, filed August 3, 1990: **Schulze v. Schulze.** Appeal from the District Court for Douglas County: Stephen A. Davis, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-701, filed August 3, 1990: **Kramer v. Redick Food Serv., Inc.** Appeal from the District Court for Douglas County: John E. Clark, Judge. Heard before Warren, Coady, and Riley, District Judges.

No. 88-712, filed September 28, 1990: **Klein v. Klein.** Appeal from the District Court for Douglas County: Paul J. Hickman, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-724, filed August 3, 1990: **E.L. Nogg Fruit Co. v. Food City.** Appeal from the District Court for Douglas County: John E. Clark, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 88-742, filed September 28, 1990: **Graziano v. Graziano.** Appeal from the District Court for Sarpy County: Ronald E. Reagan, Judge. Heard before Hamilton, Knapp, and Quist, District Judges.

No. 88-749, filed November 16, 1990: **Talbot v. Skyline Country Club.** Appeal from the District Court for Douglas County: Stephen A. Davis, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 88-797, filed August 3, 1990: **Satter v. Moran.** Appeal from the District Court for Douglas County: Donald J. Hamilton, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 88-817, filed August 3, 1990: **Nebraska Nat. Bank v. Burt Cty. Bd. of Equal.** Appeal from the District Court for Burt County: Darvid D. Quist, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 88-824, filed August 3, 1990: **North Am. Rolling Door**

v. Lyle D. Rath & Assoc. Appeal from the District Court for Douglas County: Keith Howard, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 88-838, filed August 10, 1990: **Fay v. Nebraska Dept. of Correctional Servs. Appeals Bd.** Appeal from the District Court for Douglas County: Robert V. Burkhard, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 88-883, filed August 3, 1990: **Clausen v. Cass Cty.** Appeal from the District Court for Cass County: Raymond J. Case, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 88-904, filed September 28, 1990: **Peterson v. Peter Kiewit & Sons.** Appeal from the District Court for Douglas County: Keith Howard, Judge. Heard before Warren, Coady, and Riley, District Judges. White, Judge, dissents.

No. 88-933, filed November 16, 1990: **Kreikemeier Hog Co. v. Stan Ortmeier & Co.** Appeal from the District Court for Cuming County: Richard P. Garden, Judge. Heard before Hamilton, Knapp, and Quist, District Judges.

No. 88-952, filed November 16, 1990: **Martin v. Bottoms.** Appeal from the District Court for Douglas County: James M. Murphy, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

No. 88-954, filed January 4, 1991: **Webster v. Sherman.** Appeal from the District Court for Douglas County: Theodore L. Carlson, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

No. 88-985, filed November 16, 1990: **Keffeler v. Sherman.** Appeal from the District Court for Douglas County: Paul J. Hickman, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

No. 88-988, filed August 3, 1990: **Parrett v. Platte Valley State Bank.** Appeal from the District Court for Buffalo County: Dewayne Wolf, Judge. Heard before Hippe, Norton, and Rowlands, District Judges. White, Judge, dissents.

No. 88-1003, filed November 16, 1990: **Wiedel v. Wiedel.** Appeal from the District Court for Thayer County: Orville L. Coady, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

No. 88-1063, filed January 11, 1991: **County of York v. Cleveland.** Appeal from the District Court for York County: Bryce Bartu, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 89-016, filed November 16, 1990: **Brodie v. Brodie.** Appeal from the District Court for Douglas County: Robert V. Burkhard, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

No. 89-051, filed January 11, 1991: **McWhirt v. McWhirt.** Appeal from the District Court for Sarpy County: Ronald E. Reagan, Judge. Heard before McGinn, Corrigan, and Witthoff, District Judges.

No. 89-065, filed October 19, 1990: **State v. Love.** Appeal from the District Court for Lancaster County: Donald E. Endacott, Judge. Heard before Hamilton, Knapp, and Quist, District Judges.

No. 89-070, filed January 11, 1991: **Farmers Union Co-op v. Johnson.** Appeal from the District Court for Howard County: William H. Riley, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 89-071, filed January 11, 1991: **In re Estate of Ziemer.** Appeal from the District Court for Saunders County: William H. Norton, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 89-083, filed January 11, 1991: **Newingham v. Newingham.** Appeal from the District Court for Sarpy County: Ronald E. Reagan, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 89-174, filed January 4, 1991: **Pease v. Pease.** Appeal from the District Court for Lincoln County: John P. Murphy, Judge. Heard before McGinn, Corrigan, and Witthoff, District Judges.

No. 89-232, filed January 4, 1991: **Wolbach Area Heritage Found. v. Teter.** Appeal from the District Court for Greeley County: Ronald D. Olberding, Judge. Heard before McGinn, Corrigan, and Witthoff, District Judges.

No. 89-334, filed January 4, 1991: **Jacob v. Jacob.** Appeal from the District Court for Sarpy County: Ronald E. Reagan, Judge. Heard before McGinn, Corrigan, and Witthoff, District

Judges.

No. 89-357, filed September 28, 1990: **State v. Liggins.** Appeal from the District Court for Douglas County: Lawrence J. Corrigan, Judge. Heard before Hendrix, Sprague, and John P. Murphy, District Judges.

No. 89-500, filed January 11, 1991: **Dietrich v. Dietrich.** Appeal from the District Court for Colfax County: John C. Whitehead, Judge. Heard before McGinn, Corrigan, and Witthoff, District Judges.

No. 89-764, filed September 28, 1990: **State v. Murray.** Appeal from the District Court for Hamilton County: William H. Norton, Judge. Heard before Hamilton, Knapp, and Quist, District Judges.

No. 89-1165, filed August 3, 1990: **State v. Wykoff.** Appeal from the District Court for Hall County: Joseph D. Martin, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 89-1217, filed January 11, 1991: **State v. Polfus.** Appeal from the District Court for Saline County: Orville L. Coady, Judge. Heard before Clark, Gitnick, and Carlson, District Judges.

No. 89-1245, filed August 3, 1990: **State v. Estes.** Appeal from the District Court for Douglas County: Stephen A. Davis, Judge. Heard before Hippe, Norton, and Rowlands, District Judges.

No. 89-1286, filed November 16, 1990: **State v. Blockett.** Appeal from the District Court for Douglas County: Jerry M. Gitnick, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

No. 89-1369, filed November 16, 1990: **State v. Butler.** Appeal from the District Court for Douglas County: Jerry M. Gitnick, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

No. 89-1400, filed November 16, 1990: **State v. Mason.** Appeal from the District Court for Douglas County: Keith Howard, Judge. Heard before Kortum, Empson, and Merritt, District Judges.

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 88-002: **Federal Land Bank of Omaha v. Wagner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 88-759: **Rorick Partnership v. Haug.** Appeal dismissed. See Rule 7A(2).

No. 88-796: **Schmidt v. Mutual of Omaha Ins. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 88-805: **Chapman v. Union Pacific RR.** Appeal dismissed. See Rule 7A(2).

No. 88-827: **AM Fam, Inc. v. Tomorrow's Heritage, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 89-006: **Messinger v. Messinger.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-149: **Cavalieri v. LCF Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-229: **Courtwright v. Motel 6, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-649: **In re Application for Ratification of Oil Lease.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-837: **Janssen v. First State Bank.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-851: **State v. Thompson.** Motion of appellee to dismiss appeal sustained upon reinstatement of direct appeal.

No. 89-869: **State v. Bean.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1179: **Petersen Engineering Co. v. Hedden.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-1231: **State v. Duffy.** Appeal dismissed. See Rule

7A(2).

No. 89-1281: **State v. Jackson.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1288: **State v. Rodriquez.** Affirmed.

No. 89-1301: **State v. Kiertzner.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1326: **State v. Williams.** Appeal dismissed. See Rule 7A(2).

No. 89-1336: **State v. Vanbrocklyn.** Appeal dismissed. See Rule 7A(2).

No. 89-1386: **Henco, Inc. v. Lodwig.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 89-1460: **State v. Etter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 89-1502: **Richardson v. Camp.** By order of the court, appeal dismissed for failure to file briefs.

No. 89-1505: **Gallion v. Johnson.** By order of the court, judgment of district court affirmed as modified to provide that dismissal is without prejudice.

No. 90-006: **Gay v. Hoagland.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-017: **Irvington Investment Co. v. Dowd.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-018: **Transamerica Financial Servs. Corp. v. Pacino.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-042: **State v. Smith.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-044: **DeSchamp v. American Standard Ins. Co. of Wisconsin.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 90-066: **In re Adoption of Gakemeier.** Appeal dismissed. See Rule 7A(2).

No. 90-089: **State v. Eckley.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-105: **State v. Fentiman.** Affirmed. See Rule 7A(1).

No. 90-115: **State v. Kreiter.** Affirmed. See Rule 7A(1).

No. 90-124: **State v. Manchester.** Motion sustained; appeal

dismissed as moot.

No. 90-135: **Cornhusker Cas. Co. v. Vice.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-138: **Evans v. Pattavina.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-142: **State v. Thomas.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-145: **State v. Anstey.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-152: **State v. Jackson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-154: **In re Interest of Smith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-164: **Occidental Life Ins. Co. of California v. Flott Constr. Co.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-167: **State v. Wilmart.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-168: **State v. Richter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-173: **In re Interest of Ouellette.** Motion of appellee for summary dismissal sustained; appeal dismissed as moot.

No. 90-181: **United Fed. Sav. Bank of Iowa v. Bielenberg.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-186: **Citizens State Bank v. Cobb & Hallinan, P.C.** Stipulation allowed; appeal dismissed with prejudice.

No. 90-193: **State v. Winslow.** Affirmed. See Rule 7A(1).

No. 90-194: **State v. Canada.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-210: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-211: **State v. Rowley.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 90-213: **State v. Geiger.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-226: **State v. Brown.** Affirmed. See Rule 7A(1).

No. 90-228: **Federal Land Bank of Omaha v. Rudloff.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-236: **Lewis v. Borgman.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-253: **Dofner v. Terminix.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-256: **Frederick v. A.M.W., Inc.** Stipulation reviewed; appeal dismissed at cost of appellant.

No. 90-261: **Toedtli v. Ackerman.** Stipulation allowed; appeal dismissed.

No. 90-277: **State v. Fry.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-278: **State v. Garrett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-284: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-288: **Pantano v. Maryland Plaza Partnership.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice at cost of appellant.

No. 90-292: **Whitten v. Whitten.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-295: **Mitchell v. Mitchell.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-308: **State v. Hundley.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-310: **In re Conservatorship of Kerrey.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-312: **State v. Pope.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-313: **State v. Vernon.** Motion of appellee for

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

No. 90-314: **State v. McClarity.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-315: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-316: **State v. Breaman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-318: **Norman v. City of Crawford.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-321: **State v. Pillard.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-322: **State v. Pillard.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-323: **Rupp v. Rupp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-324: **State v. Breaman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-326: **Olson v. Olson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-327: **Koelling v. Nebraska State Bank.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-336: **State v. Easter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-341: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-347: **State v. Beran.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-352: **State v. Caudillo.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-354: **Dixon v. Employers Mutual Companies.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-362: **State v. Pittman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-363: **Tyler v. Myott Park.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-365: **State v. Houston.** Affirmed. See Rule 7A(1). Purported appeal in Douglas County case Docket 126, No. 174, dismissed for lack of jurisdiction.

No. 90-368: **State v. Johnson.** Affirmed. See Rule 7A(1).

No. 90-370: **State v. Crump.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-378: **General Motors Acceptance Corp. v. Avidano.** Stipulation allowed; appeal dismissed.

No. 90-387: **State v. Straw.** Affirmed. See Rule 7A(1).

No. 90-391: **State v. Ring.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-393: **State v. Denson.** Stipulation allowed; appeal dismissed.

No. 90-394: **State v. Otero.** Motion of appellee for summary affirmance of Douglas County District Court No. 125-554 sustained; judgment affirmed; see rule 7B(2). Purported appeal in Douglas County District Court No. 125-387 dismissed for lack of jurisdiction.

No. 90-398: **Zarkowski v. Nebraska State Patrol.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-400: **State v. Ellis.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-401: **State v. Plater.** Affirmed. See Rule 7A(1).

No. 90-402: **State v. Freeman.** Affirmed. See Rule 7A(1).

No. 90-403: **State v. Hernandez.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-404: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-405: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-406: **State ex rel. Storz v. Storz.** Summarily reversed

and dismissed due to lack of jurisdiction of Seward County District Court. Costs taxed to Seward County.

No. 90-409: **Smith v. Shortridge.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-413: **State v. Woodard.** Affirmed. See Rule 7A(1).

No. 90-414: **State v. Fraedrich.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-420: **State v. Crouch.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-421: **Dametz v. Tussing.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-422: **Dametz v. Tussing.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-436: **Stoffer v. Stoffer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-437: **State v. Blann.** Affirmed. See Rule 7A(1).

No. 90-440: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-442: **Willoughby v. City of Lincoln.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice at cost of appellant.

No. 90-444: **Campbell v. Churda.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-445: **State v. Snipes.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-451: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-452: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-457: **State v. Collins.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-462: **State v. Turner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-463: **State v. Hayes.** Motion of appellee for summary

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

No. 90-468: **In re Administration of the Court.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-472: **Dixon v. Lincoln Cty.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 90-473: **Eacker v. Eacker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-476: **State v. Barnes.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-477: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-480: **Tyler v. Carson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-481: **Tyler v. Levitt.** By order of the court, appeal dismissed for failure to comply with Supreme Court rules.

No. 90-482: **Mauk v. Bronco's Holding Co.** Stipulation allowed; appeal dismissed.

No. 90-483: **State v. Eggink.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-484: **State v. Eggink.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-487: **Dormer v. Blodig.** Cause having not been shown, appeal dismissed as settled and therefore moot.

No. 90-488: **State v. Ransom.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-489: **State v. Shelton.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-490: **State v. Rollins.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-491: **State v. Martensen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-493: **Jones v. Jones.** By order of the court, appeal

dismissed for failure to file briefs.

No. 90-498: **Wyrick v. Lofton.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-499: **State v. King.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-501: **Martin v. City of Beatrice.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-503: **Royal v. Matuschka.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-504: **Tyler v. Hale.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-508: **State v. Gonzales.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-524: **State v. Keck.** Affirmed. See Rule 7A(1).

No. 90-528: **Bell Federal Credit Union v. Christianson.** By order of the court, case dismissed for lack of jurisdiction. See Rule 7A(2).

No. 90-530: **State v. Swanigan.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-532: **State v. Fox.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-533: **State v. Neumann.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-534: **Gage County v. Meints.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-539: **Ashley v. Allstate Ins. Co.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-540: **Lemm v. Queen.** Stipulation allowed; appeal dismissed.

No. 90-542: **Morin v. Vitek.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-543: **First Nat. Bank of Valentine v. Van Winkle.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-548: **State v. Atkisson.** Affirmed. See Rule 7A(1).

No. 90-556: **Tyler v. Douglas Cty. Court.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-558: **State v. Reid.** Appeal dismissed. See Rule 7A(2).

No. 90-563: **State v. Beermann.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-569: **Hoefs v. Ronmary, Inc.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-570: **State v. Graham.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-572: **State v. Snoddy.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-574: **State v. Kokes.** Affirmed. See Rule 7A(1).

No. 90-576: **State v. Darling.** Appeal dismissed. See Rule 7A(2).

No. 90-577: **Baltzell v. Baltzell.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-578: **State v. Norman.** Affirmed. See Rule 7A(1).

No. 90-583: **Dworak v. Cudahy Foods.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-584: **Criner v. Union Pacific Fruit Express.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-588: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-589: **State v. Morava.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-592: **Consolidated Resources v. Shalfant.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-594: **State v. Sams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-598: **Good Samaritan Hosp. of Kearney v. Department of Social Servs.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-599: **Creighton Omaha Regional Health Care Corp.**

v. Department of Social Servs. Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-600: **Columbus Comm. Hosp. v. Department of Social Servs.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-601: **Grand Island Memorial Hosp. v. Department of Social Servs.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-602: **Lundberg Memorial Hosp. v. Department of Social Servs.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-603: **Oakland Memorial Hosp. v. Department of Social Servs.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-604: **Ogallala Comm. Hosp. v. Department of Social Servs.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-605: **Pender Comm. Hosp. v. Department of Social Servs.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-606: **Thayer Cty. Memorial Hosp. v. Department of Social Servs.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-612: **State v. Carpenter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-617: **State v. Janousek.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-624: **Behrens v. F & N Investments, Inc.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-625: **State v. Contreras.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-626: **State v. Janousek.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-628: **State v. Lickliter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-632: **Christensen v. Christensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-634: **State v. Nelson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-635: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-636: **Federal Land Bank of Omaha v. Erickson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-638: **State v. Deboer.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-639: **Burns v. City of Omaha.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 90-641: **State v. Swiney.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-642: **Tyler v. Quenan.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-651: **State v. Holzworth.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-652: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-653: **State v. Meier.** Affirmed. See Rule 7A(1).

No. 90-655: **State v. Falls.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-659: **State v. Willmes.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-660: **State v. Willmes.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-662: **State v. Oltjenbruns.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-672: **Tyler v. Campbell.** Affirmed. See Rule 7A(1).

No. 90-674: **State v. Prince.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-677: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-678: **State v. Hupp.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 90-681: **State v. Nist.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 90-682: **State v. Clark.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-683: **State v. Holmes.** Motion of appellee for summary affirmance of Douglas County District Court No. 126-584 sustained; judgment affirmed; see Rule 7B(2). Purported appeal in Douglas County District Court No. 125-596 dismissed for lack of jurisdiction.

No. 90-684: **State v. Gill.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-686: **Bathe v. Parrish.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 90-688: **Hartsook v. Earleywine.** Stipulation allowed; appeal dismissed.

No. 90-703: **Fest v. Nebraska Bd. of Parole.** Stipulation allowed; appeal dismissed.

No. 90-704: **Agristor Leasing v. Erickson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-706: **State v. Keck.** Affirmed. See Rule 7A(1).

No. 90-708: **Tellinghuisen v. Tellinghuisen.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. 90-719: **McFadden v. Nash.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-721: **Allied Mut. Ins. Co. v. Loup Basin Reclamation Dist.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-723: **State v. Janousek.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-725: **Murray v. Douglas County Bank & Trust Co.** Stipulation allowed; appeal dismissed with prejudice.

No. 90-736: **State v. Poe.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-741: **State v. Larkin.** Affirmed. See Rule 7A(1).

No. 90-743: **State v. Henggeler.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-750: **Kahland v. Koelling.** By order of the court, appeal dismissed for failure to file briefs.

No. 90-752: **Hastings v. Sypho.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-757: **State v. Lewis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-759: **State v. Hackbarth.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-762: **In re Interest of Erb.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-786: **Hoover v. Hoover.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-795: **State v. Lohman.** Appeal dismissed. See Rule 7A(2).

No. 90-882: **State v. Morganflash.** Affirmed. See Rule 7A(1).

No. 90-896: **State v. Wach.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-899: **State v. Abebe.** Affirmed. See Rule 7A(1).

No. 90-902: **State v. Menagh.** Affirmed. See Rule 7A(1).

No. 90-914: **State v. Gonzales.** Affirmed. See Rule 7A(1).

No. 90-915: **State v. Gonzales.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-917: **England v. Beermann.** Stipulation allowed; appeal dismissed.

No. 90-918: **State v. Alvaro.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-931: **State v. Paige.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 90-933: **State v. Ritchison.** Motion of appellant to

dismiss appeal sustained; appeal dismissed.

No. 90-938: **In re Interest of Erks.** Stipulation allowed; appeal dismissed without prejudice.

No. 90-941: **In re Interest of Pope.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-946: **State v. Ekwekwu.** Appeal dismissed. See Rule 7A(2).

No. 90-951: **State v. Capra.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-958: **Orloff Realty Co. v. Lincoln Goodwill Industries.** Stipulation allowed; appeal dismissed.

No. 90-961: **State v. Ruth.** Stipulation allowed; appeal dismissed.

No. 90-970: **Smith v. Smith.** Stipulation allowed; appeal dismissed.

No. 90-978: **State v. Williams.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-985: **Dadey v. Dadey.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 90-1051: **Snowden v. Snowden.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 90-1069: **Jackson v. Jackson.** Stipulation allowed; appeal dismissed.

No. 90-1072: **State v. Holmes.** Appeal dismissed. See Rule 7A(2).

No. 90-1079: **Zelenka v. Zelenka.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 90-1081: **Olson v. Beermann.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. 90-1088: **State v. Welding.** Stipulation allowed; appeal dismissed.

No. 90-1089: **State v. Heithoff.** Stipulation allowed; appeal dismissed.

No. 90-1097: **State v. Fowler.** Appeal dismissed. See Rule 7A(2).

No. 90-1113: **Dakan v. Halbert.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 90-1155: **State v. Williams.** Appeal dismissed. See Rule 7A(2).

No. 90-1164: **Moore v. McConnell.** Stipulation allowed; appeal dismissed with prejudice.

No. 90-1219: **Security Nat. Bank v. Brooks.** Stipulation allowed; appeal dismissed.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA

C.E. JENSEN, SPECIAL ADMINISTRATOR OF THE ESTATE OF LAWRENCE JENSEN, DECEASED, APPELLANT, V. ARCHBISHOP BERGAN MERCY HOSPITAL, A CORPORATION, APPELLEE.

459 N.W.2d 178

Filed August 3, 1990. No. 87-1043.

1. **Malpractice: Physician and Patient.** As a general rule, hospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient.
2. **Jury Instructions.** Jury instructions should be confined to issues presented by the pleadings and supported by evidence.
3. _____. Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is, generally, prejudicial and results in a new trial.
4. **Pleadings: Negligence: Jury Instructions: Appeal and Error.** When the affirmative defense of contributory negligence is pleaded, but there is no relevant evidence to support the defense, it is prejudicial error to submit the issue of contributory negligence.
5. **Malpractice: Negligence: Proof.** In a medical malpractice action, a defendant may raise the issue of contributory negligence as an affirmative defense and has the burden to prove contributory negligence.
6. **Malpractice: Negligence.** Generally, the defense of contributory negligence has been recognized in a medical malpractice action when the patient has (1) failed to follow a medical instruction, (2) refused or neglected prescribed treatment, or (3) intentionally given erroneous, incomplete, or misleading information which is the basis for medical care or treatment of the patient.
7. **Malpractice: Negligence: Proximate Cause.** To be considered as and constitute contributory negligence in a medical malpractice action, a patient's negligence must have been an active and efficient contributing cause of the injury, must have cooperated with the negligence of the malpractitioner, must have entered into proximate causation of the injury, and must have been an element in the transaction on which the malpractice is based.
8. **Malpractice: Negligence.** In a medical malpractice action, the defense of contributory negligence is inapplicable when a patient's conduct provides the occasion for medical attention, care, or treatment which later is the subject of a

medical malpractice claim or when the patient's conduct contributes to an illness or condition for which the patient seeks the medical attention, care, or treatment on which a subsequent medical malpractice claim is based.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for a new trial.

Martin A. Cannon, of Matthews & Cannon, P.C., for appellant.

Charles F. Gotch, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

SHANAHAN, J.

C.E. Jensen, special administrator of the estate of Lawrence Jensen, deceased, brought this malpractice action against Archbishop Bergan Mercy Hospital (Bergan Mercy). Jensen appeals from the judgment on the verdict for Bergan Mercy and, among his assigned errors, contends that the trial court erred in refusing one of Jensen's tendered instructions and in submitting the issue of contributory negligence.

LAWRENCE JENSEN'S MEDICAL BACKGROUND

Lawrence "Larry" Jensen became a patient of Dr. Richard E. Peters in 1976, when Larry suffered a back injury while playing football for the UNO Mavericks. At that time, Larry, 21 years old, had a height of 6 feet 3 inches and weighed 263 pounds. After Larry's back surgery, Peters diagnosed Larry's condition as pulmonary embolism, in which a blood clot or thrombus has lodged in the lung after the clot, previously located at some other bodily location such as the pelvis or legs, has traveled through the bloodstream to the lung. Pulmonary embolism is a complication from thrombophlebitis, the formation of blood clots inside a vein, which often results from physical injury or trauma to the vein. Larry was treated with heparin, an anticoagulant, and, after several days, was released from medical care. Two years later, Peters saw Larry for abdominal problems. At that time, Peters advised Larry, who weighed 291 pounds, to lose weight. In 1981, Larry, weighing

326 pounds, was admitted to Bergan Mercy for abdominal and back pain. Peters' diagnosis was acute colitis, for which he hospitalized Larry and then released him 6 days later.

LAWRENCE JENSEN'S DEATH

In January 1983, Larry, an equipment operator for a utility company, was injured in a family sledding accident and sustained a compression fracture of a lumbar vertebra. Larry was admitted to Bergan Mercy under Dr. Peters' care. At this time, Larry weighed 290 pounds, and, on account of the thrombophlebitis, Peters treated Larry with small doses of heparin to prevent blood clots while Larry was bedridden. After 15 days Peters released Larry from the hospital and advised him not to return to work.

When Larry was readmitted to Bergan Mercy on February 9, 1983, he complained of pain in the calf and thigh area of his left leg. Peters diagnosed Larry's condition as acute thrombophlebitis and treated him with 5,000 units of heparin every 8 hours. Larry continued to have pain in his left thigh and, 4 days after entering Bergan Mercy, complained of discomfort of his right chest area. Throughout this period, hospital nurses monitored Larry's condition, made notations on his hospital charts, and reported his condition to Peters, who continued the heparin.

Early on the morning of February 15, 6 days after his admission to Bergan Mercy, Larry called his nurse for help because he was nauseated and suffered from "dry heaves." His blood pressure dropped, his heart rate increased, and he suffered a "petit mal" seizure, for which a nurse administered oxygen. Larry's attending nurse telephoned Peters at his home. Peters ordered morphine and directed that Larry be taken to the intensive care unit. Shortly afterward, Larry became cold and clammy, then cyanotic and nonresponsive. The nurse again telephoned Peters and told him that Larry had gone into cardiac arrest. Peters immediately left for the hospital and, on arriving there, found that cardiopulmonary resuscitation was being administered to Larry. CPR throughout an hour produced no results. Larry died from cardiac arrest due to pulmonary embolism.

WRONGFUL DEATH ACTION

Pleadings.

C.E. Jensen, Larry's father and special administrator of Larry's estate, filed a malpractice action against Bergan Mercy and alleged that the hospital, through its nurses, was negligent in failing to monitor Larry's condition, inform Peters concerning the details of Larry's condition, treat Larry properly, and obtain professional medical care for Larry during Peters' absence immediately before Larry's death.

In its answer, Bergan Mercy denied negligence and, as an affirmative defense, alleged that "the injuries, complications and subsequent death of [Lawrence Jensen] was [sic] partially due to his own negligence which caused and contributed to cause said injuries and complications and death . . . ."

Evidence.

Dr. Peters noted that Lawrence Jensen, throughout Peters' care and treatment, was markedly overweight and had been admonished to lose weight. Jacquin Jensen, Larry's widow, testified that no one, including Larry, had mentioned a diet in a program to reduce Larry's weight. Nothing indicates that Larry did not try to lose weight. Various physicians acknowledged that there are risks from obesity, such as a greater likelihood of blood clots when an overweight person is injured and immobilized, thromboembolic disease, hypertension, and, generally, a significant decrease in life expectancy. Experts testified and found fault in Lawrence Jensen's care from the hospital's nurses or testified that the nursing care met the appropriate standard. Some witnesses testified that nurses for Lawrence Jensen should have concluded that the heparin dosage ordered by Peters was incorrect and should have obtained another physician to attend Larry. Others testified that the nurses appropriately followed Peters' orders and that a nurse's questioning a physician's order would be highly irregular. One physician, as an expert for Bergan Mercy, expressed the opinion that the primary, if not the only, cause of Lawrence Jensen's death was Peters' negligence.

Instructions and Verdict.

During an instruction conference, the court considered Jensen's tendered instructions and, with counsel, reviewed the court's proposed instructions.

Jensen requested, and the court refused, the following instruction:

INSTRUCTION NO. II

> If the defendant hospital, through its employees in the course of their employment, knew, or in the exercise of reasonable care, skill and learning, should have known, that the treatment generated by Dr. Peters was improper, it became the duty of the hospital, through its said employees, to intervene and provide or obtain proper care for Larry Jensen.

Notwithstanding Jensen's objection, the court instructed the jury:

INSTRUCTION NO. 3

> . . . .
>
> Defendant alleges that the injuries, complications and subsequent death of Mr. Jensen were partially due to his own negligence which caused and contributed to cause said injuries and complications and death, and whose negligence was more than slight and sufficient to bar recovery.

and

INSTRUCTION NO. 18

> It is the duty of a patient to follow all reasonable and proper advice and instructions given him by his physician regarding the patient's care, activity and treatment.
>
> If the death of the plaintiff's decedent resulted in whole or in part because the patient failed to follow his physician's instructions, then to that extent the plaintiff may not recover damages against the defendant hospital.

The jury returned a general verdict for Bergan Mercy.

ASSIGNMENT OF ERROR

Jensen claims that the court should have given instruction No. II regarding intervention by Bergan Mercy's staff. Jensen also contends that "the contributory negligence claim was

unfounded as a matter of law . . . ." Brief for appellant at 11. Bergan Mercy counters that instructions Nos. 3 and 18 were appropriate under the circumstances. Regarding instruction No. 3, Bergan Mercy argues that although instruction No. 3 does mention the defense of contributory negligence, a subsequent instruction informed the jury that the contents of instruction No. 3 merely stated "the claims and allegations of the parties and except for the admissions therein are not to be regarded as evidence in the case." Brief for appellee at 23. For that reason, Bergan Mercy argues, there is no harm from instruction No. 3. Referring to instruction No. 18, Bergan Mercy suggests:

> If the cause of [Lawrence Jensen's] pulmonary embolism was, even in part, within the control of Mr. Jensen, then his participation in that cause must be noted. The evidence demonstrated that Mr. Jensen's actions created a substantial increase in risk for pulmonary embolism. The pulmonary embolism resulted in death which plaintiff contends is wrongful . . . . All the court did under Instruction 18 was advise the jury that if the plaintiff's decedent caused in whole or in part his own death, then to that extent the hospital could not be found liable. The contribution of the plaintiff's decedent to his own poor health cannot be ignored in the analysis of this claim for wrongful death.

Brief for appellee at 24-25.

REFUSED INSTRUCTION

> To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

State v. Reynolds, 235 Neb. 662, 691, 457 N.W.2d 405, 423 (1990); *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989); *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

Concerning intervention by Bergan Mercy's staff in Larry's care, in substance, Jensen places on the hospital and its nurses the duty to analyze all orders and conduct of the treating physician, and, if the hospital or nurses disagree with the treating physician's course of care, the hospital and its nurses must seek another physician for the patient whose care is in question or embark on care which the nurses deem proper under the circumstances, notwithstanding the order of the attending physician.

In *Sparks v. St. Luke's Reg. Medical Ctr.*, 115 Idaho 505, 768 P.2d 768 (1988), a Dr. Orme, the treating physician, instructed the hospital's nursing staff to extubate a patient who had been on a respirator. This extubation resulted in brain damage to the patient, whose condition required remaining on a respirator. The plaintiffs argued that the nurse, Newhall, should have sought another physician's advice before following the treating physician's instruction on extubation. In *Sparks*, the Supreme Court of Idaho rejected the plaintiff's contention and stated:

> To argue that Nurse Newhall should have sought out another hospital staff physician to change Dr. Orme's instructions would not only violate the applicable standard of care for Nurse Newhall, but suggests that the nurse was better qualified to evaluate the needs of the patient than Dr. Orme—essentially an exercise in hindsight.

115 Idaho at 516, 768 P.2d at 779.

As noted in the concurrence of Justice Henderson in *Koeniguer v. Eckrich*, 422 N.W.2d 600, 604 (S.D. 1988):

> A life is so often in a nurse's hands when the doctor is not in attendance. Nurses are not, however, licensed to practice medicine. They are not the ultimate decision-makers in terms of the patient's care; rather, they are the decision-implementers. . . . Nurses are not authorized to write discharge slips for patients and they are not to second-guess a physician's decision to discharge. . . . Were nurses to get into an advocacy role and to question the orders of doctors by which their statements were taken to superiors and to other doctors, they would soon lose their job or create extreme professional friction,

> if not pandemonium, in the hospital. So, a nurse should not be required to be a practicing physician and make an independent evaluation to then question a doctor's decision.

Also, a commentator has noted:

> As a rule of thumb, when a patient in a hospital is under the care of his private treating physician, a facility may be liable for professional malpractice only if its employees fail to follow that physician's direct and explicit orders. Hospital staff members are not authorized to alter or circumvent such orders and determine for themselves what is a proper course of medical treatment. Conversely, a hospital is generally insulated from liability if its staff merely follows the direct orders of the patient's private physician or is practicing under that physician's direct supervision.

J. Smith, Hospital Liability § 4.04 at 4-20 (1990).

As a general rule, hospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient. The foregoing is recognition of the realities and practicalities inherent in the physician-hospital nurse relationship.

We, therefore, conclude that the trial court properly refused Jensen's tendered instruction No. II because the tendered instruction was not a correct statement of law.

CONTRIBUTORY NEGLIGENCE INSTRUCTION

Review of Instructions Given.

"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." *Rose v. City of Lincoln*, 234 Neb. 67, 74, 449 N.W.2d 522, 528 (1989).

"All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury." *State v. Pierce*, 231 Neb. 966, 975, 439 N.W.2d 435, 443 (1989).

Jury instructions should be confined to issues presented by the pleadings and supported by evidence. *Bump v. Firemens*

Ins. Co., 221 Neb. 678, 380 N.W.2d 268 (1986).

Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is, generally, prejudicial and results in a new trial. *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988).

Causation and Contributory Negligence.

"A defendant's conduct is the cause of an event if the event would not have occurred but for that conduct; conversely, a defendant's conduct is not the cause of an event if the event would have occurred without the defendant's conduct." *Zeller v. County of Howard*, 227 Neb. 667, 672, 419 N.W.2d 654, 658 (1988); *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). See, also, Prosser and Keeton on the Law of Torts, *Proximate Cause* § 41 (5th ed. 1984).

The proximate cause of an injury 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. *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988); *Zeller v. County of Howard, supra*; *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986).

"A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause." *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 850, 438 N.W.2d 485, 490 (1989). See, also, *Mandery v. Chronicle Broadcasting Co., supra*; *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987).

When the affirmative defense of contributory negligence is pleaded, but there is no relevant evidence to support the defense, it is prejudicial error to submit the issue of contributory negligence. *Gehre v. Coleman*, 233 Neb. 32, 443 N.W.2d 606 (1989).

Bergan Mercy's defense of contributory negligence is premised on Lawrence Jensen's disregard of his physician's recommendation that Larry lose weight. Therefore, the

question is whether Larry's failure to lose weight is evidence which supports the defense of contributory negligence and, therefore, renders contributory negligence a jury question.

In a medical malpractice action, a defendant may raise the issue of contributory negligence as an affirmative defense and has the burden to prove contributory negligence. See, *Kaspar v. Schack*, 195 Neb. 215, 237 N.W.2d 414 (1976); *Mecham v. McLeay*, 193 Neb. 457, 227 N.W.2d 829 (1975); *Skar v. City of Lincoln, Neb.*, 599 F.2d 253 (8th Cir. 1979) (applying Nebraska law).

Generally, the defense of contributory negligence has been recognized in a medical malpractice action when the patient has (1) failed to follow a medical instruction, (2) refused or neglected prescribed treatment, or (3) intentionally given erroneous, incomplete, or misleading information which is the basis for medical care or treatment of the patient; for example, *Kaspar v. Schack, supra* (notwithstanding scheduled appointment, the patient failed to return for a physical examination which would have disclosed the patient's treatable condition which resulted in death); *Skar v. City of Lincoln, Neb., supra* (patient furnished materially false and incomplete information used to formulate care for the patient).

Availability of contributory negligence as a defense in a malpractice action was examined by the Supreme Court of Minnesota in *Martineau v. Nelson*, 311 Minn. 92, 102-03, 247 N.W.2d 409, 415-16 (1976):

> Both courts and text writers have emphasized, however, that the availability of a contributory negligence defense in a malpractice case is limited because of the disparity in medical knowledge between the patient and his doctor and because of the patient's right to rely on the doctor's knowledge and skill in the course of medical treatment. Thus, it has been held that it is not contributory negligence to follow the doctor's instructions or to fail to consult another physician when the patient has no reason to believe his pain is caused by the doctor's negligence. It has also been suggested that the patient's neglect of his own health after negligent treatment may be a factor in reducing damages, but should not bar all recovery. . . .

> The relevant issue . . . which must be considered . . . is whether and to what extent plaintiffs may be charged with acting unreasonably in the face of certain statements and advice of defendant doctors.

Several courts have recognized the principle that a patient may be contributorily negligent in a failure to follow the treating physician's specific instructions in the patient's care and treatment. See, *Grippe v. Momtazee*, 705 S.W.2d 551 (Mo. App. 1986) (patient's failure to return to her physician or see a surgeon after her physician had diagnosed an apparently malignant tumor in the patient's breast); *Faile v. Bycura*, 297 S.C. 58, 374 S.E.2d 687 (1988) (patient refused to wear a medically prescribed postoperative orthotic device after surgery on patient's foot); *Welker v. Scripps Clinic etc. Foundation*, 196 Cal. App. 2d 338, 16 Cal. Rptr. 538 (1961) (patient fell while attempting to get out of bed, although repeatedly cautioned to call for assistance); *Wisker v. Hart*, 244 Kan. 36, 766 P.2d 168 (1988) (patient, who had been seriously injured, was instructed by physician not to return to work, but returned to strenuous physical labor which caused deterioration of the patient's condition and eventual death); *Hunter v. United States*, 236 F. Supp. 411 (M.D. Tenn. 1964) (patient revoked consent for additional surgery which would have arrested the condition involved in the malpractice claim).

Also, many courts have held that the defense of contributory negligence in a medical malpractice action is inapplicable when a patient's conduct provides the occasion for medical attention, care, or treatment which later is the subject of a medical malpractice claim or when the patient's conduct contributes to an illness or condition for which the patient seeks the medical attention, care, or treatment on which a subsequent medical malpractice claim is based. Illustrative is *Matthews v. Williford*, 318 So. 2d 480 (Fla. App. 1975), wherein plaintiff's decedent, 10 years before the heart attack which resulted in his death, had had a heart attack and was advised at that time to stop smoking and watch his weight. Ten years later, plaintiff's decedent suffered a heart attack, was admitted to a hospital under the defendant physician's care, and several hours later died from a massive myocardial infarction. In the wrongful

death action against the physician, the plaintiff claimed that the physician negligently failed to take medical precautions at the hospital to prevent the fatal heart attack. The physician requested, but was refused, an instruction on contributory negligence based on the earlier conduct of the patient regarding the patient's health. In affirming a plaintiff's verdict, the *Matthews* court stated:

> The law is well settled in this state that a remote condition or conduct which furnishes only the occasion for someoneelse's [sic] supervening negligence is not a proximate cause of the result of the subsequent negligence. . . .
>
> . . . .
>
> The plaintiff is not claiming damages for the heart attack. The damages she claims, and received from the jury under proper instructions from the court, were the damages for the survival period losses during the life expectancy of the deceased if he had survived, together with damages for the wrongful death, not the heart attack. Any conduct on the part of the plaintiff or the decedent contributing to the heart attack was not a proximate cause of the damages sought in these two actions.
>
> In short, conduct prior to an injury or death is not legally significant in an action for damages like this, unless it is a legal or proximate cause of the injury or death—as opposed to a cause of the remote conditions or occasion for the later negligence. So it is with conduct of a patient which may have contributed to his illness or medical condition, which furnishes the occasion for medical treatment. That conduct simply is not available as a defense to malpractice which causes a distinct subsequent injury—here, the ultimate injury, wrongful death.

318 So. 2d at 481, 483.

In *Sendejar v. Alice Physicians & Surgeons Hosp., Inc.*, 555 S.W.2d 879 (Tex. Civ. App. 1977), the patient, who had been involved in a serious automobile accident, was later treated by a physician who failed to promptly diagnose the plaintiff's spinal cord injuries sustained in the accident. In the patient's malpractice action, the physician argued that the patient should

be barred from a recovery because the patient's own conduct had caused the accident which resulted in the injury related to the malpractice claim. The court in *Sendejar* rejected the physician's argument, held that contributory negligence was not an issue submissible to the jury because the patient's negligence in sustaining the accidental injury did not constitute a defense to the malpractice claim, and stated:

> To constitute a bar to a suit for malpractice, the contributory negligence of the patient must have been an active and efficient contributing cause of the injury made the basis of the patient's claim; it must have been simultaneous and co-operating with the alleged fault of the defendant, must have entered into the creation of the cause of action and must have been an element in the transaction which constituted it.

555 S.W.2d at 885.

Refusal to instruct a jury on contributory negligence was affirmed in *Cowan v. Doering*, 215 N.J. Super. 484, 522 A.2d 444 (1987). Cowan, a suicidal patient under Doering's medical care for taking an overdose of sleeping pills, jumped from a second-story window of the hospital where Cowan was being treated. Cowan brought a malpractice action against her physicians and the hospital for failure to take appropriate precautionary steps to prevent her attempt at suicide. The defendants maintained that Cowan's condition provided a basis for contributory negligence as a defense to Cowan's malpractice action. The trial court refused to submit a contributory negligence instruction because Cowan's suicidal conduct constituted one of the very symptoms for which Cowan was being treated. Refusal of the contributory negligence instruction was upheld, when the court stated in *Cowan, supra* at 495-96, 522 A.2d at 450: "[W]e are entirely satisfied that the trial judge correctly refused to submit the question of plaintiff's negligence to the jury. Simply stated, plaintiff committed the very act that defendants were under a duty to prevent. . . . A triable factual question was not presented in that regard." See, also, *Lamoree v. Binghamton General Hospital*, 68 Misc. 2d 1051, 329 N.Y.S.2d 85 (1972) (malpractice action for negligent treatment of gunshot wound;

the hospital claimed that the patient was contributorily negligent in sustaining the gunshot wound in the first instance; held, patient's conduct before admission to the hospital is not a defense to the defendant's negligent or improper treatment); *Los Alamos Medical Center v. Coe*, 58 N.M. 686, 275 P.2d 175 (1954) (patient was not contributorily negligent on account of the patient's addiction to morphine when the treating physician readily prescribed additional morphine rather than attempting to treat the patient's underlying condition of addiction); *Owens v. Stokoe*, 140 Ill. App. 3d 355, 485 N.E.2d 537 (1985) (patient's failure to maintain his teeth and gums, so that the patient developed oral infections and pyorrhea, was insufficient to raise the issue of contributory negligence).

Finally, an important distinction between "contributing cause in fact" and "contributing legal or proximate cause" was recognized in *Whitehead v. Linkous*, 404 So. 2d 377 (Fla. App. 1981), a case in which Whitehead, in an apparent attempt at suicide, had taken an overdose of tranquilizers and consumed a large quantity of alcohol. After Whitehead was taken to the hospital, he died as the result of cardiac and pulmonary arrest. In a malpractice action, the trial judge instructed the jury to the effect that if the jury found that decedent's intentional or negligent acts in the attempted suicide were a contributing legal cause of decedent's injury, plaintiff's conduct, as contributory negligence, could be considered by the jury in reaching its verdict. In *Whitehead*, the appellate court held that the contributory negligence instruction was unwarranted and stated:

> A remote condition or conduct which furnishes only the occasion for someone else's supervening negligence is not a proximate cause of the result of the subsequent negligence. [Citation omitted.] Both Dr. Linkous and the hospital assert that the decedent's acts in attempting to commit suicide were a contributing legal cause of his death . . . . We think this argument confuses the difference between a contributing cause in fact and a contributing legal or proximate cause. . . . [I]t is clear that Whitehead's actions in consuming the Valium, Darvocet, and beer furnished the occasion for Dr. Linkous' and the hospital's

> later negligence in failing to properly treat him. This conclusion is predicated upon the uncontroverted testimony . . . that but for the hospital's and the doctor's negligent treatment of the deceased, he would be alive today. Since Whitehead's death would not have occurred "but for" the negligent acts or omissions of the hospital and the doctor, those acts and omissions must be deemed the cause of the injury. [Citations omitted.] Stated differently, any conduct on Whitehead's part before he entered the hospital which contributed to his cardiac and pulmonary arrest and subsequent death was not a proximate, legal cause of the damages sought in this case.

404 So. 2d at 379.

Consequently, to be considered as and constitute contributory negligence in a medical malpractice action, a patient's negligence must have been an active and efficient contributing cause of the injury, must have cooperated with the negligence of the malpractitioner, must have entered into proximate causation of the injury, and must have been an element in the transaction on which the malpractice is based. Accordingly, in a medical malpractice action, the defense of contributory negligence is inapplicable when a patient's conduct provides the occasion for medical attention, care, or treatment which later is the subject of a medical malpractice claim or when the patient's conduct contributes to an illness or condition for which the patient seeks the medical attention, care, or treatment on which a subsequent medical malpractice claim is based.

Although Larry's failure to lose weight may have been causally related to his pulmonary embolism, Larry's conduct concerning his weight problem merely furnished an occasion or condition for the medical care which is the basis of the malpractice action against Bergan Mercy. Any conduct on Larry's part before he was admitted to Bergan Mercy and which may have causally contributed to his demise was not a proximate cause in reference to alleged malpractice in medical treatment at Bergan Mercy. Relying on instruction No. 18, the jury may have found that Lawrence Jensen's conduct before admission to Bergan Mercy constituted contributory

negligence. Because there was no evidence to support a finding of contributory negligence, it was prejudicial error to submit the issue of contributory negligence through instruction No. 18. Since the trial court committed reversible error by giving instruction No. 18, we believe that the error was underscored by instruction No. 3, which was a summary or synopsis of the parties' contentions in the malpractice action. Although a trial court may analyze, summarize, and submit the substance of numerous allegations in a malpractice action, *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978), a trial court, expressing such summary or synopsis, shall not place before the jury an issue which is not raised by the pleadings or is unsupported by evidence. See, *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986); *Empire State Building Co. v. Bryde*, 211 Neb. 184, 318 N.W.2d 65 (1982); *Snyder v. Farmers Irr. Dist.*, 157 Neb. 771, 61 N.W.2d 557 (1953).

Because we reverse the judgment of the district court and remand for a new trial, Jensen's other assignments of error need not be addressed. The district court's judgment is reversed, and this cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

GRANT, J., not participating.

RUTH CAPPS, APPELLANT, V. MARK MANHART, D.D.S., APPELLEE.

458 N.W.2d 742

Filed August 3, 1990. No. 88-353.

1. **Actions: Appeal and Error.** In reviewing a law action case, this court considers the evidence most favorably to the successful party and resolves evidential

conflicts in favor of such party, which is entitled to every reasonable inference deducible from the evidence.

2. **Health Care Providers: Physicians and Surgeons: Malpractice.** The rules governing duty and liability of physicians and surgeons in the performance of professional services are also applicable to dentists.
3. **Trial: Expert Witnesses: Appeal and Error.** The admission or exclusion of expert testimony is left largely to the discretion of the trial court, which ruling will be upheld absent an abuse of discretion.
4. **Trial: Malpractice: Expert Witnesses.** A medical expert from one medical community is competent to testify as an expert witness in a medical negligence case as to the standard of care or skill required in another community if the witness has knowledge of or familiarity with the practice and standard of the locality in question, or of a similar or like community.
5. **Trial: Evidence: Witnesses: Impeachment.** Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.
6. _____: _____: _____: _____. A ruling on evidence of a collateral matter intended to affect the credibility of a witness falls within the discretion of a trial court.
7. **Trial: Witnesses: Appeal and Error.** Failure to permit cross-examination regarding credibility constitutes reversible error if prejudice results to the complaining party.
8. **Jury Instructions: Appeal and Error.** The failure of counsel to object to the giving of certain instructions after they have been submitted to counsel for review will preclude raising an objection to the instructions on appeal, unless there is plain error indicative of a probable miscarriage of justice.
9. **Trial: Attorneys at Law: Appeal and Error.** One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

James L. Rold, of Rold & Peppard, for appellant.

Lyman L. Larsen, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

WHITE, J.

This is an appeal from a jury verdict and subsequent motions for judgment notwithstanding the verdict and new trial.

Plaintiff-appellant, Ruth Capps, brought suit against defendant-appellee, Dr. Mark Manhart, for dental malpractice. Capps' charges of negligence against Dr. Manhart involve three areas of dentistry: periodontal (gum disease), restorative (bridgework), and endodontic (root canal). The first area focuses on Dr. Manhart's use of calcium hydroxide as a part of the treatment provided for Capps' periodontal disease. Second, Capps complains that the bridgework that Dr. Manhart planned for her utilized two disease-weakened molars (an upper right and a lower left) as supports. Third, Capps alleges that Dr. Manhart improperly filled the canal of the upper right molar, and caused a perforation of the tooth, in performing a root canal. Dr. Manhart's negligence, according to Capps, would hasten the demise of these two molars and require more restorative work. After the conclusion of the evidence, the jury returned a verdict for the defendant.

The appellant's assigned errors may be summarized as follows: (1) The trial court erred in allowing and excluding certain testimony of defendant and his expert witness and in overruling appellant's motions for a directed verdict; (2) the trial court allowed the opposing counsel, over objection, to make improper arguments to the jury; and (3) the trial court erred in giving certain instructions.

In reviewing a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, which is entitled to every reasonable inference deducible from the evidence. *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990); *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989).

Taking the view most favorable to the appellee, the record discloses the following operational facts: Periodontal disease is a common disease that destroys the tooth-supporting structures: the gum tissue, the bone, the root surface, and the periodontal ligament (which is a sling in which the tooth is suspended in the bone). The disease is initiated by bacteria, and it becomes an infection which occurs beneath the gum tissue and dissolves the bone.

Ruth Capps had a history of periodontal problems prior to

seeing Dr. Manhart. In 1979 Capps' general dentist referred her to a periodontist, Dr. McVaney, who treated her periodontal problems until the summer of 1981, when Capps moved to South Dakota. While there, Capps saw a dentist who fitted her with removable appliances on the upper and lower parts of her mouth, which were necessitated by the earlier removal of teeth by Capps' general dentist in Nebraska. Capps last saw the South Dakota dentist on September 15, 1982. She moved back to Omaha in 1983 and had not seen a dentist since the 1982 visit when she first saw Dr. Manhart on October 14, 1985, with a severe toothache in an upper right molar.

Dr. Manhart noted periodontal involvement on the affected tooth and treated the area with calcium hydroxide. Dr. Manhart also discussed with Capps the implications of her situation and her removable partial appliances, and asked her not to wear the partial in the upper right area of her mouth, as it was not helping the matter. After further examination and probing, Dr. Manhart determined that Capps had a moderate periodontal problem throughout her mouth, with severe problems on specific teeth.

Dr. Manhart continued to treat Capps until February 1986. The treatment included calcium hydroxide treatments, bridgework, and root canal work. Capps' last visit to Dr. Manhart's office was on February 3, 1986, at which time a dispute arose as to Capps' bill. Dr. Manhart testified that his work with Capps was not finished, and he expected to see her back in his office after the February 3 visit.

EXPERT TESTIMONY

We begin our discussion regarding the expert testimony in this case, keeping in mind the following: The rules governing duty and liability of physicians and surgeons in the performance of professional services are also applicable to dentists, *Mangiameli v. Ariano*, 126 Neb. 629, 253 N.W. 871 (1934); the approved test for determining whether a physician was negligent in performance of medical services is whether he followed the generally accepted and recognized standard of care or skill of the community or similar communities in performing those services, *Hanzlik v. Paustian*, 216 Neb. 575,

344 N.W.2d 649 (1984); *Kortus v. Jensen*, 195 Neb. 261, 237 N.W.2d 845 (1976).

Lastly, the admission or exclusion of expert testimony is left largely to the discretion of the trial court, which ruling will be upheld absent an abuse of discretion. *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990). See, also, *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990).

Competence of Defendant's Expert

Capps argues that the defendant's expert witness and defendant were not competent to testify to the appropriate standard of care. The objections made at trial by Capps' counsel alleged that Dr. Allan Nalbor, who testified on behalf of Dr. Manhart and practices dentistry in Merrillville, Indiana, was not licensed to practice, nor did in fact practice, dentistry in Nebraska and that he failed to show a familiarity with the standards in Omaha and similar communities.

A medical expert from one medical community is competent to testify as an expert witness in a medical negligence case as to the standard of care or skill required in another community if the witness has knowledge of or familiarity with the practice and standard of the locality in question, or of a similar or like community. *Wentling v. Jenny*, 206 Neb. 335, 293 N.W.2d 76 (1980); *Kortus v. Jensen, supra*. Dr. Nalbor did testify that he was familiar with the standard of practice applicable to general dentists in Omaha and similar communities. He attended Creighton University for dental school, has taken continuing education courses around the country, and performs work daily in all of the areas of dentistry to which he testified. He testified that Merrillville is "for all practical purposes" a suburb of Chicago.

In *Wentling v. Jenny, supra*, we cited *Kortus v. Jensen* in saying that evidence that the expert had never practiced in the defendant's community goes to the weight to be accorded the evidence by the trier of fact; it does not keep the expert from testifying to a general standard of skill in the defendant's community if he testifies that he is familiar with that standard. Such is the case with Dr. Nalbor's testimony. Dr. Manhart's testimony generally consisted of a description of his patented

calcium hydroxide treatment and of his course of treatment of Capps. The matters that appellant complains of were issues of credibility for the jury. The opinions of defendant and his expert had a reasonable basis, and they were properly received in evidence at the discretion of the trial court. See, *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988); *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982).

Cross-Examination

Appellant assigns error to the trial court in excluding certain evidence in her cross-examination of defendant's expert. Appellant's brief discusses three areas where cross-examination was denied: (1) certain practices employed by Dr. Nalbor in his office, (2) the licensing agreement between Drs. Manhart and Nalbor, and (3) reference by defendant and his expert to alleged hearsay material and other material introduced by appellant.

The appellant's counsel asked Dr. Nalbor if he had his patients sign a release before he performed calcium hydroxide therapy. Counsel for the appellee objected because the case did not involve an issue of informed consent and because the issue was not relevant to the alleged negligence in Capps' treatment. Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded. *State v. Williams*, 219 Neb. 587, 365 N.W.2d 414 (1985). Whether Dr. Nalbor's office practice included having patients sign a release has no bearing on whether Dr. Manhart breached the standard of care in his treatment of appellant. The trial court's exclusion of this testimony was not prejudicial to the appellant and was not an abuse of discretion.

Appellant next claims that the trial court erred in refusing to admit into evidence the licensing agreement between Drs. Nalbor and Manhart, which provided the terms for Dr. Nalbor's use of Manhart's patented calcium hydroxide treatment. Dr. Nalbor admitted by oral testimony the existence of the agreement and that he paid Dr. Manhart a royalty for each use of the treatment. With this testimony already in evidence, the court found the agreement to be unnecessary and

cumulative. See Neb. Rev. Stat. § 27-403 (Reissue 1989). We agree.

Lastly, the appellant claims that she was not allowed to cross-examine the defendant and his expert on their reference to alleged hearsay material. The trial court sustained several objections throughout appellant's cross-examination of Drs. Nalbor and Manhart in reference to literature they rely on.

While the right of cross-examination is fundamental, a ruling on evidence of a collateral matter intended to affect the credibility of a witness falls within the discretion of a trial court. *State v. Williams, supra*. The appellant claims that considerable time was spent by counsel for appellee in establishing foundation of Dr. Manhart's status as an expert in his field. The appellant's expert witnesses testified similarly to their status in the dental community. The credibility of each was then a matter for the jury. Further, we note below that while appellant makes claims of hearsay testimony by reliance on outside research and literature, appellant's experts also rely on literature in forming their opinions. Failure to permit cross-examination regarding credibility constitutes reversible error if prejudice results to the complaining party. *L. J. Vontz Constr. Co. v. Alliance Indus.*, 215 Neb. 268, 338 N.W.2d 60 (1983); *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983). Appellant has failed to demonstrate that she was prejudiced by the trial court's rulings; therefore, the rulings are affirmed.

Hearsay

To appellant's objection to the alleged admission of hearsay, we note that the appellee's references to research and literature were not offered to prove the truth of their contents, but as a basis for Dr. Manhart's testimony of his treatment of the appellant. This is proper in expert testimony, and the basis for the expert's opinion need not be disclosed or admitted into evidence. See, Neb. Rev. Stat. § 27-703 (Reissue 1989); Neb. Rev. Stat. § 27-705 (Reissue 1989).

Expert witnesses quite often rely on sources of research and literature as bases of their opinions, and a reference to those sources during testimony does not reduce that testimony to hearsay. One of appellant's experts even made reference to "the

literature" in describing the effect of calcium hydroxide in dentistry. The literature referred to by the appellee was not offered as independent evidence of its truth, and the trial court's rulings on this matter were not an abuse of discretion.

Having affirmed the trial court's evidentiary rulings, we find that there was ample evidence presented by both parties on the issue of liability, thus creating a jury question. The court properly denied appellant's motions for directed verdict.

JURY INSTRUCTIONS

The appellant assigns error to the giving of instructions Nos. 11 through 14, particularly instruction No. 13, which reads:

> A general dentist is not bound to use any particular method of treatment, and if, among general dentists of ordinary skill and learning, more than one method of treatment is recognized as within the standard of care, it is not negligence for a general dentist to adopt any of such methods. The fact that some other dentist testified in this case that he would have followed a different method than that followed by the defendant, does not, standing alone, establish that Dr. Manhart made or gave improper treatment.

It appears from the record before us that at no time before this appeal did appellant object to the above instructions. The failure of counsel to object to the giving of certain instructions after they have been submitted to counsel for review will preclude raising an objection to the instructions on appeal, unless there is plain error indicative of a probable miscarriage of justice. *Gilbert v. Archbishop Bergan Mercy Hospital*, 228 Neb. 148, 421 N.W.2d 760 (1988); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987).

ARGUMENT TO THE JURY

Appellant lastly assigns error to the district court in allowing appellee's counsel to make improper argument to the jury by raising issues of contributory negligence and assumption of risk, which were not pled. We have said that one may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a

mistrial but consents to take the chances of a favorable verdict. *Johnson v. Nebraska Public Power Dist.*, 187 Neb. 421, 191 N.W.2d 594 (1971).

Appellant admits in her brief that she did not move for a mistrial, and concedes that she does not argue that this issue is sufficient to overturn the jury's verdict. Therefore, we do not consider appellant's argument, and the alleged error is without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

JEANENE LYNN LIMBACH, APPELLEE, V. MICHAEL ALLAN LIMBACH, APPELLANT.

458 N.W.2d 465

Filed August 3, 1990. No. 88-589.

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, upon the recommendation of the Appellate Division of the District Court, HENDRIX, SPRAGUE, and JOHN P. MURPHY, District Judges. Affirmed as modified.

Nicholas J. Lamme, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellant.

D.A. Martin, of Kerrigan, Line & Martin, for appellee.

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

PER CURIAM.

Upon our consideration of the record, the briefs, and the recommendation of the Appellate Division of the District Court, we find that because the trial court erred as a matter of law in awarding child care expenses on a percentage basis, the award is therefore modified to provide for payment by appellant of $150 per month for such expenses. In all other respects the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

KAREN A. GARVEY, APPELLEE, V. THOMAS J. GARVEY, APPELLANT.
458 N.W.2d 466

Filed August 3, 1990. No. 88-761.

Appeal from the District Court for Sarpy County: ORVILLE L. COADY, Judge. Affirmed.

Larry L. Fugit for appellant.

Dennis M. Connolly, of Taylor, Connolly, Kluver & Bock, for appellee.

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

PER CURIAM.

This is an appeal from an order dismissing appellant Thomas Garvey's July 30, 1987, petition to modify the decree of dissolution entered on May 4, 1984, insofar as that decree affects his child support obligations. We affirm.

We review the record de novo and uphold the determination of the lower court absent an abuse of that court's discretion. *Empfield v. Empfield*, 229 Neb. 83, 425 N.W.2d 334 (1988). Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since the entry of the decree or a previous modification. *Id.*

In our de novo review, we find that the appellant was not prejudiced by any determination of the trial court and that he failed to prove any material change in circumstances justifying an alteration of the support obligation created by a settlement agreement incorporated in the original divorce decree.

No attorney fees are awarded.

AFFIRMED.

WARREN KERNDT, APPELLANT, V. JOHN T. RONAN, SR., ET AL., APPELLEES.

458 N.W.2d 466

Filed August 3, 1990. No. 88-785.

1. **Judgments: Res Judicata.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
2. _____: _____. The doctrine of res judicata dictates that any right, fact, or matter which has been expressly or directly adjudicated on the merits in a previous action before a court acting within its jurisdiction, or which was necessarily included in the determination of the previous action, is conclusively settled by the judgment in the previous action and may not be relitigated by the parties to the previous action, whether the claim, demand, purpose, or subject matter in subsequent litigation would or would not be the same as that in the previous litigation.
3. **Judgments: Res Judicata: Proof.** A party relying on a judgment as the basis for application of the doctrine of res judicata has the burden to prove that the prior judgment was an adjudication on the merits.
4. **Judgments: Res Judicata.** The doctrine of res judicata is inapplicable if there was no final judgment on the merits in the previous proceeding which is used as the basis for application of the doctrine.
5. _____: _____. For the purpose of the doctrine of res judicata, a judgment on the merits involves legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form.
6. **Judgments: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
7. **Judgments: Courts: Appeal and Error.** After the time for appeal from a judgment has passed, a trial court's postjudgment interpretation of the judgment is irrelevant to an appellate court's determination of the judgment's meaning, which, as a matter of law, is determined by the contents of the judgment in question.
8. **Judgments: Res Judicata.** If a previous judgment is ambiguous as to whether the judgment was on the merits, the doctrine of res judicata is inapplicable.

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

Thomas H. Dahlk, of Lieben, Dahlk, Whitted, Houghton & Jahn, P.C., for appellant.

Jeff C. Miller, of Young & White, for appellees.

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

SHANAHAN, J.

Warren Kerndt filed an action in the district court for Dodge County and sought dissolution of a partnership involving Kerndt, an accounting, and damages. The alleged partnership consisted of Ronan & Associates, Inc., John T. Ronan, Sr., and John T. Ronan, Jr. (the preceding corporation and persons are collectively called "Ronans"); Gary W. Dross; and Kerndt. Finding that Kerndt's action was barred by the doctrine of res judicata, the court granted summary judgment to Ronans and dismissed Kerndt's action.

"DROSS ACTION"

On May 5, 1986, Dross filed an action in the district court for Dodge County, in which Dross sought a partnership dissolution and accounting. The alleged partnership included Dross, Ronans, and Kerndt, who was not joined in the action. Ronans moved for dismissal because Dross had failed to join Kerndt as a necessary party. The court sustained Ronans' motion, but allowed 2 weeks for Dross' amended petition or Kerndt's intervention in the suit. Kerndt filed his intervention petition, which was nearly identical to Dross' petition, except Kerndt alleged that he had not been paid sums required by his oral contract with Ronans. Ronans, alleging that Dross and Kerndt had interfered with Ronans' business relationships, filed a counterclaim against Dross and Kerndt.

All claims within the Dross action were dismissed when the court entered an order, which provided in its entirety:

> On January 5th, 1987, this matter came on for trial. Trial was resumed on January 16, 1987. Thereupon the matter of trial was continued. Trial resumed on March 4th, 1987, and was continued until April 2nd, 1987. Trial resumed on April 2nd, 1987, and evidence was further adduced.
>
> At the close of taking of evidence, the Court and counsel discussed a time schedule in which the parties would submit their closing argument in writing, as well as Findings of Fact and Conclusions of Law. Plaintiff and

> Intervenors [sic] were granted until April 13, 1987, to submit their argument and Findings of Fact and Conclusions of Law. Defendants were given until April 27, 1987, to answer thereto. Plaintiff and Intervenors [sic] were given until May 4, 1987, to reply.
>
> To date neither the Plaintiff, the Intervenor, nor the Defendants have submitted to the Court their closing argument, nor their proposed Findings of Fact and Conclusions of Law.
>
> Now, the Court being fully advised in the premises does FIND and ORDER that the Plaintiff's Petition, the Intervenor's Petition, and the Defendants' Counterclaim should be, and are hereby, dismissed; with each party bearing their own cost.
>
> Dated this 24th day of June, 1987.

Dross and Kerndt filed a motion and requested that the court vacate its dismissal judgment or grant a new trial. The court denied the motion. Neither Dross nor Kerndt appealed.

"KERNDT ACTION"

On February 5, 1988, in the district court for Douglas County, Kerndt filed an action against Ronans for a dissolution and accounting of the partnership composed of Kerndt, Dross, and Ronans. Kerndt also alleged that he had not been compensated for services that he performed for Ronans pursuant to an oral agreement. After successfully transferring the case to the district court for Dodge County, Ronans moved for summary judgment on the ground that dismissal of the Dross lawsuit in 1987 barred Kerndt's action in 1988. Finding that the doctrine of res judicata applied to and barred Kerndt's action filed in 1988, the district court determined that there was no genuine issue of material fact, sustained Ronans' motion for summary judgment, and dismissed Kerndt's action.

The order overruling Kerndt's motion for a new trial, entered September 6, 1988, recited that Kerndt's action is "barred under the doctrine of res judicata as the Order of June 24, 1987 entered in [Kerndt's] previous case in this Court on these same causes of action, was a decision of dismissal on the merits based on the testimony and evidence adduced during trial . . . ."

ASSIGNMENT OF ERROR

Kerndt has appealed and, in his sole assignment of error, contends that the district court erred in its conclusion that the 1987 dismissal order in the Dross action "was a ruling on the merits rather than a dismissal without prejudice, and that the dismissal served as a bar under the doctrine of res judicata." Brief for appellant at 1.

THE DOCTRINE OF RES JUDICATA

"The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action." *NC+ Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 310, 422 N.W.2d 542, 545 (1988); *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989).

The doctrine of res judicata dictates that any right, fact, or matter which has been expressly or directly adjudicated on the merits in a previous action before a court acting within its jurisdiction, or which was necessarily included in the determination of the previous action, is conclusively settled by the judgment in the previous action and may not be relitigated by the parties to the previous action, whether the claim, demand, purpose, or subject matter in subsequent litigation would or would not be the same as that in the previous litigation. *State v. Gerdes, supra*; *Security State Bank v. Gugelman*, 230 Neb. 842, 434 N.W.2d 290 (1989). A party relying on a judgment as the basis for application of the doctrine of res judicata has the burden to prove that the prior judgment was an adjudication on the merits. See *State v. Gerdes, supra*.

From the foregoing, the doctrine of res judicata is inapplicable if there was no final judgment on the merits in the previous proceeding which is used as the basis for application of the doctrine. Cf. Neb. Rev. Stat. § 25-1902 (Reissue 1989) (which provides that a final order is "[a]n order affecting a substantial right in an action . . ."). Furthermore, at least "[f]or the purposes of *res judicata*, the definition of a judgment on the merits is one which 'is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or

form.' " *Harper Plastics v. Amoco Chemicals Corp.*, 657 F.2d 939, 943 (7th Cir. 1981) (quoting *Fairmont Aluminum Co. v. Commissioner of Int. Rev.*, 222 F.2d 622 (4th Cir. 1955), *cert. denied* 350 U.S. 838, 76 S. Ct. 76, 100 L. Ed. 748). See, also, *Points v. Oklahoma Pub. Co.*, 672 P.2d 1146 (Okla. 1983); *Bi-State Dev. Agency v. Whelan Sec.*, 679 S.W.2d 332 (Mo. App. 1984).

In support of his argument that dismissal of the Dross action was not a judgment on the merits, Kerndt directs our attention to Neb. Rev. Stat. § 25-601 (Reissue 1989), which provides in relevant part: "An action may be dismissed without prejudice to a future action . . . (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases on the trial of the action the decision must be upon the merits." In explaining § 25-601(5), this court has stated that it is within the " 'discretion of the district court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action.' " *Vodehnal v. Grand Island Daily Independent*, 191 Neb. 836, 837, 218 N.W.2d 220, 221 (1974) (quoting *Howell v. Malmgren*, 79 Neb. 16, 112 N.W. 313 (1907)); *Pressey v. State*, 173 Neb. 652, 114 N.W.2d 518 (1962). Kerndt asserts that the court dismissed the Dross action in 1987 because the parties failed to comply with the order regarding submission of written closing arguments and proposed findings of fact and conclusions of law; hence, on account of § 25-601(5), dismissal was without prejudice and does not bar Kerndt's present action. See *Morris v. Linton*, 74 Neb. 411, 415-16, 104 N.W. 927, 929 (1905): "[T]he dismissal of a bill without prejudice does not conclude the parties thereto, and they are at liberty to bring another bill upon the same subject matter."

Kerndt's interpretation of the trial court's dismissal order in the Dross action is certainly plausible, inasmuch as the trial court's order specifically referred to the fact that the parties had failed to follow the court's prior order regarding written closing arguments and proposed findings of fact and conclusions of law.

Ronans, however, argue that "the contents of the Order itself reveal that a decision on the merits was rendered by the trial

court." Brief for appellees at 13. Ronans point out that the dismissal order was entered at the conclusion of evidence in the Dross action, a fact noted in the order of dismissal. Ronans also contend that the phrase "fully advised in the premises," which is contained in the court's dismissal order, means "in consideration of the evidence adduced at trial." *Id.* Most assuredly, Ronans' interpretation of the dismissal order is reasonable.

Without clarifying language, such as "based on the evidence presented at trial, the court finds," or "due to the parties' failure to comply with the court's order concerning written closing arguments, the court finds," the 1987 dismissal order is susceptible to the two reasonable interpretations suggested by the parties. On one hand, the 1987 dismissal order may be interpreted as a sanction for noncompliance with the trial court's progression order for disposition of the case, while, on the other hand, the order, entered after conclusion of all the evidence, may have been a disposition on the merits. "Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." *Knox v. Cook*, 233 Neb. 387, 391, 446 N.W.2d 1, 4 (1989); *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990). See, also, *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). Thus, we conclude that, as a matter of law, the dismissal order in question is ambiguous.

We realize that the trial court, when Kerndt's motion for new trial was overruled in 1988, offered an interpretation of the 1987 dismissal order in the Dross action which was used as the basis for application of res judicata. However, after the time for appeal from a judgment has passed, a trial court's postjudgment interpretation of the judgment is irrelevant to an appellate court's determination of the judgment's meaning, which, as a matter of law, is determined by the contents of the judgment in question. See *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986). See, also, *Crofts v. Crofts*, 21 Utah 2d 332, 335, 445 P.2d 701, 702-03 (1968):

> If a judgment can mean one thing one day and something else on another day, there would be no reason

> to suppose that the litigation had been set at rest. The same must be said if the judgment can mean one thing to one judge and something else to another judge. All are bound by the original language used, and all ought to interpret the language the same way. . . . The judge who tried the case and who ought to know what he meant to say, after the time for appeal, etc., has passed cannot any more change or cancel one word of the judgment than can any other judge.

Ambiguity in a dismissal order, that is, whether the dismissal is actually a final judgment on the merits, will frequently lead to a procedural dilemma for a party whose action has been dismissed. Should that party, interpreting the dismissal as a final order, appeal, only to learn through the appeal that there has been no final and, therefore, appealable order? Or should that party, interpreting the dismissal as one which is not a disposition on the merits, withhold an appeal and later be confronted with res judicata as a bar to a subsequent action? To avoid procedural dilemmas inherent in an ambiguous dismissal order, courts in other jurisdictions have determined that if a previous judgment is ambiguous as to whether the judgment was on the merits, the doctrine of res judicata is inapplicable. See, *Henderson v. Bardahl Int'l Corp.*, 72 Wash. 2d 109, 117, 431 P.2d 961, 966 (1967): "An ambiguous and inconsistent judgment should not be the basis for an estoppel by judgment"; *Melaro v. Mezzanotte*, 352 F.2d 720, 721 n.2 (D.C. Cir. 1965): "A judgment the basis of which is ambiguous is not res judicata"; *Philpot v. Minton*, 370 S.W.2d 402, 403 (Ky. 1963): "When the basis of an earlier decision is not made clear it cannot operate as res judicata"; *State ex rel. Hamilton v. Cohn*, 1 Wash. 2d 54, 95 P.2d 38 (1939).

Since the 1987 dismissal order is ambiguous, the doctrine of res judicata is inapplicable to bar Kerndt's present action. Therefore, the district court's summary judgment is erroneous. For that reason, we reverse the judgment of the district court and remand this matter for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., not participating.

ALBERT F. TRITCH AND MARIAN I. TRITCH, APPELLANTS, V. BURLINGTON NORTHERN, INC., A DELAWARE CORPORATION, APPELLEE.

458 N.W.2d 471

Filed August 3, 1990. No. 88-834.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, upon the recommendation of the Appellate Division of the District Court, WARREN, COADY, and RILEY, District Judges. Affirmed as modified.

Dick H. Hartsock for appellants.

Gary L. Dolan, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

PER CURIAM.

Upon our consideration of the record, the briefs, and the recommendation of the Appellate Division of the District Court, this court finds that because of an error of law committed by the trial court in interpreting the statute on costs, appellants are awarded the additional sum of $282.50 expended for costs. In all other respects, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK J. GREEN, APPELLANT.

458 N.W.2d 472

Filed August 3, 1990. No. 89-658.

1. **Constitutional Law: Right to Counsel.** An accused has a sixth amendment right to conduct his own defense, provided that he knowingly and intelligently forgoes his right to counsel and he is able and willing to abide by rules of procedure and courtroom protocol.

2. **Trial: Right to Counsel.** A trial court may appoint standby counsel to aid an accused, if the accused desires assistance, and to be available to represent the accused if termination of self-representation becomes necessary.
3. **Constitutional Law: Right to Counsel: Judges.** A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure, nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.
4. **Juror Qualifications: Waiver.** A party who fails to challenge prospective jurors for disqualification and does not use his peremptory challenges to remove such jurors from the panel waives any objection to their selection.
5. **Trial: Jury Instructions.** It is the duty of the trial judge to instruct on the law of the case, and the law so given to the jury in the instructions must apply even though the jury may decide that the law should be otherwise.
6. **Juries: Verdicts: Jury Instructions.** Although a jury may acquit an accused even if its verdict is contrary to the law and the evidence, the defendant is not entitled to have the jury instructed about the power of jury nullification.
7. **Jury Instructions: Appeal and Error.** If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
8. **Convictions: Appeal and Error.** The Supreme Court will sustain a criminal conviction if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Platte County, GERALD E. ROUSE, Judge. Judgment of District Court affirmed.

James C. Stecker for appellant.

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

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

BOSLAUGH, J.

The defendant, Patrick J. Green, was convicted by a jury of operating a motor vehicle during a period of suspension, in violation of Neb. Rev. Stat. § 60-430.01 (Reissue 1988), a Class III misdemeanor. He was sentenced to 45 days in jail, and his driving privileges were suspended for 12 months. Upon appeal to the district court, the judgment was affirmed.

The defendant has appealed to this court and claims that the

district court erred in affirming the judgment of the county court because § 60-430.01 is unconstitutional and that the trial court erred in failing to appoint an attorney to serve as standby counsel for the defendant, in limiting the scope of the defendant's voir dire, and in failing to properly instruct the jury. The defendant also claims that his driving privileges were twice taken for the same "revocation."

The record shows that during the early morning hours of July 5, 1988, Officer Fairchild and Sergeant Galitz of the Columbus Police Department saw the defendant driving an automobile within the city limits of Columbus, Platte County, Nebraska. Officer Fairchild, who was out of uniform and was in the police cruiser "[k]eeping Sergeant Galitz company," had previously arrested the defendant for driving under suspension. Sergeant Galitz was subsequently informed by dispatch that the defendant's driver's license was suspended or revoked. The defendant was arrested by the two officers outside the Columbus city limits. At trial, the State introduced records of the Department of Motor Vehicles showing that the defendant's driver's license had been suspended for the period of March 14 through September 14, 1988.

The defendant appeared pro se at his trial and in the district court. Counsel was appointed to represent the defendant in this appeal.

CONSTITUTIONALITY OF § 60-430.01

During a pretrial conference held August 11, 1988, the defendant moved that the court decide the constitutionality of § 60-430.01, contending that license revocation was cruel and unusual punishment and that he had a right to travel upon the highways. After taking the matter under advisement, the county court denied the defendant's "motion for declaratory judgment on the constitution."

It is not clear from the record whether this issue was raised in the defendant's appeal to district court. Assuming, arguendo, that the issue was properly raised, the defendant's contention that § 60-430.01 is unconstitutional is without merit.

Section 60-430.01 provides, in part:

> It shall be unlawful for any person to operate a motor

> vehicle during any period that his or her motor vehicle operator's license has been suspended, revoked, or impounded pursuant to conviction or convictions for violation of any law or laws of this state or by an order of any court or by an administrative order of the Director of Motor Vehicles or after such suspension, revocation, or impoundment but before reinstatement of his or her license or issuance of a new license.

The statute now provides a penalty of 1 year's suspension for a first offense and 2 years' suspension for each subsequent offense.

In his brief, the defendant claims the penalty constitutes cruel and unusual punishment, in violation of U.S. Const. amend. VIII. In connection with this claim, the defendant argues that a license suspension under § 60-430.01 deprives him of the opportunity to obtain meaningful work and employment.

A similar issue was raised in *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985), where Michalski argued that the penalty of permanent license revocation for third-offense drunk driving constituted cruel and unusual punishment under the U.S. and Nebraska Constitutions. This court held that Neb. Rev. Stat. § 39-669.07(3) (Reissue 1984) was constitutionally valid and that the penalty of permanent license revocation did not constitute cruel and unusual punishment under either the state or federal Constitution.

In light of our holding in *Michalski, supra*, the penalty of 1 or 2 years' suspension found in § 60-430.01 does not constitute cruel and unusual punishment.

The defendant further contends that, pursuant to the statute, he has been deprived of "life, liberty, and the pursuit of happiness," contrary to Neb. Const. art. I, § 1. Brief for appellant at 35. In connection with this argument, the defendant claims the suspension of his driver's license infringes on his happiness by limiting his ability to obtain jobs with better pay. He also claims that the statute unconstitutionally restricts his ability to travel. These arguments are frivolous. The defendant has not been deprived of employment, only of his privilege to drive an automobile, and is not prevented from

pursuing other modes of transportation or being transported by others in an automobile.

The defendant's constitutional arguments are without merit.

RIGHT TO COUNSEL

The defendant next contends that the trial court erred in failing to appoint an attorney to serve as standby counsel. Notwithstanding his earlier emphatic statements to the contrary, he argues that "it is obvious that the defendant did not want to proceed through trial without any legal assistance." Brief for appellant at 15.

In *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the U.S. Supreme Court held that an accused has a sixth amendment right to conduct his own defense, provided that he knowingly and intelligently forgoes his right to counsel and he is able and willing to abide by rules of procedure and courtroom protocol. See, also, *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985) (although an accused is entitled to be represented by counsel in all critical stages of a criminal proceeding against him, including sentencing, the right to counsel may be waived if such waiver is made intelligently and understandingly, with the knowledge of an accused's right to counsel).

A trial court may appoint standby counsel to aid an accused if the accused desires assistance, and to be available to represent the accused if termination of self-representation becomes necessary. *Faretta supra* at 422 U.S. at 834-35 n.46. However, *Faretta* does not require a trial judge to permit "hybrid" representation. *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). "A defendant does not have a constitutional right to choreograph special appearances by counsel." 465 U.S. at 183. In holding that a defendant's sixth amendment rights are not violated when a trial judge appoints standby counsel, even over the defendant's objection, the *McKaskle* Court noted that "[a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of

course." 465 U.S. at 183-84.

The record shows that during his arraignment, the defendant was advised of his constitutional rights, including his right to a court-appointed attorney for jailable offenses. After an extensive discussion with the court, the defendant indicated he understood the possible penalty for the offense to be a maximum of 3 months' imprisonment, a $500 fine, or both. When the court asked the defendant if he desired an attorney, the defendant replied, "I certainly don't," and indicated that he wanted to proceed without an attorney.

At the August 11 pretrial conference, the trial court ascertained that the defendant did not have an attorney and asked whether he was able to afford an attorney. The defendant replied, "I don't see what difference that makes." The court then asked if the defendant waived his right to have an attorney. The defendant answered, "I certainly did." The defendant then moved "sua supondo" to have the trial judge keep him informed of each and every right as it came up during the proceedings. In overruling the defendant's motion, the trial court informed the defendant that "my requirement to both you and the State is that you've been informed of your rights. The Court no longer has any obligation beyond that. If you represent yourself, you're expected to take the status of an attorney." The defendant made no request for an attorney to assist him in the trial of this case.

The record shows that the defendant's waiver of his right to counsel was voluntarily, understandingly, and intelligently made, see *State v. Jost, supra*, and the trial court was neither asked nor required to appoint standby counsel. The defendant also was informed that if he proceeded pro se, he would be expected to take the status of an attorney. The defendant's assignment is without merit.

VOIR DIRE

The defendant next complains that the trial court improperly limited his questioning of the jury panel and set an unreasonable time limit for him to complete his voir dire. He also contends that he was unfairly limited in the types of questions he was allowed to ask the prospective jurors.

The selection of jurors is governed by Neb. Rev. Stat. § 29-2004 (Reissue 1989); peremptory challenges and challenges for cause are governed by Neb. Rev. Stat. §§ 29-2005 and 29-2006 (Reissue 1989).

The record shows that jury selection began on October 19, 1988. The court began the proceedings by asking the jurors some basic questions. The prosecution briefly questioned the panel and passed the jury for cause. The defendant proceeded to examine six prospective jurors.

During the defendant's voir dire, the court refused to allow answers to be made to a number of improper questions. Several of the questions were argumentative, extremely broad, and irrelevant to the case at hand. Other questions constituted personal attacks on the prospective jurors.

The defendant was advised by the court that he would be limited on the amount of time that he could ask questions. After examining two prospective jurors at length, the defendant moved to strike one juror for cause. This motion was denied. The defendant was then warned that he would have another 20 minutes to finish voir dire. He asked questions of four other jurors and announced, "I'm happy with that six," including the juror he previously challenged for cause. He stated to the court that he did not have any questions of the other members of the panel and declined to exercise any of his peremptory challenges.

In *State v. McCoy*, 228 Neb. 178, 183, 421 N.W.2d 780, 783 (1988), we held that "a party who fails to challenge prospective jurors for disqualification and does not use his peremptory challenges to remove such jurors from the panel waives any objection to their selection."

There was no error in the selection of the jury, and the defendant's assertions to the contrary are without merit.

JURY INSTRUCTIONS

The defendant next contends that the trial court erred in failing to instruct the jury as follows: "Any one or all six may vote to nullify the Law in this case." "The Law which I have explained to you in this case was written, passed and administered by public servants and now you the governed have the full right and duty to nullify this Law if you do not wish to

be governed by it."

In *State v. Chaney*, 184 Neb. 734, 740, 171 N.W.2d 787, 791 (1969), this court said: "[I]t is the duty of the trial judge to instruct on the law of the case and the law so given to the jury in the instructions must apply even though the jury may decide that the law should be otherwise." This rule is reflected in NJI2d 1.01, which provides:

> Members of the jury, now that you have heard all of the evidence[and the arguments of counsel], it is my duty to instruct you in the law.
>
> . . . .
>
> (2) It is my duty to tell you what the law is. It is your duty to decide what the facts are and to apply the law to those facts.
>
> . . . .
>
> (3) You must apply the law in these instructions, even if you believe that the law is or should be different.

Pursuant to § 29-2006, a juror may be challenged for cause if he has formed or expressed an opinion as to the guilt or innocence of the accused. If a juror states that he has formed such an opinion, the court must examine the juror as to the ground of his opinion. The court may, in its discretion, admit the juror as competent to serve if the juror's opinion is not founded upon certain impermissible factors "and the juror . . . shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence."

The defendant's proposed instructions were not correct statements of the law. Although a jury may acquit an accused even if its verdict is contrary to the law and the evidence, the defendant is not entitled to have the jury instructed about the power of jury nullification. See, e.g., *Reale v. U.S.*, 573 A.2d 13 (D.C. App. 1990).

The defendant also complains that the trial court erred in giving instructions Nos. 9 and 10, contending that these instructions unfairly emphasized portions of the State's evidence. He properly objected to these instructions at trial.

Instruction No. 9 provided: "The Director of Motor Vehicles shall adopt a seal. Copies of all records or other instruments in

the department when certified by the director as true copies and bearing the seal thereof, shall be received in any court as prima facie evidence of the original records or instruments."

Instruction No. 9 is taken directly from Neb. Rev. Stat. § 60-418.01 (Reissue 1988) and correctly advised the jury regarding the admissibility and effect of documentary evidence presented by the State which bore the seal of the Department of Motor Vehicles. In any event, the jury was separately instructed that "[y]ou are the sole judges of the credibility of the evidence and every part thereof and of the weight to be given to the same." The defendant has failed to show any prejudice resulting from instruction No. 9.

Instruction No. 10 provided: "A city police officer has the authority to stop and arrest a person outside the city limits if a misdemeanor offense was committed in his presence within the city limits."

The defendant concedes that instruction No. 10 is a correct statement of the law, but claims that this instruction was irrelevant. The record shows that the defendant, during his examination of Officer Fairchild, raised the issue of whether or not the officer stopped him within the Columbus city limits and called into question the officer's authority to arrest him.

If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *State v. Beins*, 235 Neb. 648, 456 N.W.2d 759 (1990); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989). We determine that the instructions given to the jury correctly stated the law, were not misleading, and adequately covered the issues involved. The defendant's assignments are without merit.

LICENSE REVOCATION

In his final assignment of error, the defendant claims that his driving privileges were twice taken for the same offense. This assignment refers to the defendant's attempt to collaterally attack the December 12, 1986, order of the director of the Department of Motor Vehicles, which became effective March 14, 1988. In connection with this assignment, the defendant

claims that the Department of Motor Vehicles improperly delayed the commencement of the suspension period on the underlying offense until the defendant's appeal to the Supreme Court was dismissed. See *Green v. Jensen*, 227 Neb. xxvi (case No. 87-1034, March 14, 1988).

The Supreme Court will sustain a criminal conviction if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Thayer*, 235 Neb. 70, 453 N.W.2d 474 (1990); *State v. Carter*, 234 Neb. 378, 451 N.W.2d 271 (1990).

The record shows that the defendant's driver's license was suspended for the period of March 14 through September 14, 1988, and that the defendant received this notice by certified mail on May 19, 1988. The defendant produced no competent evidence to the contrary, and the evidence was sufficient to support the defendant's conviction.

The judgment of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH L. MILENKOVICH, APPELLANT.

458 N.W.2d 747

Filed August 3, 1990. No. 89-1196.

1. **Double Jeopardy.** A determination of a nonfrivolous double jeopardy claim affects the substantial right not to be tried twice for the same offense.
2. **Pleadings: Final Orders.** A denial of a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989).
3. **Double Jeopardy: Indictments and Informations.** A court may consider evidence beyond the information in determining whether a prosecution violates the double jeopardy clause.

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

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

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

GRANT, J.

This is an appeal from the district court's judgment overruling the defendant's plea in bar, which alleged that the defendant was previously tried for and acquitted of a lesser-included offense of the second degree assault charged in the district court proceeding. We affirm.

The record shows the following: On January 12, 1989, Steven Smith was working as a bouncer at a Lincoln bar. Smith and the defendant had a confrontation during which the defendant allegedly reached through the window of his van and cut Smith with a screwdriver. During the confrontation, the defendant allegedly threatened to run over Smith with his van. Shortly thereafter, the defendant allegedly attempted to run over Smith and another bar employee as they were standing on the sidewalk in front of a parking lot across the street from the bar.

On January 12, 1989, in the county court for Lancaster County, the defendant was charged with two misdemeanor counts of attempted second degree assault, in violation of Neb. Rev. Stat. §§ 28-201 and 28-309(1) (Reissue 1989). These counts were apparently intended to prosecute the defendant for his attempt to run over the two bar employees with his van. The complaint alleged in the first count that on January 12, in Lancaster County, the defendant did

> intentionally engage in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of Second Degree Assault, to-wit: did then and there intentionally or knowingly cause bodily injury to Steven Smith with a dangerous instrument....

The second count was identical, except Eugene Konken, the other bar employee, was specified as the victim.

Although the record does not contain a complaint in the county court for the felony assault charge, it does reflect that on March 23, 1989, a preliminary hearing was held in the county court on the felony assault charge. At that hearing, Smith testified that the defendant cut him with a screwdriver. On March 27, an information was filed in district court charging the defendant with second degree assault under § 28-309(1), a Class IV felony. The information stated that on January 12, 1989, in Lancaster County, the defendant did "intentionally or knowingly cause bodily injury to Steven Smith with a dangerous instrument, to-wit: a screwdriver." On March 29, Milenkovich entered a plea of not guilty to the second degree assault charge in the district court proceeding.

Trial on the county court misdemeanor charges commenced on April 11, 1989. On April 17, the county court accepted the jury's verdict acquitting the defendant on both counts of attempted second degree assault.

On May 30, 1989, the district court allowed the defendant to withdraw his not guilty plea to the felony second degree assault charge and to substitute a plea in bar. The plea in bar stated that the defendant was previously tried for and acquitted of the same offense in the county court misdemeanor proceeding. A hearing on the plea in bar was held June 12, and the district court overruled the plea in bar on August 2. The defendant timely perfected this appeal.

The defendant appeals directly from the ruling on the plea in bar. He assigns error to the district court's order overruling the plea in bar.

The first issue we must address is whether this court has jurisdiction to hear an immediate appeal from an order overruling a plea in bar filed pursuant to Neb. Rev. Stat. § 29-1817 (Reissue 1989). The plea was based upon a claim that the prosecution violates the double jeopardy provisions of the U.S. and Nebraska Constitutions. The 5th amendment to the U.S. Constitution, made applicable to the states through the 14th amendment, provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Neb. Const. art I., § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense."

The U.S. Supreme Court has stated that the fifth amendment right not to be "twice put in jeopardy" for the same offense includes the right not to be twice put on trial for the same offense. In *Abney v. United States*, 431 U.S. 651, 660-62, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), the Court stated:

> [T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment . . . . However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense. . . . [T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. . . . Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy . . . his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

(Emphasis in original.) See, also, *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S. Ct. 3081, 73 L. Ed. 2d 754 (1982) (reiterating the statement in *Abney* that an adverse ruling on a double jeopardy claim must be reviewable before trial); *United States v. MacDonald*, 435 U.S. 850, 98 S. Ct. 1547, 56

L. Ed. 2d 18 (1978).

Abney based its ultimate holding on its interpretation of 28 U.S.C. § 1291 (1976), which provided appellate jurisdiction over "final decisions." The Court applied the "collateral order" exception and found that an adverse determination on a claim of double jeopardy came within the exception. Under the collateral order exception, a decision is "final" within § 1291 if (1) the decision constitutes "a complete, formal, and, in the trial court, final rejection" of the claim, (2) the claim "is collateral to, and separable from, the principal issue" to be tried, and (3) the claimant's rights would be significantly undermined if appellate review were postponed. See *Abney, supra* at 431 U.S. at 659. See, also, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). The above-cited language from *Abney* was part of the Court's analysis for the third prong of the test.

Because of the statutory basis for the opinion in *Abney*, several state courts have determined that *Abney* does not promulgate a federal constitutional requirement of immediate review of double jeopardy claims. See, *Burleson v. State*, 552 So. 2d 186 (Ala. Crim. App. 1989); *State v. Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), *cert. denied* 324 N.C. 115, 377 S.E.2d 241 (1989); *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986); *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 387 N.E.2d 325 (1979), *cert. denied* 444 U.S. 940, 100 S. Ct. 292, 62 L. Ed. 2d 306; *State v. Fisher*, 2 Kan. App. 2d 353, 579 P.2d 167 (1978).

Other courts, citing *Abney*, have permitted immediate review of double jeopardy claims. See, *Griffin v. State*, 545 So. 2d 729 (Miss. 1989); *State v. King*, 131 N.H. 173, 551 A.2d 973 (1988); *Com. v. Hall*, 371 Pa. Super. 333, 538 A.2d 43 (1988); *State v. Sanchez*, 532 A.2d 956 (R.I. 1987); *Com. v. Chatfield-Taylor*, 399 Mass. 1, 502 N.E.2d 512 (1987); *State v. Choate*, 151 Ariz. 57, 725 P.2d 764 (1986); *State v. Jenich*, 94 Wis. 2d 74, 288 N.W.2d 114 (1980); *County Ct. v. Ruth*, 194 Colo. 352, 575 P.2d 1 (1977); *Gray v. State*, 36 Md. App. 708, 375 A.2d 31 (1977). See, also, *Neal v. State*, 272 Md. 323, 322 A.2d 887 (1974) (Constitution requires immediate appeal).

Some courts have limited the procedural means of obtaining

immediate review of double jeopardy claims. See, *Markiewicz v. Black*, 138 Colo. 128, 330 P.2d 539 (1958) (review through writ of prohibition); *Ex Parte Robinson*, 641 S.W.2d 552 (Tex. Crim. App. 1982); *Harden v. State*, 460 So. 2d 1194 (Miss. 1984) (review through writ of habeas corpus); *State ex rel. Wark v. Freerksen*, 84 Or. App. 90, 733 P.2d 100 (1987) (review through writ of mandamus).

In dissenting from the denial of certiorari in the case of *Spradling v. State*, 634 S.W.2d 89 (Tex. App. 1982), *cert. denied* 455 U.S. 971, 973, 102 S. Ct. 1482, 71 L. Ed. 2d 686, Justice Brennan, joined by Justice Marshall, stated:

> It is true that the Court had no need to reach the constitutional question presented in the instant case when it decided *Abney*, but the Court's recognition in *Abney* that double jeopardy claims not considered prior to trial are rendered, in significant part, moot surely has significant constitutional overtones. We have never held that the Federal Constitution requires that a State provide appellate review. But once such review is provided, it may not be denied arbitrarily without violating the Equal Protection Clause. [Citations omitted.] Fundamental precepts of due process require a right to be heard "at a meaningful time" before suffering a grievous loss. [Citations omitted.] Thus, there is surely a good deal of force to petitioner's argument that, if the State provides for appeals to protect other constitutional rights, it runs afoul of the Federal Constitution when it fails to give the same meaningful consideration to a defendant asserting his right not to be subjected to a second trial for the same offense.

We agree that a defendant must be granted the opportunity to raise a claim of double jeopardy prior to being subjected to the second trial. Section 29-1817 provides:

> The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or been convicted, or been pardoned for the same offense; and to this plea the county attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon. On the trial of such issue to the court or

> to a jury . . . the accused must produce the record of such conviction or acquittal, or the pardon, and prove that he is the same person charged in the record or mentioned in the pardon; and shall be permitted to adduce such other evidence as may be necessary to establish the identity of the offense.

We need not reach the issue as to whether an immediate appeal from a denial of a plea in bar is constitutionally mandated, because such an order is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989), which states:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding . . . is a final order which may be vacated, modified or reversed, as provided in this chapter.

As the *Abney* decision points out, there is no question that a determination of a nonfrivolous double jeopardy claim affects the substantial right not to be tried twice for the same offense.

The only issue is whether a ruling on a plea in bar is a ruling in a "special proceeding" within the language of § 25-1902. In *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980), we held that a determination that an accused was incompetent to stand trial in a proceeding under Neb. Rev. Stat. § 29-1823 (Reissue 1989) was a final order under the special proceeding provision of § 25-1902. We stated: " ' "Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special . . . ." ' [Citation omitted.]" *Guatney, supra* at 506, 299 N.W.2d at 542. We also stated: " 'A special proceeding may be said to include every special statutory remedy which is not in itself an action. . . .' " *Id.* Section 29-1817 authorizes a defendant to bring a special application to a court to enforce the defendant's constitutional right to avoid double jeopardy. The application is not made as a step in determining the merits of any issue in the criminal prosecution itself. Also, § 29-1817 does not create an independent action. As the analysis in *Guatney, supra* at 506, 299 N.W.2d at 542, noted:

> A reading of § 29-1823 clearly establishes that it is a "statutory remedy which is not itself an action." . . .

> Before one may be examined pursuant to § 29-1823, one must be charged with a crime and awaiting trial. One cannot be subjected to the provisions of § 29-1823 standing alone.

The same analysis applies to § 29-1817. We therefore conclude that a denial of a plea in bar is a final order as defined in § 25-1902 and that this court has jurisdiction over the appeal in this case.

The next issue is whether the defendant's trial in the district court on the second degree assault felony charge would violate his right not to be twice put in jeopardy for the same offense. Defendant contends that the broad language of the attempted misdemeanor assault charge, which did not specify the dangerous instrument or the specific location of the attempted assault, combined with the admission at the misdemeanor trial of Smith's statement that defendant attempted to cut him with a screwdriver, put him in jeopardy of being convicted of the attempted assault charge based upon the confrontation in front of the bar.

We have stated that

> one may go outside the information itself to determine what charge the conviction was based upon in order to raise it as a bar to a subsequent prosecution. [Citations omitted.]
>
> "An indictment or information alone need not be full protection against double jeopardy because a defendant may allege and prove facts outside the record in support of a plea of former adjudication. [Citation omitted.] The remedy of a bill of particulars is available to assist a defendant in preparing his defense and to protect him against a second prosecution for the same offense. [Citation omitted.]"

State v. Piskorski, 218 Neb. 543, 548, 357 N.W.2d 206, 210-11 (1984). This language is in accord with the language of § 29-1817 which provides that a defendant may present evidence outside the record to prove the identity of the offenses. Consequently, a court may consider evidence beyond the information in determining whether a prosecution violates the double jeopardy clause. Looking beyond the complaint in the

misdemeanor county court proceeding, it is clear that the appellant was acquitted of a different charge, predicated upon a different event, than is sought to be prosecuted in the district court.

Trial on the county court misdemeanor charges commenced on April 11, 1989. A full record of that trial, including opening statements and final arguments, contained in a 355-page bill of exceptions, is before us. The prosecution did not refer to the screwdriver incident in opening statements or closing arguments and presented the case on the theory that the defendant attempted to assault the two bar employees with his van. The prosecution specifically related to the jury that the defendant's van was the "dangerous instrument" referred to in the charges. As part of its case in chief, the prosecution elicited the following evidence from Smith about the assault with the screwdriver:

> Q Did Mr. Milenkovich do anything towards you before he moved his van?
>
> A He attempted to cut me with a screwdriver.
>
> Q Did you see the screwdriver?
>
> A Yes, I did.

The prosecution did not elicit further evidence of the assault, nor did the prosecution ever refer to the screwdriver assault at any other time during the trial.

In closing arguments, the prosecution stated:

> The only thing really that seems in contention here is whether or not Mr. Milenkovich attempted to cause bodily injury to those two people with a dangerous instrument. The State submits to you that the State has proven that on that date in Lancaster County, Nebraska on both of those individuals, Mr. Milenkovich did attempt to cause them bodily injury with a dangerous instrument. That dangerous instrument was his van, his 1976— '77 blue Chevy van.

With reference to the jury instructions in closing arguments, the prosecution stated:

> [The jury instructions are] going to set out a lot of things for you. Go into definitions. For example, what is a dangerous instrument. A dangerous instrument is defined

> as being any object which because of its nature and the matter [sic] and intention of its use, is capable of inflicting bodily injury. And the State submits to you that that van when it is driven by Mr. Milenkovich and was headed towards Steve Smith and Gene Konken was indeed a dangerous instrument.

The prosecution ended closing arguments with the statement: "Mr. Milenkovich did indeed attempt to assault Mr. Konken and Mr. Smith with a dangerous instrument and cause bodily injury and that dangerous instrument was his Chevy van."

In his opening statement, defense counsel related to the jury that the defendant kept a screwdriver in his van because he needed a screwdriver to spark the van's ignition. Defense counsel further related that the defendant "swung his screwdriver at the— at the bouncer as he was coming in [the van] and he nicked him . . . ." During the trial, the defense elicited testimony from the defendant that the defendant needed a screwdriver to start his van and that he kept a screwdriver in the van. The defendant testified that he was holding the screwdriver when the bouncer attacked him through the window of defendant's van while defendant was parked in front of the bar. The defendant testified that he did not swing at the bouncer with the screwdriver but, instead, was putting up his hands to protect himself and that he in fact tried to avoid hitting the bouncer with the end of the screwdriver. Defense counsel fully developed and addressed all the facts relating to the incident that night and did not emphasize the incident with the screwdriver. In his closing argument, defense counsel argued, "In order to find Mr. Milenkovich guilty of attempted second degree assault, what you will have to find beyond a reasonable doubt is that it was his intention to run over those two bouncers." Defense counsel did not refer to the screwdriver in his closing argument and began the argument with a discussion of the facts that took place across the street from the bar, when the defendant allegedly attempted to run over the bar employees with his van.

The jury instructions referred only to the term "dangerous instrument" in instructing on the law of assault, and did not specifically mention either the van or the screwdriver. The

defendant was acquitted in the county court on the two counts of attempted second degree assault.

In reviewing the record of the trial as a whole, we determine that the defendant was not in danger of being convicted of the attempted assault by virtue of the incident with the screwdriver. There is no question that the prosecution submitted the case solely on the theory that the defendant attempted to assault the two bar employees with his van. The jury could not ignore the arguments both of counsel for the State and for defendant and decide the case on a theory of guilt wholly unrelated to the theory on which the case was presented. In essence, the arguments and conduct of both counsel in the case treated the misdemeanor charges as ones involving the van and tried the case as one concerning the defendant's attempt to assault the victims with a dangerous instrument, a van.

Defendant's counsel introduced the screwdriver incident in his opening statement and addressed it during trial either in an effort to obfuscate the issue in the misdemeanor trial or to prepare the defense he is now making.

Certainly, this appeal could have been easily avoided by adding a reference to the van in the county court charges or in the jury instructions. On the other hand, the defendant determined not to seek a bill of particulars in the misdemeanor case, as a matter of strategy, and, as evidenced from the record, the defendant was fully aware of the different subject matters of the prosecutions in the county and district courts. The defendant was not in any danger of being convicted in the county court of an attempted assault on the basis of the screwdriver incident.

The order of the district court overruling defendant's plea in bar is affirmed.

AFFIRMED.

IN RE INTEREST OF T.E., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. Z.R., APPELLANT.

458 N.W.2d 753

Filed August 3, 1990. No. 90-055.

1. **Parental Rights: Proof: Evidence: Words and Phrases.** An order terminating parental rights must be based on clear and convincing evidence. Clear and convincing means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
2. **Parental Rights: Abandonment.** A court may terminate all parental rights between a parent and child when the parent has abandoned the child for 6 months or more immediately prior to the filing of the petition.
3. **Parental Rights: Abandonment: Words and Phrases.** "Abandonment," under the juvenile code, 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.
4. **Abandonment: Intent.** The question of abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances.
5. **Parental Rights: Abandonment.** Abandonment of a child is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
6. **Parental Rights.** 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: SAMUEL P. CANIGLIA, Judge. Affirmed.

Joseph Lopez Wilson 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 father, Z.R., appeals from the order of the separate juvenile court terminating his parental rights to his minor son, T.E.

T.E. was born out of wedlock on February 17, 1984. The birth certificate issued at that time did not list the name of the father. The child was removed from the custody of his mother in August 1986. In August 1989, the parental rights of T.E.'s natural mother were terminated. See *In re Interest of T.E.,*

S.E., and R.E., 235 Neb. 420, 455 N.W.2d 562 (1990). On August 18, 1989, a petition was filed alleging that T.E. came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), insofar as the father is concerned, and had been abandoned by the father within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 1988).

An adjudication hearing was held on December 5, 1989. At the beginning of the hearing, the State introduced into evidence a birth certificate, amended on February 17, 1987, to name appellant as T.E.'s father, and appellant's attorney and T.E.'s guardian ad litem stipulated that appellant is T.E.'s father.

Judy Olmer, the Child Protective Services worker to whom T.E.'s file had been assigned in March 1988, had her first contact with appellant in February 1989. Appellant wanted custody of T.E. if T.E.'s mother lost custody, and Olmer suggested appellant contact the court administrator, retain an attorney, and be represented in juvenile court. As a result of this conversation, Olmer reviewed T.E.'s file and found that appellant's name was on the amended birth certificate and that appellant had had two visits with T.E. in 1987. To Olmer's knowledge, appellant had made no contacts with her agency, was not on the visitation schedule, and had not yet claimed paternity.

Apparently, sometime before appellant's February 1989 phone call, Olmer had talked to appellant's mother on several occasions and found out that she, the mother, had been in touch with appellant. Olmer told appellant's mother that she needed to have appellant contact the court administrator and that if appellant could not afford an attorney, an attorney would be appointed for him.

There was no contact made by appellant with Olmer from February through August 17, 1989. To her knowledge, appellant had not visited the child during that period of time nor had he contacted anyone else in Olmer's office. Although Olmer gave appellant the address and phone number of her office and encouraged him to send money, gifts, letters, or cards to the child through that address, nothing was ever received.

Olmer also testified that appellant knew the location of the foster home where the child was residing, but, according to the

foster mother, appellant had never visited the child.

Kara Murphy, who had been a probation officer for the juvenile court for 14 months prior to the adjudication hearing, testified that the child had been on her caseload since September 1988. She testified that during that period of time she had received no phone calls, correspondence, or other contact from appellant requesting to become involved in the juvenile proceedings or inquiring about the welfare of the child.

Appellant's mother testified that she talked to Olmer three or four times between February and August 1989 and would request that appellant be allowed visitation with the child. She also testified that she knew who the child's foster family was, as well as their address and phone number. According to her, appellant had made "numerous phone calls" to the child. She knew about one call because appellant called her to get the child's phone number, then called her back to tell her that he had talked to the child.

Appellant testified that he is presently in the U.S. Navy and has been for 2 years. He claimed to have lived with the child, but not since February 1986. He made a vague reference to having visited the child numerous times at the child's maternal grandmother's house, but no dates were given. He insisted that he had hired a lawyer to become involved in the original juvenile court proceedings, but admitted that he never did enter into the court proceedings. He also said that he called the child "several" times between February and August 1989. He admitted that he had never sent any money for the support of his child, but alleged that he had attempted to have the child claimed as a dependent on the Navy's records. His excuse for the fact that no Navy allotment was ever forthcoming was that he did not know the child's address.

In an order filed December 12, 1989, the juvenile court found the child to have been abandoned by the appellant, found that it was in the best interests of the child that parental rights be terminated, and terminated appellant's parental rights to the child.

An order terminating parental rights must be based on clear and convincing evidence. Clear and convincing means and is that amount of evidence which produces in the trier of fact a

firm belief or conviction about the existence of a fact to be proved. *In re Interest of J.B. and A.P.*, 235 Neb. 74, 453 N.W.2d 477 (1990).

Section 43-292(1) provides that the court may terminate all parental rights between a parent and child when the parent has abandoned the child for 6 months or more immediately prior to the filing of the petition. "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 opportunity for displaying parental affection for the child. *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990); *In re Interest of J.M.D.*, 233 Neb. 540, 446 N.W.2d 233 (1989); *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988). The question of abandonment is largely one of intent, to be determined in each case from all of the facts and circumstances. *In re Interest of A.G.G., supra.*

The evidence is clear and convincing that this child was abandoned by appellant.

Neb. Rev. Stat. § 43-1402 (Reissue 1988) provides that "[t]he father of a child [born out of wedlock] whose paternity is established . . . by acknowledgment . . . shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support." Appellant acknowledged his paternity of the child by his conduct, including his testimony in court. Therefore, he was legally liable for the child's support. Nevertheless, during the 6 months immediately prior to the filing of the termination petition, appellant provided no financial support for his son. In fact, appellant has never provided financial support for T.E. Appellant had an obligation to provide financial support and failed to fulfill his obligation.

Appellant's story that he attempted to claim his son as a dependent when he joined the Navy so as to provide for his care, but could not do so because he did not have the child's address, defies belief. In his enthusiasm to demonstrate that he called his son on "numerous" occasions, he disclosed that he knew of the child's location. Appellant knew how to contact Child Protective Services and the juvenile court, and was urged

by a worker of the former agency to call, write, and send gifts to the child. Appellant knew that his own mother was aware of the location of the child, yet he never sent money to her to be forwarded to his child.

In the 6 months immediately prior to the filing of the petition, appellant made no inquiries of anyone at Child Protective Services as to the well-being of his son. Given his call to Olmer in February 1989, it is clear appellant knew that he could make inquiries if he wanted to. Even if appellant was unable to make phone calls because he was at sea for 3 of the 6 months, he failed to do anything when he was not at sea. Furthermore, the record is devoid of any evidence of attempts by appellant through the various resources offered by the Navy to contact or provide for his son.

Olmer testified that appellant did not phone his son until after the termination petition was filed. Appellant, on the other hand, testified that he phoned T.E. "a lot." According to appellant, he first called his son 5 months prior to the termination hearing (in July 1989) and called him about nine times. It is clear from appellant's testimony that some, if not most, of the phone calls took place after the termination petition was filed.

Assuming, without deciding, that appellant did call T.E. prior to the filing of the termination petition, appellant still abandoned his son within the meaning of § 43-292(1). Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child. *In re Interest of J.M.D., supra.* Considering his failure to provide any kind of financial support for the child, his failure to contact the welfare agency regarding his son's welfare from at least March 1988 to February 1989, and his failure to utilize the address given in order to maintain contact with his son, appellant's eleventh-hour phone calls may be characterized as nothing more than token efforts to maintain a minimal contact with T.E.

The evidence is also clear and convincing that termination of appellant's parental rights would be in T.E.'s best interests. As this court has said many times before, a child cannot, and should not, be suspended in foster care, nor be made to await

uncertain parental maturity. *In re Interest of L.K.Y. and A.L.Y.*, 235 Neb. 545, 455 N.W.2d 828 (1990).

The order of the juvenile court is affirmed.

AFFIRMED.

PAUL UHING AND CLARENCE UHING, APPELLANTS, V. CITY OF OAKLAND, NEBRASKA, APPELLEE.

459 N.W.2d 187

Filed August 10, 1990. No. 88-355.

1. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider 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. **Injunction: Proof.** A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.
3. **Constitutional Law: Property: Damages.** When private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under Neb. Const. art. I, § 21.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert D. Moodie, of Moodie & Moodie, for appellants.

William J. Dunn, of Gross, Welch, Vinardi, Kauffman & Day, P.C., and Clarence E. Mock for appellee.

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

WHITE, J.

This is an appeal from an order of the Burt County District Court granting partial injunctive relief, but refusing to order money damages. The plaintiffs appeal. We affirm in part, reverse in part, and remand with instructions.

On February 11, 1985, the plaintiffs, Clarence and Paul Uhing, filed an amended petition in the Burt County District Court, alleging that the defendant, the City of Oakland, Nebraska, in 1983 "wrongfully and unlawfully" altered one culvert and placed several others in such a way as to cause runoff water to drain onto and damage plaintiffs' land. Plaintiffs sought a permanent injunction enjoining defendant from maintaining these culverts and sought damages for, inter alia, lost crops and decreased value of the farmland. Evidence was presented to the court. The trial court, apparently relying on common law and statutory theories of liability, found that plaintiffs failed to show by a preponderance of the evidence that defendant was negligent in the construction and maintenance of the culvert system. The trial court did not consider whether a "taking" had occurred. The trial court did order, however, that a culvert running under a driveway be removed or enlarged to facilitate the unimpeded flow of water between culverts on either side of the driveway.

Plaintiffs appeal to this court, contending, in sum, that the trial court erred in failing to grant the requested injunctive relief, failing to find that the plaintiffs have proven money damages, and failing to find that the defendant has taken private property without the payment of just compensation.

In this appeal we focus solely on whether the defendant has taken private property for public benefit without the payment of just compensation. Defendant maintains that a theory of inverse condemnation was not pled in plaintiffs' petition. We disagree. In *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985), plaintiff filed a petition seeking injunctive relief and damages. Plaintiff alleged that the adjoining landowners, who were named as defendants, filled in a natural watercourse, causing surface waters to back onto plaintiff's land. Plaintiff also alleged that Nance County and East Newman Township, also named as defendants, raised the adjoining highway and installed inadequate culverts so as to cause floodwaters to dam onto his land. The trial court granted the injunctive relief against the adjoining landowners and Nance County, but denied damages because the plaintiff failed to comply with the Nebraska Political Subdivisions Tort Claims Act, and because

the action had not been properly brought as an inverse condemnation case. It was conceded on appeal that plaintiff had not complied with the Political Subdivisions Tort Claims Act. We considered the inverse condemnation issue:

> We assume the district court, in ruling that the case had not properly been brought as an inverse condemnation action, relied on Neb. Rev. Stat. § 76-705 (Reissue 1981). That section 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." (Emphasis supplied.) That procedure was not followed in this instance. That statute became effective in 1951.
>
> However, Neb. Const. art. I, § 21, provides that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor." When private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under that constitutional provision. *Beach v. City of Fairbury*, 207 Neb. 836, 301 N.W.2d 584 (1981).
>
> That section of the Constitution is self-executing, and legislative action is not necessary to make the remedy available. *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962). The fact that the plaintiff could have sued in tort under the Political Subdivisions Tort Claims Act does not preclude him from proceeding in a direct action for damages under the Constitution. *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977).
>
> Additionally, a landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain. Also, the plaintiff had the right to join with his action for equitable relief his claim for temporary

> damages. *Armbruster v. Stanton-Pilger Drainage Dist.*, 165 Neb. 459, 86 N.W.2d 56 (1957).
>
> It is not indispensable that the constitutional provision be set out or its existence alleged in the petition stating the cause of action. *Patrick v. City of Bellevue*, 164 Neb. 196, 82 N.W.2d 274 (1957). All that is necessary is that the litigant allege and prove facts constituting a cause of action because of it. Neb. Rev. Stat. § 25-804 (Reissue 1979). Therefore, it is necessary to consider both the pleadings and evidence to determine whether a cause of action for property damaged for a public use existed.

219 Neb. at 628-29, 365 N.W.2d at 442-43.

We determined that the plaintiff alleged and proved sufficient facts to require the trial court to consider damages under a theory of inverse condemnation. We reversed and remanded for further proceedings.

In the present case the plaintiffs, through their petition, alleged that the defendant, a municipal corporation, wrongfully and unlawfully altered and constructed a series of culverts which diverted the flow of drainage water so as to injure their land. It was not necessary that the constitutional provision be alleged in the petition. *Kula v. Prososki, supra.* Plaintiffs have adequately alleged that their land has been damaged or taken for a public benefit without just compensation.

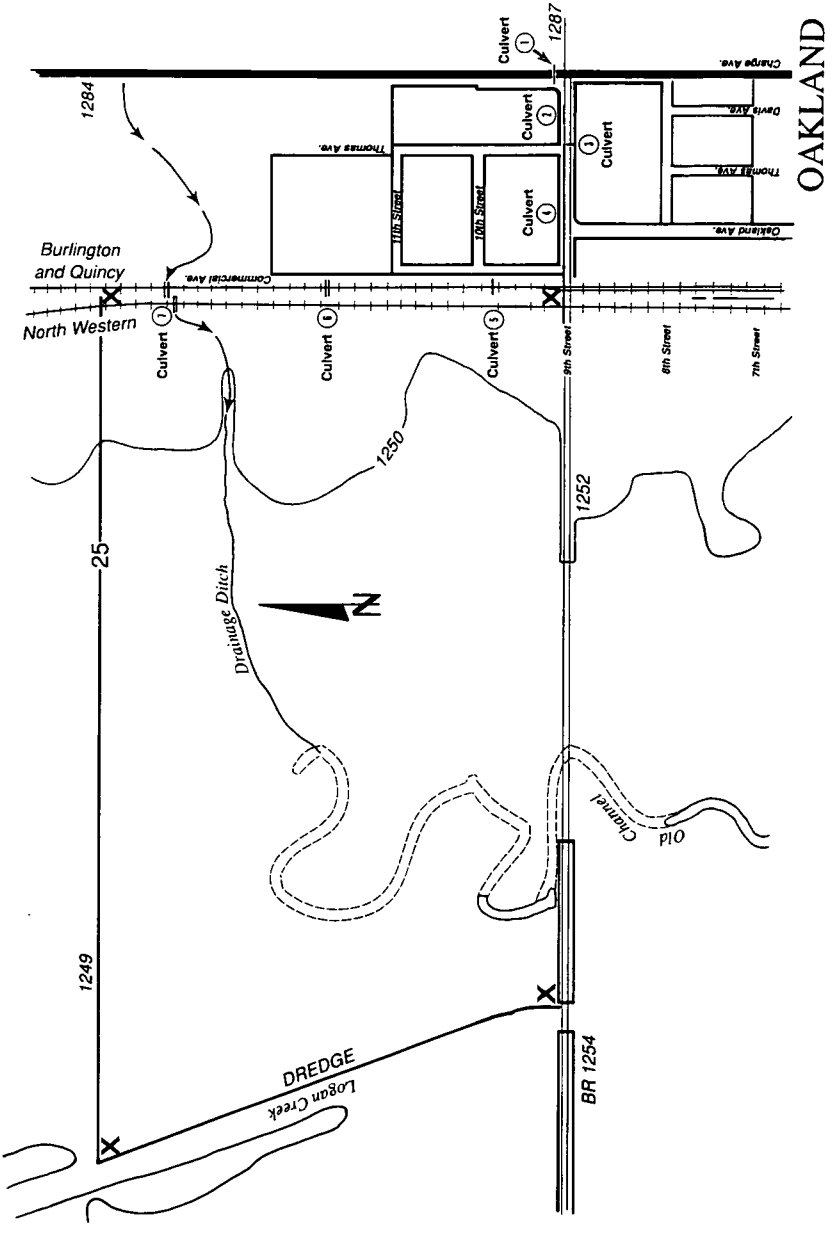
It remains to be determined whether the facts establish a basis for relief. In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider 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. In its de novo review of the record, this court is guided by the rule that a party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief. *Stuthman v. Adelaide D. Hull Trust*, 233 Neb. 586, 447 N.W.2d 23 (1989).

We have reviewed the record de novo and make the following

findings of material fact. The area which has been damaged is part of a 265-acre tract of land located to the north and west of Oakland, Nebraska. This land is owned by the plaintiffs, who purchased it in 1978. They have farmed the land continuously since 1979.

The tract of land and the surrounding area is drained by a series of culverts and drainage ditches. Although there were some additions and an alteration done by defendant in 1982 and 1983 as discussed below, the area in question and the culverts as they existed in 1986, the time of the trial, are shown in the diagram on the following page. The corner boundaries of plaintiffs' land are indicated by X's. Culvert 1 is a 3-foot-high by 10-foot-4-inch-long box culvert that runs east and west under Charge Avenue (U.S. Highway 77). Culvert 2 is 18 inches in diameter and runs east and west under a private drive. Culvert 3 is 48 inches in diameter and runs north and south under 9th Street. Culvert 4 is 24 inches in diameter and runs east and west 1,100 feet along and under 9th Street. Culvert 5 is 27 inches in diameter, with a 33-inch-diameter extension. Culvert 6 is actually two culverts, both 24 inches in diameter, with 30-inch-diameter extensions. Culvert 7 is also two culverts, one a 59-inch-wide by 67-inch-high oval pipe culvert and the other a 72-inch-wide by 86-inch-high oval pipe culvert, having extensions of 10 feet and 15 feet in diameter respectively. Culverts 5, 6, and 7 run east and west under the railroad tracks. The evidence is not clear as to which railroad owns the tracks on the diagram.

In 1982 and 1983 the defendant altered one culvert and added two others. In 1982 defendant installed culvert 2 under a private driveway. In 1983, as part of a drainage project, the city installed culvert 4 and placed a concrete plug in culvert 3, which is immediately adjacent to culvert 4. The plug extends from the flow line (the bottom) of the culvert to a point approximately 15 inches from the top of the culvert. The top of the plug is approximately 4 inches above the top of culvert 4. Culvert 4 runs under the ground along 9th Street; runs under Thomas Avenue, Commercial Avenue, and the railroad tracks; and empties into a county right-of-way along 9th Street. The land to the immediate west of the east end of culvert 4 is higher in


OAKLAND
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Thomas Ave.
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Culvert
1287
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Burlington
and Quincy
North Western
9th Street
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7th Street
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Old Channel
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DREDGE
Logan Creek
BR 1254

elevation than the east end of culvert 4.

Prior to the changes in 1982 and 1983, water which flowed through culvert 1 would flow unimpeded through culvert 3, and through the City of Oakland. After 1983, drainage water which leaves culvert 1 flows to culvert 2. Most of this water will travel through this culvert to culverts 3 and 4. However, during periods of peak flow, the water will pool on the east side of culvert 2. When the water reaches a sufficient depth it will move in a north to northwest direction, then flow west on 10th Street, then north along the railroad tracks, eventually flowing over the railroad tracks or through culvert 6 and onto plaintiffs' land. Water which reaches culverts 3 and 4 will flow through culvert 4 due to the plug in culvert 3 which prevents water from flowing south into Oakland. All the water which flows through culvert 4 is deposited in the county right-of-way immediately north of, and parallel to, 9th Street. This county right-of-way runs to Logan Creek, at the west end of plaintiffs' property line. From the end of culvert 4 the right-of-way slopes down toward the west for a distance of approximately 300 to 400 feet. At that point, the right-of-way and the surrounding land which is owned by plaintiffs flattens out for the remaining distance to Logan Creek. The water which flows through culvert 4 will be deposited in the right-of-way and on plaintiffs' land due to the flat area, where it will stand for extended periods of time, causing crop damage.

Although plaintiffs had some problems with standing water and wet fields prior to 1982, it is clear that the land receives more water and is more difficult to farm since the defendant altered the drainage system in 1982 and 1983. Little or no water now flows into the City of Oakland due to the size and positioning of culvert 2 and the plug in culvert 3. Runoff water which in the past would flow through culvert 3 is now being diverted onto plaintiffs' land, causing damage to crops and decreasing land value. It is equally clear that the drainage changes were for a public benefit. Defendant's former street superintendent testified that

> there was a drainage area that came into Oakland from the northeast corner of town and traversed down the entire length of the city, and there were problems with standing

water from time to time — health-type problems. There was also a problem with heavy water flows at times causing debris and such to plug the undercrossings under streets and there was some concern about safety for small children and such.

The plaintiffs have shown by a preponderance of the evidence that portions of their land have been damaged for a public use or benefit. With regard to injunctive relief, plaintiffs prayed in their petition for a permanent injunction enjoining defendant from maintaining culvert 2, maintaining the plug in culvert 3, and maintaining culvert 4. We affirm that part of the trial court's order that culvert 2 be enlarged or removed so as to permit water to flow unimpeded from culvert 1 in a westerly direction to culverts 3 and 4. We also hold, however, that the trial court erred in failing to enjoin defendant from maintaining the plug in culvert 3. If the plug in that culvert is not removed, the majority of water flowing to culverts 3 and 4 will flow through culvert 4 and eventually onto plaintiffs' land. The plug in culvert 3 must be removed to allow at least some of the water to flow through culvert 3 and away from plaintiffs' land. Without going so far as to order that culvert 4 be plugged or removed, we hold further that the trial court should retain jurisdiction of this matter to ensure that the relief granted in this appeal is effective in alleviating the problem of excess drainage water depositing on plaintiffs' land.

There was evidence presented at trial that deepening the county right-of-way near the flat land where water spills onto plaintiffs' land would facilitate the flow of water from culvert 4 into Logan Creek. This right-of-way, however, is owned by Burt County, which is not a party to this action. In addition, the culverts which are owned and maintained by a railroad may unlawfully contribute to the flow of water onto plaintiffs' land. The railroad, however, was also not made a party to this action.

With respect to damages for crop loss, the trial court found:

> Plaintiffs have failed to prove by a preponderance of the evidence the nature and extent of damages suffered as the proximate result of the construction and maintenance of culvert 2 or any part of the drainage project and this Court is unable to determine what damages, if any,

resulted from the water flowing from the ponding behind culvert 2, or from the water flowing through culvert 4.

We agree with the trial court that plaintiffs failed to prove the extent to which defendant's actions have damaged plaintiffs' crops. The evidence is clear that plaintiffs' land receives more water as a result of defendant's actions in diverting the flow of drainage water. The evidence is also clear, however, that plaintiffs' land would periodically experience some drainage problems before the changes in 1982 and 1983. Plaintiffs have failed to demonstrate the extent to which the additional drainage water has injured their crops.

In light of our holdings above, it would be premature to discuss whether plaintiffs' land has been permanently damaged. The injunctive relief may eliminate the condition leading to the alleged decrease in value.

Accordingly, the order of the Burt County District Court is affirmed in part and reversed in part, and the cause is remanded with directions.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., concurs.

METROPOLITAN UTILITIES DISTRICT OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE, V. DELBERT L. PELTON, APPELLANT.

459 N.W.2d 193

Filed August 10, 1990. No. 88-648.

Appeal and Error. In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.

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

Delbert L. Pelton, pro se.

Randall W. Owens for appellee.

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

GRANT, J.

Defendant-appellant, Delbert L. Pelton, brings this appeal from a judgment of the district court for Douglas County. Plaintiff-appellee, Metropolitan Utilities District of Omaha (MUD), brought an action in district court seeking payment for utilities furnished to 1540 Willis Avenue in Omaha. After a trial where Pelton appeared pro se, the court found in favor of MUD and entered judgment in the amount of $6,733.95. Pelton timely appealed to this court.

Pelton's assignments of error can be summarized as contending that the trial court's finding of defendant's liability for utility debts was based on the erroneous admission of two exhibits. For reasons hereafter stated, the order of the district court is affirmed.

In reviewing the trial court's judgment in an action at law tried to the court, the Supreme Court does not reweigh the evidence but, instead, considers the evidence in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence. *Hughes v. Cornhusker Cas. Co.*, 235 Neb. 656, 456 N.W.2d 765 (1990).

The record, when viewed in this light, shows that on January 5, 1984, MUD's customer service department received a telephone call requesting water service for an apartment building located at 1540 Willis Avenue. The caller requested that the account be placed in the name of Delbert L. Pelton, effective December 19, 1983. Pelton had other accounts with MUD and no deposit was required on the new account. On December 19, 1983, MUD received a request for gas service at the Willis property, and the caller again instructed that the account be placed in Pelton's name. Services were commenced, and bills were sent to Pelton at the address of a property management company which managed other properties for Pelton.

At trial, Pelton testified that Real Estate Management

company customarily placed accounts in Pelton's name to avoid paying utility deposits. When Pelton was asked whether the management company was authorized to put utility accounts in Pelton's name, Pelton responded, "I did not object. I'm sure I ratified it at least."

The court also received two memorandums in evidence. The first, exhibit 9, was a handwritten memorandum from Pelton to MUD, dated January 1, 1985, in which Pelton stated: "GAS BILL. This property is to have gas turned off. . . . The bill doesn't reflect the [$]1600, paid in the last two weeks. I will not pay for any gas after date of notifying you to turn gas off." Exhibit 8, also handwritten, was a memorandum from Pelton to MUD's attorney, dated January 4, 1984, wherein Pelton stated: "1540 Willis Omaha I'm giving up the ghost on this building and will no longer be responsible for gas service on this building effective FEBRUARY 1st. . . ."

Accordingly, MUD terminated the accounts on or about February 1, 1985. The parties stipulated at trial that the Willis property was not owned by Pelton at the time the debt accrued with MUD. After trial, the district court found that Pelton was liable for the utility debt, stating as its reason that Pelton had acknowledged indebtedness in the above memorandums.

Pelton's contention that exhibits 8 and 9 were offers of compromise under Neb. Rev. Stat. § 27-408 (Reissue 1989) and, therefore, inadmissible is wholly without merit. In addition to showing that MUD was to discontinue utility services at the Willis property, the memorandums indicate Pelton's control over the utilities there. The memorandums are not offers of compromise. In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (1990); *Otoe Cty. Nat. Bank v. Froelich*, 234 Neb. 1, 448 N.W.2d 917 (1989). In view of the contents of the memorandums, Pelton's contention fails. The finding of the trial court is correct, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRELL CODY, APPELLANT.

459 N.W.2d 195

Filed August 10, 1990. No. 89-475.

1. **Trial: Evidence: Pretrial Procedure: Appeal and Error.** In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
2. **Motions to Suppress: Confessions: Proof: Police Officers and Sheriffs.** Although the State bears the burden of proof in a suppression hearing to show by a preponderance of the evidence that an accused's statements were voluntarily made, whether an officer has made a promise to induce an accused's statement is a question of fact to be determined by the trial court.
3. **Confessions: Proof: Appeal and Error.** We examine the totality of the circumstances to determine whether the State has satisfied its burden to prove the defendant's statement was the product of a rational intellect and a free will.
4. **Search and Seizure: Warrants: Arrests.** A warrantless arrest of an individual is a species of seizure which must be reasonable.

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

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan for appellant.

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

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

GRANT, J.

Defendant, Jerrell Cody, appeals from his convictions of burglary and escape, after trial to a jury in the Lancaster County District Court. Defendant was sentenced to terms of imprisonment for not less than 18 months nor more than 3 years on the burglary charge and not less than 6 months nor more than a year on the escape charge, the sentences to be served consecutively. We affirm.

The escape charge was filed because subsequent to his arrest for a burglary on June 27, 1988, the defendant ran away from the arresting officer at the door of the police station. Defendant was later recaptured. This matter was submitted to the jury, and the defendant was convicted of the crime of escape. No issue is

made on this appeal concerning the validity of that sentence.

On this appeal, defendant assigns the following errors:

> [1.] The district court erred in permitting a police officer, who promised to not arrest defendant if he would agree to make a statement, to testify at trial regarding statements made pursuant to that promise.
>
> [2.] The district court erred in permitting a police office[r], who initiated contact with defendant for the purpose of obtaining statements after defendant had asserted his right to counsel, to testify at trial regarding statements made by defendant.
>
> [3.] The district court erred in permitting a police officer, who arrested defendant in his home without a warrant, to testify regarding statements and evidence obtained from defendant as a result of the illegal arrest.

The record shows the following: On June 22, 1988, the Lincoln Police Department received an anonymous telephone call linking the defendant to a burglary and explosion occurring at a church on June 21. Police Officer James Spanel was assigned to investigate the lead. On June 22, Spanel, after unsuccessful attempts to locate the defendant earlier that evening, talked to the defendant's wife outside the defendant's apartment residence. The defendant's wife gave Officer Spanel permission to search the apartment for the defendant. While Spanel was in the apartment, the telephone rang, and defendant's wife indicated that the defendant was on the phone and would speak to the officer.

The record shows the following aspects of the conversation: Officer Spanel identified himself as a police officer and stated that he was investigating a serious matter based upon an anonymous tip. Spanel indicated that he needed to ask the defendant some questions. Spanel testified that the defendant wanted to know what the investigation was about and whether he was going to be arrested. Spanel testified that he responded by stating, "I'm not going to arrest you tonight, but I can't promise you that later on." Spanel testified that the defendant agreed to talk with him and that the defendant returned to the apartment 5 minutes after the phone conversation ended.

When the defendant arrived at his apartment, Spanel told

him that an anonymous phone call linked him to a burglary and explosion at a church, and Spanel asked the defendant if he had any burns on him. The defendant showed Spanel several burn injuries and stated that he received the injuries when the carburetor on a van backfired as he was attempting to prime it. The defendant made other statements about his whereabouts during the times in question and about the clothes he was wearing when he was burned.

Officer Spanel testified that he then asked the defendant if he would be willing to take a polygraph test and that the defendant replied that "he would like to consult with an attorney before giving a response to that question." Spanel testified that his questioning ended at that point.

Spanel testified that the defendant appeared to make his statements voluntarily and intelligently, that he did not induce the defendant to make statements to him by threat or promise, and that the defendant appreciated the situation and was not mentally confused or intoxicated.

Spanel relayed his findings to Police Officer Richard Doetker, who was in charge of the investigation of the burglary and explosion at the church. On June 23, Doetker contacted the defendant at the defendant's apartment. The defendant agreed to answer more questions and allowed Doetker to photograph his burns.

On June 27, Officer Doetker went to the defendant's apartment once again. Officer Doetker did not have an arrest warrant for the defendant, but apparently he intended to arrest him. There was no response to his knocks on the defendant's apartment door. When Doetker returned to his unmarked police vehicle, he received information that the defendant had just called another officer and told the officer that he had returned from an out-of-town trip. Doetker then requested the police dispatcher to call the defendant and to ask him to come outside his apartment and to talk to the officer. The dispatcher placed the call. Doetker testified that the defendant came outside and asked, "What's up?" Doetker then asked him to remove his shoes, and when the defendant refused, he was placed under arrest. Defendant was given his *Miranda* warnings, and he subsequently made statements to Officer

Doetker. Additional photographs were taken of the defendant.

The defendant moved "for an order suppressing at trial the use of all evidence obtained from defendant's residence during a search thereof as well as any statements made by defendant to law enforcement officers during their investigation of this case." At the hearing on the motion, the parties agreed that the hearing would also serve as a *Jackson v. Denno* hearing. See, generally, *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Doetker and the defendant testified at the hearing. During closing arguments on the motion to suppress, the defense counsel conceded that the statements to Spanel made on June 22 and the statements to Doetker on June 23 were not suppressible. Defense counsel argued that the arrest on June 27 was a warrantless seizure inside the defendant's home and that any statements or evidence obtained as a result of the arrest should be suppressed.

The trial court stated that the testimony indicated that the police dispatcher had requested, and not ordered, the defendant to come out of his residence, and the court found beyond a reasonable doubt that the arrest was legal.

During the trial, another *Jackson v. Denno* hearing was held to determine whether defendant's statements to Officer Spanel on June 22 were voluntary. After hearing testimony from Officer Spanel, defense counsel argued that the statements to Officer Spanel were not voluntary because they were induced by Spanel's promise not to arrest the defendant. The State responded that Spanel only stated his present intention not to arrest the defendant that evening and that Spanel's statement was not a beneficial inducement to the defendant's statements that evening. The trial court ruled that in view of the fact that the defendant was not under arrest at the time the statements were made, the defendant's statements to Officer Spanel were freely, voluntarily, and intelligently made.

At the same hearing, defense counsel also raised the argument that in view of Spanel's testimony that the defendant asked to speak with a lawyer on June 22, the statements to Officer Doetker on June 23 were inadmissible because that "was an assertion of the Sixth Amendment right which had to be honored before any further contact or further questioning

could take place." The trial court noted that the defendant's request for counsel was with reference to whether he would take the polygraph test and that the subsequent statements to Officer Doetker on June 23 were admissible. The court stated that it would go outside the presence of the jury once again, if necessary, if Officer Doetker "gets to any conversation that he had with the defendant."

Defense counsel did not object during the trial itself to Officer Spanel's testimony regarding statements the defendant made to him on June 22.

Subsequently, during the testimony of Officer Doetker at trial, defense counsel objected to the admission of any statements made by the defendant to Officer Doetker and stated, "As grounds for my objections, I would rely on the arguments that I made to the Court during the motion to suppress evidence." The court responded that at the hearing on the motion to suppress it ruled that the statements made to Doetker were admissible. The court inquired as to whether the prearrest statements should be treated differently from the statements made after arrest. Defense counsel responded that he wanted a standing objection, but that he would raise the objection again when the officer moved to postarrest statements. The trial court suggested that defense counsel simply state that he renewed his objections made previously, so that another bench conference would not be necessary. Defense counsel then reaffirmed that the objection was based upon his motion to suppress evidence and statements. The trial court then overruled the objection for "reasons dictated into the record."

Defense counsel objected to the admission of photographs taken of the defendant's burns by Officer Doetker on June 23, because they were the "fruit of an illegal confrontation." Defense counsel's argument continued, "So, for the grounds I raised at the time of the motion to suppress, I object to these exhibits." The trial court overruled the objection "for the reasons given at the conclusion of the hearing on the motion to suppress."

Defense counsel later renewed his previous objections to all evidence emanating from the allegedly unlawful arrest. The

objections were overruled.

With regard to the first assignment of error, concerning the June 22 statements made to Spanel, we note that we stated in *State v. Pointer*, 224 Neb. 892, 895, 402 N.W.2d 268, 271 (1987), "[I]n a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal." We see no reason why the same rule should not apply where there has been a previous ruling on the voluntariness of the statement in a *Jackson v. Denno* hearing but no objection to the evidence in the trial itself. In this case, although the voluntariness of the defendant's statements to Officer Spanel was considered during a *Jackson v. Denno* hearing, there was no objection to Officer Spanel's testimony on the trial record, and therefore the issue pertaining to the admissibility of the statements obtained by Officer Spanel from the defendant cannot be the predicate for an assignment of prejudicial error on appeal.

Moreover, although the State bears the burden of proof in a suppression hearing to show by a preponderance of the evidence that an accused's statements were voluntarily made, whether an officer has made a promise to induce an accused's statement is a question of fact to be determined by the trial court. *State v. Hayes*, 229 Neb. 53, 424 N.W.2d 624 (1988). Such a factual decision will not be overturned unless clearly wrong. *Id.* With respect to the factual finding of the trial court in the context of this case, we do not find that the trial court was clearly wrong in determining that the statements the defendant made to Officer Spanel were voluntarily made. The trial court could reasonably find that Spanel's statement merely conveyed the officer's present intention not to arrest the defendant that evening, that the statement did not amount to a promise not to arrest the defendant, and that the statement did not overcome the defendant's will to resist.

The State also contends that the voluntariness objection to the admission of the defendant's statements to Officer Spanel was waived by defendant's failure to challenge the statements before the commencement of the trial, pursuant to Neb. Rev. Stat. § 29-115 (Reissue 1989). We need not address the issue,

because we have determined that there was no objection at trial and because the statement was voluntary. As discussed above, the first assignment of error is without merit.

The second assignment of error relates to the inadmissibility of the defendant's statements to Officer Doetker on June 23, which were made after the defendant stated that he would like to speak to an attorney before determining whether to take a polygraph test. The State argues that the defendant waived this objection, pursuant to § 29-115; that the objection was not properly raised at trial; and that the defendant's statement with reference to the polygraph test does not render his statements on June 23 inadmissible.

Rather than addressing whether the voluntariness objections to the statements the defendant made to Officer Doetker on June 23 were waived and whether defense counsel properly referenced his objections in order to preserve the admissibility issues on appeal, we shall focus on the voluntariness of the statements the defendant made to Officer Doetker on June 23.

The defendant does not contend that his freedom was restrained by the Lincoln police on June 23. In other words, the defendant was not in custody on June 23, and neither his fifth amendment right to remain silent nor his sixth amendment right to counsel had attached. See, generally, *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Consequently, the issue is whether the defendant's statements on June 23 were voluntary within the due process clause. See, *State v. Hayes, supra*; *State v. McCurry*, 228 Neb. 841, 424 N.W.2d 364 (1988). We examine the totality of the circumstances to determine whether the State has satisfied its burden to prove the defendant's statement was the product of a rational intellect and a free will. *McCurry, supra*. Also, we will not overturn a factual finding of the trial court unless it is clearly wrong. *Id*. The defendant was not subject to the inherently coercive environment of a custodial interrogation. His request for an attorney on June 22 was unambiguously given with respect to the polygraph test and was clearly not an

indication that he wanted all questioning to cease. There is no evidence that he resisted the contact with Officer Doetker on June 23. Considering the totality of the circumstances, we find that the evidence indicates that the defendant freely, voluntarily, and intelligently responded to Officer Doetker on June 23. The second assignment of error is without merit.

In his third assignment of error, the defendant contends that his arrest was an unreasonable and warrantless seizure in violation of the fourth amendment to the U.S. Constitution. The basis of his argument is that his arrest took place in his home when the police dispatcher telephoned and requested that he go outside and talk to Officer Doetker. As acknowledged in *State v. Marcotte*, 233 Neb. 533, 537, 446 N.W.2d 228, 232 (1989), " '[a] warrantless arrest of an individual is a species of seizure which, the courts have ruled, must be reasonable.' " The facts in *Marcotte* are similar to the facts in this case, and the reasoning of that case applies here. The trial court's determination that the defendant was not ordered to go outside, and impliedly that the defendant did not perceive that he was under arrest, and freely and voluntarily went out to meet Officer Doetker is not clearly wrong. A felony had been committed, and the officer had reasonable cause to believe that the defendant was responsible. See Neb. Rev. Stat. § 29-404.02 (Reissue 1989). The manner of the defendant's arrest was not unreasonable as a matter of law, and the third assignment of error is without merit.

The judgment and sentences of the defendant are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SEAN PHINNEY, APPELLANT.

459 N.W.2d 200

Filed August 10, 1990. No. 89-759.

1. **Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant a requested waiver and to transfer proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the

juvenile's request in light of the criteria or factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988).

2. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** The district court, on request, shall transfer a juvenile case involving a crime to the juvenile court unless a sound basis exists for retaining it.
3. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** The standard of review applicable to an appeal from a denial of a motion to transfer to juvenile court is abuse of discretion.
4. **Juvenile Courts: Jurisdiction: Minors.** The juvenile court's jurisdiction over a juvenile lasts only until the juvenile attains the age of majority, age 19, or the court otherwise discharges the juvenile from its jurisdiction.
5. **Trial: Expert Witnesses.** A trier of fact is not obligated to take the opinions of an expert as binding upon it.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Thomas L. Spinar for appellant.

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

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

HASTINGS, C.J.

In *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990), because this court found that the record furnished on appeal failed to provide an adequate basis for a meaningful review by the court under Neb. Rev. Stat. § 43-276 (Reissue 1988), we remanded the cause with directions to the district court to review the record made on the motion to transfer and to set forth its findings as required by law. We further directed the district court to certify those findings back to this court for further consideration of defendant's appeal.

Suffice it to say that defendant was originally charged with the January 20, 1989, first degree murder of his mother and with the use of a weapon in the commission of a felony. Following the overruling of the defendant's motion to remove his case to the juvenile court, an agreement was reached whereby an amended information was filed charging defendant only with second degree murder, of which he was found guilty following a plea of no contest.

The district court has now certified to this court a journal entry dated June 20, 1990, in which further findings and conclusions in support of a denial of removal of the case to juvenile court were made. We review that certified record in light of defendant's original appeal.

In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in light of the criteria or factors set forth in § 43-276. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990); *State v. Thieszen*, 232 Neb. 952, 442 N.W.2d 887 (1989). Neb. Rev. Stat. § 29-1816 (Reissue 1989) provides that the district court shall transfer the case unless a sound basis exists for retaining it.

Section 43-276 requires consideration of the following criteria:

> (1) [t]he type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending

> beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as [are deemed] relevant . . . .

In analyzing the findings of the district court, we set them forth, nearly verbatim, categorized with respect to the nine specifications required by § 43-276.

(1) Type of treatment juvenile most likely to be amenable to:

> Dr. Riedler tested, examined and found that Sean's social skills were fairly primitive. In addition, Sean had character problems which would require therapy when he became seventeen or eighteen years of age. Retraining was necessa[r]y before releasing him back into society and it was possible that such retraining might not be accomplished before Sean was nineteen years of age.
>
> It did seem right that Sean should have been with young people rather than with adults. However, the State of Nebraska had an obligation to protect him from both adult and juvenile molestation wherever he was to be retrained.
>
> . . . .
>
> The boy needed highly structured treatment. If he were with juveniles, it would have been best but it was unlikely that he would have improved to the point where he could be released at eighteen and such release was most likely at the Youth Center.

(2) Evidence offense included violence or was committed in an aggressive and premeditated manner: "The violence that he was accused of was premeditated, considered, and exercised in the most decisive and final manner."

(3) Motivation: "His motivation was affected by one of the worst of situations and his act [to him], in some sense, constituted just desserts [sic] for the victum [sic]."

(4) Age of juvenile: "The age of fifteen is an accountable age. This boy appeared to be something less than an eighth grader in accademic [sic] ability."

(5) Previous history of juvenile: Although this was not mentioned by the court in its findings, the parties stipulated that defendant has no prior criminal record as an adult or juvenile.

(6) Sophistication and maturity of juvenile: "This boy was not mature mentally, not sophisticated and was emotional but there was no evidence that he was not accountable."

(7) Whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of juvenile:

> There was no reason for the court to believe that there were facilities or persons who would provide care for Sean in or about Kearney that would not be available in Lincoln. After all, both locations are a part of the Nebraska Department of Corrections and the State's obligation to Sean is the same in either place.
>
> . . . .
>
> Facilities for the care of the boy are provided by the Department of Corrections and the State had the obligation to take care of him where ever the Department of Corrections placed him.

(8) Whether the best interests of juvenile and the security of the public may require that juvenile continue in custody or under supervision for period extending beyond minority:

> The Court had no reason to believe that a juvenile facility would retain or retrain Sean beyond his eighteenth birthday. Dr. Riedler did not say that Sean would be cured by the time he was nineteen or that Sean could be educated or retrained by then.
>
> . . . .
>
> The available alternatives, if any, were not really evidenced, discussed or made clear at the hearing and it was not clear that other youths must be retrained in the company of such extreme cases as this.

(9) Any other relevant matters:

> If Sean was not guilty, the jury system was still available to him in the adult court system which provides greater protection for his liberty and rights than the juvenile system.
>
> If guilty, Sean had the opportunity left to request that he be cared for under a five year plan and probation rather than face abandonment at age eighteen. [Apparently, the district court meant that defendant could have pleaded guilty and requested probation for a maximum of 5 years,

which would have given him training and supervision beyond that available as a juvenile.]

In *State v. Alexander*, 215 Neb. 478, 486-87, 339 N.W.2d 297, 301-02 (1983), this court stated:

> There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors. For retention of the proceedings as a prosecution of a criminal offense, the court need not resolve every factor against the juvenile. Also, there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute. [Citations omitted.]
>
> The statutory criteria or factors of [§ 43-276] disclose a balancing test by which public protection and societal security are weighed against practical and not problematical rehabilitation of the juvenile. [Citations omitted.] "Rehabilitation has traditionally played a key role in the treatment of young offenders. . . . Nevertheless, the concept of deterrence and the need to balance individual justice with the needs of society—a balancing process that is basic and fundamental to the general scheme of the criminal law—also have a place in the juvenile justice system." *State in the Interest of C. A. H. & B. A. R.*, [89 N.J. 326, 336, 446 A.2d 93, 98 (1982)]. As a result of such balancing, some youths will be held accountable through proceedings in the adult criminal justice system for effective deterrence of future antisocial misconduct.
>
> . . . The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention, that is, in the juvenile justice system or criminal justice system. [Citations omitted.]

The standard of review applicable to an appeal from a denial of a motion to transfer to juvenile court is abuse of discretion. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990).

The juvenile court's jurisdiction over a juvenile lasts only until the juvenile attains the age of majority, age 19, or the court otherwise discharges the juvenile from its jurisdiction. See,

Neb. Rev. Stat. §§ 43-247, 43-245(6), and 43-289 (Reissue 1988).

Dr. Riedler diagnosed defendant as suffering from dysthymia and major depression with a paranoid psychotic component. He felt that defendant's condition was not permanent, that it could be treated, and that defendant needed "quite a bit more treatment." According to Riedler, when defendant is 17 or 18 he will require some therapy. Although Riedler felt that if defendant were successfully treated at the Youth Development Center-Kearney he could be released back into society without posing a danger to society, Riedler admitted on cross-examination that it is possible that defendant will still have problems after he is 19 years old.

It was Riedler's opinion that defendant should be placed in the Youth Development Center-Kearney until he is 19 years old. However, as the trier of fact, the district court was not required to take the opinions of an expert as binding upon it. See *State v. Nevels, supra*.

The district court apparently was not convinced that defendant could be rehabilitated within the time the juvenile court would retain jurisdiction over him and was concerned about defendant's premeditated act of violence which resulted in the death of his mother. The district court's implicit conclusion that a sound basis exists for retaining jurisdiction over defendant's case as a criminal prosecution is supported by appropriate evidence. Thus, it cannot be said that the district court abused its discretion in refusing to transfer defendant's case to the juvenile court.

The appropriateness of defendant's sentence need not be addressed because defendant did not assign it as error.

The judgment of the district court is affirmed.

AFFIRMED.

GARY C. WESTERHOFF, APPELLANT, V. RACHAEL WESTERHOFF, APPELLEE.

458 N.W.2d 757

Filed August 10, 1990. No. 89-846.

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

Larry L. Brauer, of Allan, Brauer & Mullally, for appellant.

Kent F. Jacobs, of Blevens & Jacobs, for appellee.

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

PER CURIAM.

The petitioner, Gary C. Westerhoff, has appealed from the judgment of the district court in a proceeding for the dissolution of a marriage. All of the assignments of error relate only to the division or distribution of property and indebtedness made by the trial court.

The division of property in marriage dissolution cases is a matter initially entrusted to the discretion of the trial court. On appeal, the judgment of the trial court is reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988). See, also, *Hamm v. Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988).

From our review of the record de novo, we find no abuse of discretion by the trial court in the division of property that was made.

The judgment is, therefore, affirmed.

The respondent is allowed the sum of $1,000 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RALPH E. THOMAS, APPELLANT.

459 N.W.2d 204

Filed August 10, 1990. No. 89-874.

1. **Criminal Law: Limitations of Actions: Words and Phrases.** In Neb. Rev. Stat. § 29-110 (Reissue 1985), the phrase "fleeing from justice" means to leave one's usual abode or to leave the jurisdiction where an offense has been committed, with intent to avoid detection, prosecution, or punishment for some public offense.
2. **Criminal Law: Directed Verdict.** A trial court will direct a verdict in a criminal case only if there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character and lacking probative value that a finding of guilt based upon such evidence cannot be sustained.
3. **Speedy Trial: Indictments and Informations.** Neb. Rev. Stat. § 29-1207(2) (Reissue 1989) requires that a defendant be afforded a trial within 6 months of the day the indictment is returned or the information filed.
4. **Criminal Law: Trial: Complaints.** Neb. Rev. Stat. § 29-504 (Reissue 1989) requires that when the complaint is for a felony, upon the accused's being brought before the magistrate, he shall proceed as soon as may be, in the presence of the accused, to inquire into the complaint.
5. **Judges: Recusal: Appeal and Error.** A motion to disqualify a judge on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
6. **Criminal Law: Trial.** In criminal prosecutions the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.

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

Rodney W. Smith for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

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

GRANT, J.

Following a jury trial on July 6, 1989, the defendant-appellant, Ralph E. Thomas, was convicted in the district court for Knox County on the charge of failure to appear, in violation of Neb. Rev. Stat. § 29-908 (Reissue 1989). Defendant was sentenced to imprisonment for 1 year, to be

served consecutively to a sentence previously imposed for a conviction of assault.

On appeal to this court, defendant assigns as error the actions of the trial court (1) in failing to grant defendant's motion for directed verdict in that the evidence was not sufficient to support defendant's conviction, particularly on the issue of the applicability of the statute of limitations; (2) in giving a certain jury instruction and in rejecting defendant's proposed instruction on the same issue; (3) in failing to release defendant because he was denied his right to a speedy trial; (4) in the trial judge's refusing to recuse himself; and (5) in permitting the State, during defendant's trial, to reopen its case in chief after resting. We affirm.

On January 21, 1981, defendant was convicted in the district court for Knox County of the crime of first degree assault. He was sentenced to 3 to 5 years' imprisonment. A timely appeal was taken to this court. On April 20, 1981, a hearing was held on the question of defendant's release on bond during the pendency of the appeal. Defendant appeared at this hearing with his then attorney. At this hearing, the trial court specifically advised defendant as follows:

> I am, for the record, advising you, Mr. Thomas, I'm sure you are aware of this, but the law requires that I advise you that it is a separate felony to fail to appear when ordered by the Court and it will be a part of the order that you appear before this Court if your sentence is affirmed immediately and bond would be conditioned on that.

This verbal order of the court was reflected in the journal entry signed by the court.

On April 23, 1981, defendant executed the bond and was released pending determination of his appeal.

This court affirmed defendant's conviction and sentence in *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981). The mandate of this court was issued on January 19, 1982, and received by the clerk of the district court for Knox County on the following day.

Defendant did not appear in the Knox County Court to serve his sentence. At a hearing on February 16, 1982, the court

ordered that defendant's bond be forfeited and a bench warrant be issued for defendant's arrest. At that time, after hearing evidence, the trial court found that "the defendant Ralph Eugene Thomas has been advised by the affirmance of the Supreme Court of his conviction and sentence and of the necessity to surrender himself to the sheriff of Knox County."

On September 11, 1987, the county attorney for Knox County filed in district court a pleading entitled "Information for: Failure to Appear Class IV Felony Under Section: 29-908 Penalty Section: 29-908." Prior to this filing, no complaint had been filed in the county court, and this information was treated by the court and the parties as an information (called a direct information in this jurisdiction, see, *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988); *State v. Chamley*, 223 Neb. 614, 391 N.W.2d 99 (1986)). A direct information requires a preliminary hearing. This direct information also alleged that defendant had been arrested on May 16, 1986, and on May 2, 1987, in Denver, Colorado, on misdemeanor charges. The record before us does not show any service of this pleading.

Defendant began serving the sentence for his 1981 assault conviction on March 3, 1988, in Nebraska. On November 29, 1988, defendant filed a motion to dismiss the charge of failure to appear in this case, alleging, inter alia, that he had been denied the right to a speedy trial as guaranteed by the sixth amendment to the U.S. Constitution and as required pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 1989). The statute requires that a defendant be brought to trial within 6 months "from the date the indictment is returned or the information filed." The court overruled defendant's motion, stating "the defendant has failed to request, in writing, the final disposition of the untried Information pending against him in the District Court of Knox County, Nebraska in Case No. 11312, through the Director of the Department of Correctional Services, as required by Section 29-3803 . . . ."

A hearing was held in the Knox County District Court on April 17, 1989, with defendant and his counsel present. At the beginning of the hearing the court identified the hearing as the "Preliminary hearing on Information filed September 11, 1987." Defendant's counsel stated to the trial court that

defendant "should properly be before the Court on a Complaint" and that "[w]e have no objection to proceeding if we're allowed to reserve any rights that we may have prior to the filing of the Information in district court." The trial court responded:

> THE COURT: I don't really see that it makes any difference whether the preliminary hearing is held in county court or district court. You have the same rights regardless. If there's a bindover then you have the same rights as if the preliminary hearing was held in county court.

The court found probable cause that a crime had been committed and bound defendant over for trial in district court. After the bind-over order, the State filed an information on May 15, 1989. Defendant was arraigned on this information on May 15, at which time he waived notice of the filing and pled not guilty to the charge of failure to appear.

On July 5, 1989, defendant filed two motions. In the first, defendant moved that the court "recuse itself from the hearing of the trial . . . for the reason that the Defendant filed an action in the United States District Court for the District to Nebraska entitled Ralph Thomas, Plaintiff vs. Merritt C. Warren, et.al., Defendants . . . ." In the second motion, defendant moved for an order of discharge because he had not been brought to trial "within the time allowed by R.R.S. 29-1207."

On July 6, 1989, the case came on for trial. Defendant's two motions were argued and submitted to the court before the trial began. As to the first motion, the trial judge stated that he had not received any notice of suit, but that, in any event, he had no bias or prejudice toward defendant and was able to preside over a jury trial. The trial judge denied the motion that he recuse himself.

The trial court also overruled the second motion, stating:

> THE COURT: All right. The Court takes judicial notice of the file and notes that the original Information filed September 11, 1987 was actually in the nature of a Complaint. The operative Information that was filed after preliminary hearing in the District Court of Knox County was filed May 15, 1989, and trial is being held less

than two months thereafter. So the Motion to Discharge will be overruled.

A jury was then selected and sworn. The State adduced testimony from two witnesses and certain documentary evidence and rested. Defendant then moved for a directed verdict, contending that the prosecution was barred by the statute of limitations as set out at Neb. Rev. Stat. § 29-110 (Reissue 1985), which provides:

> No person or persons shall be prosecuted for any felony . . . unless a complaint for the same shall be filed before the magistrate within three years next after the offense shall have been done or committed and a warrant for the arrest of the defendant shall have been issued . . . *Provided*, nothing herein contained shall extend to any person fleeing from justice . . . .

The court then granted the State's motion to withdraw its rest and permitted the State to adduce evidence on the issue of whether defendant fell within the "fleeing from justice" exception to the statute of limitations. The State adduced such evidence and again rested. Defendant offered no evidence at trial and rested. Defendant then renewed his motion for a directed verdict. The motion was overruled. The case was submitted to the jury, which returned a verdict of guilty on the failure to appear charge.

With regard to his first assignment of error, defendant contends that he was entitled to have a verdict directed in his favor because the statute of limitations bars prosecution for the offense with which defendant was charged. Defendant contends that the evidence in this case is insufficient to support a finding that defendant falls within the "fleeing from justice" exception to the statute of limitations.

In his argument that the statute of limitations has run, defendant relies on *Colling v. State*, 116 Neb. 308, 217 N.W. 87 (1927). In *Colling*, we stated that the term "fleeing from justice," as used in the statute of limitations, "means to leave one's usual place of abode, or to leave the jurisdiction, where an offense has been committed, with intent to avoid detection or prosecution for some public offense." *Id.* at 311, 217 N.W. at 88. Defendant implies that the "fleeing from justice" phrase in

§ 29-110 can be applied only to those persons fleeing from prosecution and not to those fleeing from the court to avoid punishment for a crime of which they have been convicted.

Such a contention is frivolous. The State obviously has a vital interest in seeing that justice is not thwarted by convicted defendants fleeing to avoid a legal sentence imposed after appropriate proceedings in a Nebraska court. We hold that in § 29-110 the phrase "fleeing from justice" means to leave one's usual abode or to leave the jurisdiction where an offense has been committed, with intent to avoid detection, prosecution, or punishment for some public offense. We note the *Colling* opinion relied on essentially the same language referring to "punishment" in *United States v. O'Brian*, 27 F. Cas. 212 (C.C.D. Kan. 1873) (No. 15,908). In this case, the State is concerned with the defendant's fleeing to avoid the punishment levied on him in the underlying assault case, not, as defendant would have it, with defendant's fleeing to avoid prosecution for the § 29-110 violation.

The trial court will direct a verdict in a criminal case only if there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character and lacking probative value that a finding of guilt based upon such evidence cannot be sustained. *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990).

In this case, a verdict could be directed only if the State has failed to establish that the statute of limitations does not apply, and the evidence is so doubtful in character and lacking probative value that a finding that defendant was fleeing from justice cannot be sustained.

The evidence that defendant was fleeing from justice was circumstantial in nature, but was uncontroverted, since the defendant offered no evidence. The State's evidence adduced at trial included testimony of the hearing on defendant's release from custody in 1981, pending appeal of his assault conviction. At that hearing, the district court informed the defendant that if the conviction and sentence were affirmed on appeal, defendant's failure to appear before the court would constitute a felony.

Evidence was adduced that the defendant did not appear as

ordered when the mandate was issued in the case. Defendant's attorney had sent the defendant notice, to the address defendant provided, of the Supreme Court's mandate. That address was the home of defendant's parents. Defendant's attorney explained that in the notice sent to the defendant, defendant was informed that his conviction and sentence had been affirmed and that he was to appear immediately before the court. Defendant's attorney received no response from the defendant, and the notice was never returned.

Notice of the February 16, 1982, hearing was also sent to the person who had advanced the $2,500 cash for the 10-percent payment on defendant's $25,000 bond on appeal, and no response was received from that person.

Testimony at trial showed that the Knox County Sheriff's Department had searched for the defendant on several occasions at his parents' house and at the house of his children and then wife, as well as throughout Knox County. Such evidence is not so doubtful in character or so lacking in probative value that it cannot sustain a finding that defendant was fleeing from justice. The evidence presented a question of fact and was properly submitted to the jury. In reviewing a criminal conviction, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Zaritz*, 235 Neb. 599, 456 N.W.2d 479 (1990).

Upon construing the evidence in favor of the State, a jury could find that defendant departed from his usual abode with intent to avoid detection, apprehension, and punishment. There was sufficient evidence for a jury to conclude that defendant was fleeing from justice. Defendant's contention that prosecution of the offense of failure to appear was barred by the statute of limitations is without merit.

With respect to defendant's speedy trial claim, § 29-1207(2) requires that a defendant be afforded a trial within 6 months of the day "the indictment is returned or the information filed." We agree with the trial court that trial was held within the

requisite time period. The operative information on which the case was tried was filed on May 15, 1989, and trial was held on July 6. Defendant's attorney, after noting that the pleading filed September 11, 1987, was called an information, pointed out at the preliminary hearing that the "matter should properly be before the Court on a Complaint" and that defendant would not object to proceeding with the hearing as long as defendant reserved any rights he might have prior to the filing of the information, in reference to Neb. Rev. Stat. § 29-1607 (1989), which requires a preliminary hearing before an information is filed. Defendant's counsel was fully aware of the facts that the pleading filed September 11, 1987, was actually in the nature of a complaint and that an information would properly be filed after the preliminary hearing. That information was filed on May 15, 1989, within 6 months of trial. Defendant's assignment of error is without merit.

Defendant next contends that the time between the filing of the initial information on September 11, 1987, and the preliminary hearing on April 17, 1989, constituted inexcusable delay, in violation of Neb. Rev. Stat. § 29-504 (Reissue 1989). Defendant was not extradited to Nebraska until March 2, 1988. The total time that elapsed between the date defendant returned to Nebraska and the date of the preliminary hearing was approximately 13 months.

Section 29-504 requires that "[w]hen the complaint is for a felony, upon the accused being brought before the magistrate, he shall proceed as soon as may be, in the presence of the accused, to inquire into the complaint."

We have said that this provision means that the accused must be brought before a magistrate as soon as is practical under the existing circumstances. *State v. Ellis*, 184 Neb. 523, 169 N.W.2d 267 (1969); *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963). "There can be no precise length of time after a legal arrest of a person charged with a crime in which he must be given a hearing." *O'Kelly, supra* at 813, 124 N.W.2d at 220. In *Ellis*, the Supreme Court stated:

> There might be some question as to whether a preliminary hearing, standing by itself, comes within the ambit of the constitutional guarantee of a speedy trial.

> Nevertheless: "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of the accused to defend himself."

Id. at 525-26, 169 N.W.2d at 268 (quoting *United States v. Ewell*, 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966)). While undue incarceration before trial and public accusation would be material under many circumstances, those factors are not controlling here. During the period between March 3, 1988, and April 17, 1989, defendant was incarcerated in the state penitentiary, serving a legal sentence for a previous felony conviction. Defendant did not seek the remedies available to him in such circumstances under Neb. Rev. Stat. § 29-3803 (Reissue 1989). There is no contention that defendant's ability to defend himself was impaired. Defendant offered no evidence on his own behalf. While we do not condone the 13 months' delay between the time defendant was returned to custody and the time of the preliminary hearing, defendant has failed to show that such delay was oppressive or prejudicial. Defendant's assignment of error is without merit.

Defendant also contends that the trial judge erred in not granting defendant's motion for disqualification. Defendant maintains that the trial judge should have recused himself from the case because the judge was named a party to a federal suit brought by defendant. A motion to disqualify a judge on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will ordinarily be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989). The defendant has not presented any evidence of bias or unfair prejudice, and this assignment of error is without merit.

In support of his assignment of error contending that the court erred in instructing the jury, defendant states:

> The Defendant takes exception with the Court's instruction and particularly in Paragraph 3 where it provides "that the Defendant did flee from justice and

> conceal himself to avoid serving the sentence for the crime of assault in the First Degree during the period from December 28, 1981 until March 3, 1988" and that portion of Paragraph 4 which provides "that the Defendant did flee from justice and conceal himself to avoid serving such sentence during the period from December 28, 1981 until March 3, 1988."

Brief for appellant at 17.

Such a characterization of the court's instruction is a gross distortion and is taken out of context. Paragraphs 2, 3, and 4 of instruction No. 4 stated as follows:

> You are instructed that the words "fleeing from justice" as used in the law of Nebraska implies [sic] a departure by a person from his usual place of abode or from the place where he has committed an offense, with the intent to avoid detection, prosecution, or punishment for a crime.
>
> You will first consider this question, and if the state has failed to prove from the evidence beyond a reasonable doubt that the defendant did flee from justice and conceal himself to avoid serving the sentence for the crime of Assault in the First Degree during the period from December 28, 1981 until March 3, 1988, then it would be your duty, without going any further into the evidence, to find the defendant not guilty.
>
> If, however, you do find from the evidence and beyond a reasonable doubt that the defendant did flee from justice and conceal himself to avoid serving such sentence during the period from December 28, 1981 until March 3, 1988, then you shall further consider all of the evidence in the case and determine the guilt or innocence of the defendant upon the charge of Failure to Appear in accordance with the remaining instructions.

These paragraphs precisely and properly set out the applicable law in this case. Defendant's contention to the contrary is without merit.

In his last assignment of error, defendant contends that the trial court erred in allowing the State to withdraw its rest made at the conclusion of the State's evidence, after defendant had moved for a verdict of acquittal. In *State v. Putnam*, 178 Neb.

445, 448-49, 133 N.W.2d 605, 608 (1965), we held: "Even in criminal prosecutions the withdrawal of a rest in a trial on the merits is within the discretion of the trial court." We approved that statement in *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989).

In this case, the court did not abuse its discretion in permitting the State to withdraw its rest.

The judgment of the district court is affirmed.

AFFIRMED.

JOHN L. LEWIS, APPELLANT, V. LAURIE SMITH CAMP ET AL., APPELLEES.

459 N.W.2d 211

Filed August 10, 1990. No. 89-1155.

1. **Presumptions: Pleadings: Records.** A presumption indulged in by a judge of a court that a pleading was filed at a different time than disclosed by the record is insufficient by itself to impeach the veracity of the record.
2. **Pleadings: Time: Jurisdiction: Appeal and Error.** Petitions in error must be filed within the timeframe provided for by Neb. Rev. Stat. § 25-1931 (Reissue 1989) in order to confer jurisdiction on the court asked to review a final judgment or order.
3. **Pleadings: Time: Prisoners.** Imprisonment in and of itself is not a disability entitling one imprisoned to a period of exclusion from the normal time limitation, articulated in Neb. Rev. Stat. § 25-1931 (Reissue 1989), within which to file a petition in error.
4. **Courts: Jurisdiction: Appeal and Error.** If the district court lacked power to entertain an error proceeding and decide questions raised by such action, the Supreme Court is equally without power to review the final judgment or order which is the subject matter of the action brought to the district court.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Appeal dismissed.

John L. Lewis, pro se.

Robert M. Spire, Attorney General, and Delores Coe-Barbee for appellees.

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

PER CURIAM.

A disciplinary committee found appellant, John L. Lewis, an inmate within the Nebraska Department of Correctional Services, guilty of escape. The decision was upheld by the Department of Correctional Services Appeals Board. Pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 1989), Lewis instituted this error proceeding in district court, naming as defendants the three members who served on the appeals board. The district court affirmed the decision of the disciplinary committee and the appeals board. Lewis appeals.

These proceedings arose out of an incident which occurred on September 4, 1988, when three Nebraska State Penitentiary officials found a piece of black tape covering a 1/3-inch-long cut (apparently from a hacksaw blade) in a bar of a window in the cell which was occupied by Lewis and another inmate.

The disciplinary committee, following a hearing, concluded that Lewis had violated 68 Neb. Admin. Code, ch. 5, § 005I[E] (1987) (escape). Certain sanctions were imposed. Lewis filed a written appeal with the appeals board. After a hearing on October 11, 1988, the appeals board, on that same date, upheld the decision of the disciplinary committee. Lewis then instituted this error proceeding in district court by filing a petition in error and transcript in the district court on November 16, 1988.

Because it is apparent from the record that the error proceeding was commenced out of time, the district court never acquired jurisdiction of this matter and neither did this court.

Section 25-1901 provides: "A judgment rendered or final order . . . made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court."

It is provided in Neb. Rev. Stat. § 25-1931 (Reissue 1989):

> Proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within thirty days after the rendition of the judgment or making

> of the final order complained of, except that when the person entitled to such proceedings is . . . imprisoned, he or she shall have one year, exclusive of the time of his or her disability, within which to commence such proceedings.

In the first place, there is a claimed discrepancy as to the date the petition and transcript were filed. It is abundantly clear that these documents were filed by the clerk of the district court on November 16, 1988, 36 days after the rendition of the judgment or order sought to be reviewed. Confusion arises because the record discloses that the district judge, during a telephonic conference hearing on a motion for default, commented to the effect that he "presume[d]" and "imagine[d]" that the petition and transcript were timely filed on November 7, 1988, the same time Lewis filed his motion to proceed in forma pauperis.

The presumption of the district court that the petition and transcript were timely filed finds no support in the record and is insufficient to impeach the veracity of the record itself. See *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989).

Petitions in error must be commenced within the timeframe provided by § 25-1931. "Timely filing of both items [petition and transcript] is mandatory to confer jurisdiction on a court asked to review [by error proceedings] a final judgment or order." *Transcon Lines, Inc. v. O'Neal*, 230 Neb. 31, 33-34, 429 N.W.2d 718, 719 (1988).

Although § 25-1931, requiring filing within 30 days, speaks of an exception for imprisoned persons, this court, in *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985), and *Clark v. Cornwell*, 223 Neb. 282, 388 N.W.2d 848 (1986), without comment as to the disability language, found the error proceedings filed by inmate plaintiffs were not properly perfected on the basis of the language in § 25-1931 preceding the exception provision.

In a concurring opinion in *Newquist v. State*, 153 Neb. 917, 46 N.W.2d 639 (1951), a case involving a denial of a claim by an infant for additional time beyond the 30 days, we find language providing additional insight into the application of the disability language of the statute.

> As I interpret [§ 25-1931] the provision thereof allowing . . . a person . . . imprisoned . . . one year, exclusive of the time of disability, within which to commence proceedings to reverse, vacate, or modify any judgment or final order has no application except where, on account of the . . . imprisonment, there is or has been a recognizable legal disability which prevents or prevented such person from protecting his rights or liberties within the time as . . . provided.

Newquist v. State, supra at 918, 46 N.W.2d at 640 (Wenke, J., concurring). Thus, there must be a showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights as stated in § 25-1931.

There is longstanding precedent for the proposition that imprisonment in and of itself is not a disability entitling one behind bars to a period of exclusion from the normal time limitation articulated in the statute. In *Kock v. State*, 73 Neb. 354, 357-58, 102 N.W. 768, 769 (1905), this court stated:

> But it is contended by the accused that he is one of the class of persons mentioned in the statute as being under disability; and he insists that, because he was taken to the penitentiary and imprisoned therein in compliance with the judgment of the court, the limitation [period which was then 6 months] does not apply to him. The mere statement of this proposition is its own refutation. If this contention should be held good, the defendant could serve out his full [term] of imprisonment and still have one year thereafter in which to prosecute his petition in error. The fact is that he is under no disability by reason of his imprisonment; and in truth he is already prosecuting his proceedings in error . . . .

If, as is the case here, the district court lacked power to entertain the proceedings and decide the questions raised by such action, this court is equally without power to review the final judgment or order which is the subject matter of the action brought to the district court. *Clark v. Cornwell, supra*.

There is no jurisdiction to hear this matter, and accordingly the appeal is dismissed.

APPEAL DISMISSED.

DONNELLE GALLION, APPELLANT, V. WILLIAM ZINN, APPELLEE.

459 N.W.2d 214

Filed August 10, 1990. No. 89-1270.

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

Donnelle Gallion, pro se.

Robert M. Spire, Attorney General, and Lynn A. Melson for appellee.

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

SHANAHAN, J.

On July 14, 1989, Donnelle Gallion, pursuant to Neb. Rev. Stat. §§ 29-2801 et seq. (Reissue 1989), filed his pro se petition for habeas corpus relief in the district court for Lancaster County. Gallion's petition was directed toward William Zinn, executive director of the Lincoln Regional Center.

Section 29-2801 provides:

> If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, *and does at the same time produce to such judge a copy of the commitment or cause of detention of such person*, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person

> allowing such writ is a judge, directed to the proper officer, person or persons who detains such prisoner.

(Emphasis supplied.)

In his petition, Gallion alleged that he was entitled to habeas corpus relief because

> [m]y court appointed counsel . . . fraudulently manufactured a false document (written order dated 26 July 1988) which falsely states that I attended a hearing at which I requested to be transfered [sic] to the [Lincoln Regional] Center for a competency evaluation. [Counsel] advanced this fraudulent document to the Center with the intent that the officials of this center accept the document as a legal and enforceable order of the court and that I be detained and evaluated by the staff at the Center.
>
> 2. My Constitutional right to due process has been denied me—I was not provided with a hearing before being transfered [sic] to the Lincoln Regional Center as prescribed in Vitek vs. Jones 445 U.S. 480, 63 L. Ed. 2d 552.

On August 9, the district court issued an order requiring Zinn to show cause why the requested habeas corpus relief should not be granted. On September 6, the Attorney General of Nebraska, on behalf of Zinn, filed a motion in which Zinn alleged that "[t]he petition for writ of habeas corpus does not state facts sufficient, if true, to entitle the plaintiff to the writ prayed for" and requested that Gallion's habeas corpus action be dismissed. After a hearing, in which Gallion participated, on October 4, the district court sustained Zinn's motion and dismissed Gallion's habeas corpus action.

Gallion appeals and contends that he has made a sufficient showing for habeas corpus relief.

In *Swanson v. Jones*, 151 Neb. 767, 768, 39 N.W.2d 557, 559 (1949), this court, considering the availability of habeas corpus relief, stated: "Such a writ [of habeas corpus] is not demandable of course, but legal cause therefor must be shown as a prerequisite of judicial action favorable to petitioner." See, *Sedlacek v. Hann*, 156 Neb. 340, 56 N.W.2d 138 (1952); *In re Application of Dunn*, 150 Neb. 669, 35 N.W.2d 673 (1949); *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d

840 (1944).

As we interpret the allegations in Gallion's petition, Gallion claims that, on July 26, 1988, his lawyer, apparently court-appointed in the prosecution of some criminal charge against Gallion, obtained an order in some court authorizing Gallion's commitment to and detention in the Lincoln Regional Center, and that the findings expressed in the commitment order are false. Our interpretation is borne out by Gallion's statement in his brief: "Appellant states that he is a pretrial detainee who was transferred to the Lincoln Regional Center for an evaluation of his competency to stand trial." Brief for appellant at 1.

At no time did Gallion present to the district court in this case a "copy of the commitment or cause of detention" of Gallion, although Gallion's petition for relief is based on the order of commitment and detention apparently entered in the proceedings to determine Gallion's competency to stand trial. Since Gallion sought relief pursuant to § 29-2801, in addition to pleading sufficient facts to warrant habeas corpus relief, Gallion was required to produce for the district court a copy of the order under which Gallion was committed to and detained in the Lincoln Regional Center. The absence of the statutorily required copy of the commitment and detention order, an issue which we find was raised by Zinn's motion, prevented the district court from proceeding to the relief sought by Gallion's habeas corpus action.

Therefore, we find that the district court properly dismissed Gallion's action for habeas corpus relief.

AFFIRMED.

BRUCE CLAYTON HUFFMAN, APPELLANT, V. MUFFY N. HUFFMAN, APPELLEE.

459 N.W.2d 215

Filed August 10, 1990. No. 89-1413.

1. **Modification of Decree: Appeal and Error.** Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning modification.
2. **Final Orders: Appeal and Error.** Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
3. **Modification of Decree: Final Orders: Appeal and Error.** When an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal.
4. **Child Custody: Visitation.** Distance between the custodial parent's residence and the noncustodial parent's residence should be considered in the determination of the noncustodial parent's child visitation rights.
5. **Visitation.** Child visitation rights for a parent are considered and determined in relation to the best interests of the child or children.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Gregory J. Beal, of Gregory J. Beal & Associates, P.C., for appellant.

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

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

SHANAHAN, J.

Bruce Clayton Huffman, a noncustodial parent, appeals from the decision of the district court for Lincoln County, which denied Bruce Huffman's application to change the child custody provision in the marital dissolution decree by which Muffy N. Huffman was granted custody of the Huffmans' four children. Also, Bruce Huffman appeals from the district court's

judgment concerning child visitation rights and the award of an attorney fee.

Bruce Huffman and Muffy Huffman, now Muffy Gregg, are the parents of four children—Boon, born January 3, 1975; Beau, born May 26, 1977; Nels, born April 3, 1981; and Josie, born December 11, 1982. In March 1988, the marriage between Muffy and Bruce Huffman was legally dissolved. As reflected in the dissolution decree, the court granted custody of the Huffman children to Muffy Huffman, subject to Bruce Huffman's right of reasonable child visitation, which included visitation every other weekend plus 6 weeks in Bruce Huffman's care during the summer.

On July 28, 1988, Bruce Huffman filed an application to modify the child custody and visitation provisions of the dissolution decree, requested that he be granted custody of the Huffman children, and alleged that "there [had] been substantial changes in the circumstances of the parties," such as Muffy's recent move with the children to Chadron and Muffy's plans to start a day-care center in her home. In his modification application, Bruce also requested that the court determine the "reasonable rights of visitation on the part of the non-custodial parent."

On September 21, 1988, during the initial hearing on Bruce Huffman's application to modify the dissolution decree, the district court, on its own motion, raised the question of whether the court had jurisdiction to enter the decree of marital dissolution entered in March 1988, determined that it lacked jurisdiction for the dissolution proceedings, set aside the dissolution decree, and dismissed the modification proceedings. In *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989), we concluded that the district court had jurisdiction for the Huffman dissolution proceedings, reversed the district court's judgment which dismissed the modification proceedings, and directed the district court to reinstate its previous judgment and dissolution decree in the Huffman case.

The hearing to modify the Huffman decree was resumed on October 18, 1989, and the court received evidence concerning the modification requested by Bruce Huffman.

After the divorce, Bruce Huffman lived in a rural residence

near Oshkosh, Nebraska, where he raised cattle and sold cattlefeed. In June 1989, Bruce moved to a ranch near Wallace, Nebraska. During that time, Bruce regularly exercised his visitation right concerning the Huffman children and involved them in several wholesome activities.

In 1988, Muffy Huffman, with the four Huffman children, moved to Chadron. In July 1989, Muffy married Robert Gregg, who is a supervisor at Chadron State Park. Muffy Gregg abandoned her plans to start a day-care center and obtained employment as a dental assistant. The Greggs and the Huffman children live just outside Chadron, where the children attend public school.

Although the Huffman children exhibited some emotional difficulties on account of their parents' divorce, when the modification application was heard, the children had adjusted well to their new environment. Each of the boys is a straight A student, and Josie, a first grader, likes going to school. The oldest son, Boon, participates in football and baseball at school. Nels, the third child, is involved in a program for talented and gifted children.

In the initial modification hearing held in 1988, the court sustained an objection to Bruce Huffman's expressing an opinion regarding the effect of Muffy's lifestyle on the children. However, on resumption of the hearing in 1989 after *Huffman v. Huffman, supra*, Bruce Huffman testified and expressed his opinion about Muffy's lifestyle and its effect on the Huffman children.

At the conclusion of evidence at the October 18 hearing, the trial court remarked from the bench:

> [A]s far as the change in circumstances I don't see one, and it seems clear to me that the best interest of the children requires that they remain where they are.
>
> . . . .
>
> So, as far as the motion is concerned, the motion for the change of custody is denied. The motion as it relates to visitation and the issues in the Respondent's [sic] application, concerning the application the Court will take that under advisement.

In the presence of the parties and their lawyers, the court then

made this notation on its docket sheet: "The Court finds the Application to Modify Decree filed by [Bruce Huffman] should be overruled." Bruce Huffman did not file a motion for new trial or notice of appeal concerning the court's action on October 18. On November 3, the court signed and filed an order reflecting the court's action on October 18 and directing a specific schedule for Bruce Huffman's visitation of his children, which included the return of the Huffman children to their home at Chadron by 5 p.m. at the conclusion of visitation on weekends and holidays. Bruce Huffman, on November 30, filed his notice of appeal from the judgment entered "on the 3rd day of November, 1989."

Bruce Huffman appeals and claims that the trial court erred in (1) failing to find a material change of circumstances warranting a change in child custody; (2) not allowing Bruce Huffman, during the initial modification hearing on September 21, 1988, to express his opinion about Muffy's lifestyle and its effect on the children; (3) not granting reasonable visitation rights; and (4) awarding a $750 attorney fee for Muffy Gregg's lawyer.

Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning modification. See *Morisch v. Morisch*, 218 Neb. 412, 355 N.W.2d 784 (1984).

> 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); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

Muffy Gregg contends that this court's review is restricted to the issues of child visitation and the attorney fee, since the trial court's pronouncement on October 18, 1989, at the conclusion of the modification hearing, was a "final order" for the purpose of an appeal concerning modification of the dissolution decree pertaining to child custody; hence, the notice of appeal, filed on November 30, was not timely. See Neb. Rev. Stat. § 25-1912 (Reissue 1989) (for appellate jurisdiction, notice of appeal must be filed within 30 days after entry of the judgment or decree to be reviewed). Consequently, Muffy Gregg argues that this court lacks jurisdiction to review the district court's disposition of Bruce Huffman's request for modification of the dissolution decree's provision for child custody.

During oral arguments before this court, lawyers for the parties referred to the modification application and alluded to the existence of an additional motion concerning visitation of the Huffman children, that is, the application requesting change of custody and a separate motion requesting modification of the visitation schedule. However, the record contains only the "Application for Modification of Decree," which, as we construe the application, contains both the request for a change of child custody and the request for modification of the visitation schedule.

Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *In re 1983-84 County Tax Levy*, 220 Neb. 897, 374 N.W.2d 235 (1985). See, also, *Rec Centers, Inc. v. Shaughnessy*, 407 So. 2d 971 (Fla. App. 1981) (judgment which explicitly reserves jurisdiction to determine another issue within the proceedings is not a final order); *Boulder Land, Irrigation and Power Co. v. Hays*, 502 P.2d 1136 (Colo. App. 1972) (judgment on one of several issues is not a final judgment for purposes of appeal). *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984), is somewhat similar to the Huffman case now before us. In *Gerber*, the petition for

dissolution of marriage also requested a division of marital property and a determination of matters pertaining to the Gerber children, that is, child support and visitation. The district court determined that the marriage was irretrievably broken, but reserved jurisdiction for a later determination of the property division, as well as child support and visitation of the children. An appeal was taken from the judgment dissolving Gerbers' marriage. In *Gerber*, this court concluded that when any of the parties' substantial rights remain undetermined in a marital dissolution proceeding and the case is retained for further action by the trial court, any order in the dissolution proceeding is interlocutory and not final. In dismissing the Gerber appeal for lack of jurisdiction, this court in *Gerber* remarked that "there is no final order that may be appealed from as to *any* of the issues between these parties, including the issue of dissolution of the marriage." (Emphasis in original.) *Gerber v. Gerber, supra* at 231, 353 N.W.2d at 6.

In the present case, there was a solitary pleading, the application for modification of a dissolution decree. The application requested that the dissolution decree be modified to grant child custody to Bruce Huffman and that a schedule of visitation rights be determined for the noncustodial parent. The tenor of the modification application may be expressed in the alternative: a change in custody or, if such change were denied, a new schedule of visitation rights. Thus, Bruce Huffman's application was a solitary pleading which raised multiple issues, namely, custody and visitation of children, which were determinable in one proceeding regarding modification of a prior dissolution decree. Therefore, we hold that when an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal. For that reason, this court has jurisdiction to review the district court's action on Bruce Huffman's modification application.

"To justify a modification of a divorce decree, there must be a showing of a material change in the circumstances subsequent to the entry of the dissolution decree." *Morisch v. Morisch*, 218 Neb. 412, 413, 355 N.W.2d 784, 785 (1984). A divorce decree fixing custody of minor children should not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988); *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985).

> [T]his court has determined "that a decree fixing custody of minor children will not be modified unless there has been a change of circumstances [following entry of the decree] indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action." *Hoschar v. Hoschar*, 220 Neb. 913, 915, 374 N.W.2d 64, 66 (1985). The party seeking modification bears the burden of showing a material change of circumstances affecting the best interests of the child. *Hoschar, supra.*
>
> As further stated in *Hoschar, supra* at 915, 374 N.W.2d at 66: "[B]y material change of circumstances we mean that the evidence must show that something has occurred, which if the trial court had been aware of the existence of these circumstances initially, the trial court in the best interests of the children would have granted their custody to the other parent."

Hicks v. Hicks, 223 Neb. 189, 192, 388 N.W.2d 510, 513 (1986).

In the present case, the trial court found no material change of circumstances which justified a change in custody of the Huffman children. The record clearly establishes that the Huffman children are well adjusted, happy, performing very well in school, and involved in worthwhile activities for children. No detriment or harm to the Huffman children has been shown as the result of their move to Chadron and residence with the Greggs. After our de novo review, we conclude that the record fails to show a material change of circumstances or that the child custody provision in the court's 1988 decree of marital dissolution has become detrimental to

the best interests of the Huffman children.

Regarding Bruce Huffman's assignment of error based on the exclusion of his opinion testimony at the initial hearing on his modification application, "alleged error in excluding a witness' testimony is cured when the initially excluded testimony is later elicited through the same witness." *Rose v. City of Lincoln*, 234 Neb. 67, 77, 449 N.W.2d 522, 529 (1989). Also, "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." *Rose v. City of Lincoln, supra* at 76, 449 N.W.2d at 529. Although, in the initial part of the modification hearing in 1988, Bruce Huffman was prevented from expressing his opinion about Muffy's lifestyle, on resumption of the modification hearing in 1989 he expressed his view in that regard. Moreover, Bruce Huffman has failed to show prejudice from the trial court's refusing to allow Bruce's opinion testimony at the initial modification hearing in 1988.

> Ordinarily, if parental visitation is in a child's best interest, a court determines the nature and extent of visitation rights on a case-by-case basis and may consider many factors and circumstances in each individual case, such as age and health of the child; character of the noncustodial parent; the place where visitation rights will be exercised; frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; availability of the child for visitation; likelihood of disrupting an established lifestyle otherwise beneficial to the child; and, when appropriate, the wishes of the child.

Gerber v. Gerber, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987).

Bruce Huffman asserts, without contradiction from Muffy Gregg, that he "lives four and one-half hours [from Chadron] and approximately 258 miles distant" from the Gregg home. Brief for appellant at 30. Hence, Bruce Huffman argues that the court-ordered delivery of the Huffman children to the Gregg home at 5 p.m. on a visitation weekend is unreasonable

and, therefore, an abuse of discretion. Nothing indicates that the noteworthy distance between parental residences was anything but the result of location for livelihood. Nevertheless, distance between the custodial parent's residence and the noncustodial parent's residence should be considered in the determination of the noncustodial parent's child visitation rights. Child visitation rights for a parent, however, are considered and determined in relation to the best interests of the child or children. In the Huffman-Gregg situation, the Huffman children attend school, which means classes on Monday mornings and which also means that the children must be home in ample time for the transition from weekends to weekdays. All things considered, we are unable to reach the conclusion that the trial court abused its discretion in determining Bruce Huffman's child visitation rights.

Finally, Bruce Huffman alleges that it was reversible error for the trial court to order him to pay $750 toward an attorney fee for Muffy's lawyer. "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." *Ritter v. Ritter*, 234 Neb. 203, 209, 450 N.W.2d 204, 209-10 (1990); *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987); *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986). We cannot conclude that the district court abused its discretion in awarding an attorney fee of $750.

We award Muffy Gregg, formerly Muffy Huffman, $500 as an attorney fee for the services of her lawyer in this court.

AFFIRMED.

INTERSTATE PRINTING COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. DEPARTMENT OF REVENUE AND DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, APPELLEES.

459 N.W.2d 519

Filed August 17, 1990. No. 88-483.

1. **Administrative Law: Pleadings: Time: Appeal and Error.** Petitions for review in the Supreme Court under Neb. Rev. Stat. § 84-918 (Supp. 1989) of the Administrative Procedure Act, filed in the district court before July 1, 1989, are reviewed de novo on the record.
2. **Motions for New Trial: Courts: Time: Appeal and Error.** A motion for a new trial is restricted to a trial court, and where the district court acts in the capacity of an appellate court, such a motion is not a proper pleading and it does not stop the running of time for perfecting an appeal. This is true whether that court is hearing appeals from the county court or from some other lower tribunal.
3. **Judgments: Records.** The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.
4. _____: _____. A court of record has inherent authority to amend its records so as to make them conform to the facts. It is proper for a court to make an entry nunc pro tunc so that its records will speak the truth. Such an order is proper to correct the record of a judgment, but not to correct the judgment itself.
5. **Judgments: Time: Appeal and Error.** The general rule is that where a judgment is amended in a material and substantial respect, the time within which an appeal from such determination may be taken begins to run from the date of the amendment, although where the amendment relates only to the correction of a clerical or formal error, it does not affect the time allowed for appeal.
6. _____: _____: _____. If the amendment of a final judgment or decree for the purpose of correcting a clerical error either materially alters rights or obligations determined by the prior judgment or creates a right of appeal where one did not exist before, the time for appeal should be measured from the entry of the amended judgment. If, however, the amendment has neither of these results but, instead, makes changes in the prior judgment which have no adverse effect upon those rights or obligations or the parties' right to appeal, the entry of the amended judgment will not postpone the time within which an appeal must be taken from the original decree.
7. **Judgments.** Clerical errors may be corrected by an order nunc pro tunc, but judicial errors may not.
8. _____. Judicial errors may be corrected by modification or vacation of the judgment entered. A district court has inherent power to modify its judgment during the term in which the judgment was rendered.

9. **Taxation.** A sales tax is imposed upon the gross receipts from all sales of tangible personal property sold at retail in this state, whereas a use tax is imposed on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer for storage, use, or other consumption in this state.
10. _____. The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce.
11. _____. The statutes of the state provide exemptions from the sales and use taxes for materials that enter into and become an ingredient or component part of a product manufactured, processed, or fabricated for ultimate sale at retail.
12. _____. The statutory scheme of this state does not exclude from taxation material necessary to or consumed in the manufacturing process but which does not actually enter into the final product as an ingredient or component part.

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

Larry L. Ruth and David D. Cookson, of Knudsen, Berkheimer, Richardson & Endacott, and Louis M. Bruckner, of Finlayson, McKie & Fisk, for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellees.

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

HASTINGS, C.J.

Pursuant to the Administrative Procedure Act, Interstate Printing Company (Interstate) appeals the order of the district court affirming an order of the state Tax Commissioner dismissing Interstate's protest and petition for redetermination of sales tax and use tax deficiencies assessed by the Nebraska Department of Revenue (department).

Interstate is a printing company located in Omaha. During the period May 1, 1982, through April 30, 1985, Interstate used prepress supplies (developing fluid) in the prepress process and sold prepress materials to its printing customers prior to use of the materials in the prepress or printing process. The department audited Interstate for the period in question and assessed a use tax on the developing fluid used and sales tax on the sale of the prepress materials to Interstate customers. Interstate protested the assessment and petitioned for

redetermination.

After making certain adjustments to the notice of deficiency determination, the department caused a hearing to be held before a hearing officer, following which the state Tax Commissioner determined Interstate's protest and petition for redetermination to be without merit and denied the relief prayed for by Interstate.

Interstate appealed to the district court for review under Neb. Rev. Stat. § 84-917 (Supp. 1989), as it existed before July 1, 1989, which court found as follows: "[T]he Order of the Commissioner was supported by competent, material, and substantial evidence; it was not in excess of the statutory authority or jurisdiction of the agency; it was not affected by errors of law; and it was not arbitrary nor capricious."

As the petition instituting proceedings for review was filed in the district court before July 1, 1989, under Neb. Rev. Stat. § 84-918 (Supp. 1989), this court reviews the matter de novo on the record.

This court raised on its own motion the question of jurisdiction to hear this appeal under the rule expressed in *Collection Bureau of Lincoln v. Loos*, 233 Neb. 30, 443 N.W.2d 605 (1989), and succeeding cases.

The order of the district court affirming the decision of the commissioner was entered on March 7, 1988. A motion for a new trial and a separate motion for an order nunc pro tunc were filed on March 17, 1988. The district court in effect sustained the motion for an order nunc pro tunc by amending the order of March 7, 1988, and then overruled the motion for a new trial "as to order as corrected," all on April 25, 1988. Interstate's notice of appeal was filed on May 24, 1988.

On the surface it appears obvious that as to the March 7, 1988, order which is in fact being appealed, the notice of appeal was not filed until May 24, 1988, some 68 days after entry of the order and well outside the limits for perfecting an appeal. This, of course, disregards the motion for a new trial.

A motion for a new trial is restricted to a trial court, and where the district court acts in the capacity of an appellate court, such a motion is not a proper pleading and it does not stop the running of time for perfecting an appeal. This is true

whether that court is hearing appeals from the county court or from some other lower tribunal. See, *Russell v. Luevano*, 234 Neb. 581, 452 N.W.2d 43 (1990); *In re Conservatorship of Mosel*, 234 Neb. 86, 449 N.W.2d 220 (1989); *In re Guardianship and Conservatorship of Sim*, 233 Neb. 825, 448 N.W.2d 406 (1989); *Collection Bureau of Lincoln v. Loos, supra.*

Without more, the appeal would seem to be out of time, and this court would have no jurisdiction. However, Interstate argues that it was necessary to amend the district court's order of March 7, 1988, before there was any final order from which to appeal because the order had not affirmed the commissioner's order of July 9, 1987.

The order of the Tax Commissioner which was appealed to the district court was entered on July 9, 1987. The petition of Interstate prayed that "the order of the State Tax Commissioner entered herein on July *10*, 1987 be reversed . . . ." (Emphasis supplied.) The order of the district court recites that Interstate has "appealed from an Order dated July 9, 1987" (apparently the correct date), but in the decretal portion of its order it recites that "the Order dated *December 2, 1986* be affirmed . . . ." (Emphasis supplied.) Following the filing of Interstate's motion for an order nunc pro tunc, the court made a minute entry which recited that the "[o]rder dated March 7, 1988 [is] amended nunc pro tunc as to the last paragraph to reflect the correct date as July 9, 1987."

The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. *Continental Oil Co. v. Harris*, 214 Neb. 422, 333 N.W.2d 921 (1983).

In *Gunia v. Morton*, 175 Neb. 53, 56, 120 N.W.2d 371, 373 (1963), the distinction between clerical errors and judicial errors was discussed:

> A court of record has inherent authority to amend its records so as to make them conform to the facts. It is

> proper for a court to make an entry nunc pro tunc so that its records will speak the truth. [Citation omitted.] Such an order is proper to correct the record of a judgment, but not to correct the judgment itself. Clerical errors may be corrected by an order nunc pro tunc but judicial errors may not.

It does not seem that we have ever answered directly the question as to whether the entry of an order nunc pro tunc extends the time within which an appeal must be perfected. The courts of other states appear to have answered this question not as to whether an order nunc pro tunc extends the time within which to appeal but, rather, as to whether the order amends or modifies a judgment in a material or substantial respect or whether the amendment relates only to the correction of a clerical or formal error.

> The general rule is that where a judgment is amended in a material and substantial respect, the time within which an appeal from such determination may be taken begins to run from the date of the amendment, although where the amendment relates only to the correction of a clerical or formal error, it does not affect the time allowed for appeal.

4 Am. Jur. 2d *Appeal and Error* § 308 at 793 (1962). See, also, *Mulder v. Mendo Wood Products, Inc.*, 225 Cal. App. 2d 619, 37 Cal. Rptr. 479 (1964), *cert. denied* 379 U.S. 844, 85 S. Ct. 85, 13 L. Ed. 2d 50; *Faddis v. Woodward Iron Company*, 276 Ala. 283, 161 So. 2d 486 (1964).

> If the amendment of a final judgment or decree for the purpose of correcting a "clerical error" either materially alters rights or obligations determined by the prior judgment or creates a right of appeal where one did not exist before, the time for appeal should be measured from the entry of the amended judgment. If, however, the amendment has neither of these results, but instead makes changes in the prior judgment which have no adverse effect upon those rights or obligations or the parties' right to appeal, the entry of the amended judgment will not postpone the time within which an appeal must be taken from the original decree.

Mullinax and Mullinax, 292 Or. 416, 430, 639 P.2d 628, 637 (1982).

We believe this rule makes good sense, and we adopt it for guidance in situations such as this.

No record other than the minute entry made by the judge supports the entry of the order "nunc pro tunc." We do not know upon what his decision was based. Was it a clerical error or was it an error in the judgment? Clerical errors may be corrected by an order nunc pro tunc, but judicial errors may not. *Larson v. Bedke*, 211 Neb. 247, 318 N.W.2d 253 (1982), *supp. op.* 212 Neb. 134, 322 N.W.2d 367.

Judicial errors may be corrected by modification or vacation of the judgment entered. A district court has inherent power to modify its judgment during the term in which the judgment was rendered. According to the rules of procedure for the district court for Lancaster County found on file with the office of the Clerk of the Supreme Court, March 7 and April 25, 1988, are within the same term of court.

The order of March 7, 1988, was a nullity. It affirmed an order that did not exist. There was no evidence that this was a clerical mistake. Therefore, it was not correctable by an order nunc pro tunc. Although not denominated as such, the fact remains that the court modified its judgment to order the affirmance of a different order than that originally referred to, and therefore the court's action had the effect of a modification to correct a judicial error.

The amendment or modification of the final judgment affirmed an order then extant and accordingly "create[d] a right of appeal where one did not exist before," and "the time for appeal should be measured from the entry of the amended judgment." Accordingly, the appeal was within time and this court does have jurisdiction, and we therefore will deal with the appeal on its merits.

Interstate is engaged in business in Nebraska as a printer, manufacturing products such as catalogs, government publications, programs, forms, educational materials, pamphlets, and advertising literature to the order of its customers. Interstate employs the offset lithography method of printing as the means of producing the finished printed goods

that it manufactures for its customers.

Offset lithography gets its name from the fact that the lithoplate itself does not come in direct contact with the paper or other substrate undergoing printing. Instead, the inked image formed on the surface of the lithoplate is transferred to the paper by an intervening roller or cylinder. The flexible lithoplate is mounted on the press' plate cylinder. In a continuous cycle, first a series of dampened rollers picks up a film of watery fountain solution from a supply and spreads the solution over the surface of the revolving lithoplate. Next, a similar system of inking rollers comes into contact with the lithoplate, spreading a film of ink which adheres to the printing areas of the plate. Wetted and inked, the plate cylinder revolves in contact with the blanket cylinder, which is covered with a rubbery surface. The ink on the lithoplate, now organized as the image to be printed, sticks to the surface of the blanket cylinder. An impression cylinder revolves in contact with the blanket cylinder. The paper or other medium to be printed is introduced between the impression and blanket cylinders, and the ink on the surface of the blanket cylinder is transferred to the paper as it squeezes through the point of contact of the cylinders.

There are at least five distinct preparatory "prepress" operations which precede the printing process just described. The steps can be referred to by the item of prepress that is the output: (1) camera (negatives), (2) stripping flats, (3) proofs, (4) composites, and (5) lithoplate. This description of the prepress process assumes that the printer has been supplied with clean, sharp, camera-ready art and textual material to be printed.

In the "camera" stage, the camera-ready art and textual material is photographed. Development of the film results in negatives, where the dark and light areas of the photographed image are represented by corresponding transparent and opaque areas on the film—a reversal of the values in the material that was photographed. Developing fluid of appropriate chemical properties is used to dissolve the photosensitive emulsion that coats the transparent film base. The developer is washed away when it has done its job. The resulting negative consists of the same piece of film which was

exposed in the camera.

In the "stripping" stage, the negatives from the camera stage are trimmed and physically positioned and taped down in proper relation to one another on a base material. The layout of the negatives is guided not only by the desired look and content of any particular page, but also by the consideration that multiple pages may be printed by a single lithoplate, requiring that the pages must appear in proper relation to one another in order to facilitate further operations, such as two-sided printing, cutting, and assembly of the printed document. The resultant assemblage of negatives is called a flat. The technician performing the stripping operation cuts out window spaces from the base material so that light can pass through the transparent portions on the negatives.

In the next prepress stage, "proofing," light is shined through the flat, exposing photosensitive paper positioned on the other side of the negatives. In a typical finished "blue line" proof, the background areas are white, while the areas exposed to light shining through the transparent portions of the negatives turn blue. The point of the proof is to simulate through photographic techniques the result that would be achieved by mechanical printing processes using a lithoplate "burned" from the same flat. Proofs are primarily used to obtain customer approval of layout and content and to spot and plan necessary corrections and changes to the flat, all prior to consumption of lithographic plates and valuable press time.

Complex print jobs may call for "composites" to be made. This involves multiple exposures of the same piece of photographic film before developing, in order to add and combine elements on the resultant negative, building up the overall image that will be printed. An example of the use of compositing techniques would be the addition of blocks or a grid of screen shading to a catalog page consisting of columns and rows of numbers, thereby providing reference points for scanning across the page and relieving its monotonous look. The table of numbers and the blocks of shading can be photographed separately on the same piece of film, so that on the developed negative the numbers and shading are superimposed.

In the final prepress stage, the lithographic plate is imaged and developed. A typical raw plate consists of a thin aluminum sheet that has a factory-applied light-sensitive polymer coating. The lithoplate is imaged or "burned" by exposing the coated surface to intense light shined through the negatives that have been assembled into the flat. Composite burns of the same plate are possible. Where light strikes the coating of the plate, it undergoes a hardening chemical change that allows those areas to resist the solvent action of the developing fluids. When developed, the printing areas of the plate retain a coating, while the nonprinting areas have been stripped of the polymer coating and show the base metal of the plate. Once it has dissolved unexposed areas of the lithoplate, the developing fluid is washed away.

Under Interstate's standard operating procedures and its usual understanding with customers, all prepress items on a particular printing job—negatives, stripping flats, proofs, composites, and lithoplates—are deemed sold to its customers as they are bought from the outside or created in-house, prior to any use of the items for the purpose to which they are suited. Put another way, upon the acquisition or creation of prepress items, Interstate regards the items as appropriated to a contract of sale, and, therefore, Interstate treats the articles as the property of its customers. Should a customer request it, Interstate would consider itself bound to deliver a prepress article to its customer without exacting a further charge for the item. Interstate buys such prepress items or their ingredient or component parts on a "sale for resale" basis.

The record reveals that Interstate retains physical custody of its customers' prepress items at the time they are created in-house or acquired from outside suppliers. The uniform practice of Interstate is to use the prepress items as they are needed in the sequence of technical operations that will lead to eventual shipment of the customer's completed print order out the door of the Omaha plant. The customer's negatives go into the stripping flats, the customer's flats are used to burn proofs, the customer's proofs are used to make corrections to the flats, the corrected flats or composites are used to burn the lithoplates, the lithoplates are mounted on a press, and finally

the job is run. This practice of leaving prepress items in the custody of Interstate is agreeable to its customers. Interstate understands that it is authorized to retain and use the prepress items on behalf of the customers, as their agent. While any of the prepress items could be an end object in itself—and frequently they are in the case of specialty shops—Interstate's involvement with a customer ordinarily results in the delivery of finished printed goods.

Interstate assigns as error in its first five assignments the findings of the district court regarding statutory specifications found in § 84-917 relating to substantial evidence, jurisdictional authority, errors of law, claimed arbitrary and capricious findings made by the commissioner, and findings contrary to the facts. Interstate also declares that the district court erred in failing to find that the prepress items were ingredients of the final product and entered into the final product and therefore were exempt under Neb. Rev. Stat. § 77-2702 (Reissue 1986).

A sales tax is imposed "upon the gross receipts from all sales of tangible personal property sold at retail in this state . . . ." Neb. Rev. Stat. § 77-2703(1) (Reissue 1986). A use tax is imposed "on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer . . . for storage, use, or other consumption in this state . . . ." § 77-2703(2).

The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce. See *Pepsi Cola Bottling Co. v. Peters*, 189 Neb. 271, 202 N.W.2d 582 (1972). If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies.

Section 77-2702(11)(a) and (20) provides exemptions from the sales and use taxes for materials that enter into and become an ingredient or component part of a product manufactured, processed, or fabricated for ultimate sale at retail. See *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989). Without the exemptions, such materials would in effect be taxed twice, once while in their original condition and then again as part of the final product.

Under § 77-2702(11)(a), "[r]etail sale or sale at retail" does not include the sale of "[t]angible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail." Interstate argues that a part of each item of the prepress, i.e., the image, "enters into and becomes an ingredient or component part of" the finished product sold to the customer, and therefore the sale of prepress items is exempt from the sales tax under § 77-2702(11)(a). According to Interstate, the image, defined by Interstate as the arrangement of matter in a manner perceived by the senses, is "tangible personal property" within the meaning of § 77-2702(18) ("personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses"), and the image enters into and becomes an essential ingredient or component part of the final printed product.

In making this argument, Interstate ignores the express language of the statute, which provides an exemption from the sales tax by excluding from the definition of "retail sale or sale at retail" *the sale of* tangible personal property which will enter into and become an ingredient or component part of the final product. Assuming, without deciding, that an image is tangible personal property, in the sales at issue Interstate was not selling an ingredient or component part of the finished printed product, i.e., the image; rather, it was selling items of prepress on which the image could be seen. The customer provides that "ingredient-component part" image by providing the camera-ready art and textual material, the image of which is to appear on the finished printed product.

Interstate uses items of prepress—camera negatives, flats, composite film (if necessary), and lithographic plates—not to supply the image but, rather, to *convey* the "ingredient-component part" image through the process to the finished printed product. (Excluded from the foregoing list of prepress items are the proofs, which are used to see what the image looks like but not to convey the image to the next prepress stage.) Use of the prepress items to convey the image is somewhat analogous to use of the cellulose casings at issue in

American Stores Packing Co. v. Peters, 203 Neb. 76, 277 N.W.2d 544 (1979), as a mold in the manufacture of skinless meat products. Like the cellulose casings, each item of prepress is merely an instrumentality or utensil used in the process and is not property being incorporated into the product.

As an alternative theory for entitlement to exemption, Interstate requests that the court apply § 77-2702(11)(a) in such a manner that the "and" between "enter into" and "become an ingredient or component part of" be read in the disjunctive as if it were an "or." Interstate points out that the exemption from the use tax found in § 77-2702(20) applies to tangible personal property "which will enter into *or* become an ingredient or component part" of the final product. (Emphasis supplied.) According to Interstate, if § 77-2702(11)(a) is not read in the disjunctive, it is theoretically possible that an item of tangible personal property which "enters into" but does not "become an ingredient or component part of" the final product will be exempt from tax if bought out of state, but subject to tax if bought in state. Interstate fails to explain how something can enter into the final product, other than accidentally or incidentally, and not become an ingredient or component part of the final product.

However, we need not decide whether to apply § 77-2702(11)(a) as if written in the disjunctive. Even if we were to do so, Interstate still would not be entitled to exemption from the sales tax for the sale of prepress items and from the use tax for the developing fluid.

Citing *State Bd. of Equalization v. Cheyenne Newspapers*, 611 P.2d 805 (Wyo. 1980), Interstate argues that the prepress items and developing fluid "enter into" the final product in an economic sense and therefore are exempt from sales and use taxes under § 77-2702(11)(a) and (20), whether or not the items "become an ingredient or component part of" the final printed product. Interstate's argument is unavailing. Nebraska's statutory scheme does not exclude from taxation material necessary to or consumed in the manufacturing process but which does not actually enter into the final product as an ingredient or component part. See *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989).

On a de novo review of the record, we find that Interstate has failed to prove that its sales of prepress items are exempt from the sales tax and that the developing fluid is exempt from the use tax. Therefore, the order of the district court affirming the order of the Tax Commissioner is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT ET AL., APPELLANTS AND CROSS-APPELLEES, V. FRED CONLEY ET AL., APPELLEES AND CROSS-APPELLANTS, OMAHA DEVELOPMENT FOUNDATION, A NEBRASKA NONPROFIT CORPORATION, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

459 N.W.2d 222

Filed August 17, 1990. No. 88-515.

1. **Mandamus.** To warrant the issue of a writ of mandamus against an officer to compel him to act, (1) the duty must be imposed on him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.
2. _____. A writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.
3. _____. Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
4. **Constitutional Law: Municipal Corporations: Ordinances.** Under the doctrine of separation of powers, courts should not inquire into the motives of legislators if an adopted ordinance is legislative in character.
5. **Municipal Corporations: Ordinances.** In determining whether the exercise of legislative authority by a city council is within its statutorily granted powers, a reviewing court is not concerned with motives, purposes, or personal beliefs of any individual council member.
6. **Judgments: Attorney Fees.** The right of a plaintiff to an award of attorney fees under Neb. Rev. Stat. § 25-2165 (Reissue 1989) is dependent upon the plaintiff's having recovered judgment.

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

Edward F. Fogarty, of Fogarty, Lund & Gross, and Dorothy M. Tubach for appellants.

Charles K. Bunger, Assistant Omaha City Attorney, and Frank F. Pospishil, of Abrahams, Kaslow & Cassman, for appellees and intervenor-appellee.

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

BOSLAUGH, J.

Mark Himes, a taxpayer, and an organization called People for Responsible Omaha Urban Development (PROUD) commenced this action against Fred Conley, the president of the Omaha City Council; the city council of the City of Omaha; and the City of Omaha (together, the City) to obtain a writ of mandamus. The Omaha Development Foundation intervened in the litigation.

In their petition filed March 8, 1988, the plaintiffs alleged that the Riverfront Redevelopment Plan, which was adopted by the city council on February 2, 1988, had been substantially modified from its first draft and that in accordance with the Nebraska Community Development Law, Neb. Rev. Stat. §§ 18-2101 et seq. (Reissue 1987), the City was required to conduct additional public hearings. The petition prayed that the matter of the redevelopment contract be laid over at the March 8, 1988, meeting of the city council, that a hearing on the redevelopment plan be noticed by publication for 2 weeks and be held at least 10 days later, and that a similar notice and hearing be had regarding the substantial modification of the plan.

After the petition had been filed, the City immediately commenced a series of meetings which were designed to meet the objections of the plaintiffs. An amended petition was filed on March 22, 1988. Thereafter, the plaintiffs and defendants filed motions for summary judgment.

On May 16, 1988, the trial court overruled the plaintiffs' motion and sustained the defendants' motion. The plaintiffs have appealed and contend the district court erred (1) in finding that the City's duty to hold additional hearings was not clearly compelled by § 18-2115, (2) in finding that the action had been mooted by reason of the City's holding additional public hearings, and (3) in failing to award to the plaintiffs attorney

fees and costs pursuant to Neb. Rev. Stat. § 25-2165 (Reissue 1989).

In a cross-appeal, the defendants and the intervenor contend that the district court erred in finding that the plaintiffs' request for more public hearings was a proper subject of mandamus. We conclude that mandamus was not an appropriate remedy in this case.

Neb. Rev. Stat. § 25-2156 (Reissue 1989) provides in part that "[t]he writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." In addition, this court has held that to warrant the issue of a writ of mandamus against an officer to compel him to act, (1) the duty must be imposed on him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. *State ex rel. Doe v. Mid-Neb. Retard. Serv.*, 214 Neb. 381, 333 N.W.2d 909 (1983); *State ex rel. Council #32 v. City of Hastings*, 214 Neb. 20, 332 N.W.2d 661 (1983).

A writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. Neb. Rev. Stat. § 25-2157 (Reissue 1989); *Larson v. City of Omaha*, 226 Neb. 751, 415 N.W.2d 115 (1987); *State ex rel. Greyhound Lines, Inc. v. City of Omaha*, 227 Neb. 676, 419 N.W.2d 539 (1988).

In *Larson v. City of Omaha, supra*, the plaintiffs sought a writ of mandamus, claiming that they had been denied a hearing by the City of Omaha in connection with the issuance of a building permit. In affirming the judgment of the district court denying the writ, this court stated:

> Although the trial court made certain findings of fact and law pertaining to the merits of plaintiffs' contention, it concluded that the demurrers of the defendant and the intervenors should have been sustained on the basis of the plaintiffs' having an adequate remedy available by way of declaratory judgment action and by injunctive relief. We agree with the conclusion of the district court.

Id. at 751-52, 415 N.W.2d at 116.

In *State ex rel. Greyhound Lines, Inc. v. City of Omaha,*

supra, the district court denied Greyhound's petition for writ of mandamus in which Greyhound sought to compel the City of Omaha to revoke a lease involving an alley adjacent to Greyhound's building in Omaha. Although the district court determined the case on its merits, this court affirmed the judgment on the ground that Greyhound had other plain and adequate remedies in the ordinary course of the law:

> By action and by oral admission, Greyhound admittedly had, at the time of filing its petition, at least two plain and adequate remedies in the ordinary course of law available to it. Greyhound had already filed a law action . . . in the Douglas County District Court. At oral argument in this court, Greyhound's counsel admitted that the remedy of injunction was available to his client when the petition for writ of mandamus was filed.

Id. at 676-77, 419 N.W.2d at 539.

In the present case, the record contains a statement of counsel for the plaintiffs in which it was admitted they had other adequate remedies at law to accomplish their purposes. In a letter dated March 23, 1988, plaintiffs' counsel informed Mayor Bernie Simon, defendant Conley, and the Omaha City Council:

> PROUD demands that the City move immediately to suspend any further action on the Riverfront Development Plan contract until the aforementioned areas are corrected. If this action is not forthcoming, PROUD will file a lawsuit seeking declaratory relief in the above areas and such other equitable remedies as would be appropriate in the circumstances, including stopping bond and other funding.

Although we determine that mandamus was not a proper remedy in this case because the plaintiffs had plain and adequate remedies in the ordinary course of the law available to them at the time this action was filed, we have considered the plaintiffs' contention that the additional public meetings held by the City were void as sham meetings.

In *State ex rel. Hilt Truck Line v. Peterson*, 215 Neb. 81, 86, 337 N.W.2d 133, 136 (1983), we said:

> Mandamus is available to enforce the performance of

> ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. The general rule is that an act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.

See, also, *Singleton v. Kimball County Board of Commissioners*, 203 Neb. 429, 279 N.W.2d 112 (1979).

In order to determine the validity of the additional hearings, the district court would have been required to examine the motives of the city council and the planning board. However, under the doctrine of separation of powers, courts should not inquire into the motives of legislators if an adopted ordinance is legislative in character. *Copple v. City of Lincoln*, 202 Neb. 152, 274 N.W.2d 520 (1979). Furthermore, in determining whether the exercise of legislative authority by a city council is within its statutorily granted powers, a reviewing court is not concerned with motives, purposes, or personal beliefs of any individual council member. *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984).

In their final assignment of error, the plaintiffs contend that they are entitled to an award of attorney fees because if the City succeeded in mooting the lawsuit by holding the meetings the plaintiffs demanded, and assuming that such meetings were not defective as shams, then the plaintiffs clearly prevailed, and the court erred in failing to order the plaintiffs' fees and costs paid pursuant to § 25-2165. Section 25-2165 provides:

> If judgment be given for the plaintiff, he or she shall recover the damages which he or she shall have sustained, to be ascertained by the court or a jury, or by referees, in a civil action, and a peremptory mandamus shall also be granted to him or her without delay. In addition to damages the court may also award costs and reasonable attorney's fees. The costs and attorney's fees shall be paid by the governmental body represented by the public official or employee.

The statute plainly requires that "judgment be given for the plaintiff." As there was no judgment for the plaintiffs, neither damages nor costs nor attorney fees may be awarded pursuant to § 25-2165. The assignment of error is without merit.

Because the plaintiffs had plain and adequate remedies in the ordinary course of the law available to them, mandamus was not a proper remedy, and the order of the district court granting the defendants' motion for summary judgment is affirmed. The plaintiffs were not entitled to attorney fees pursuant to § 25-2165.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., not participating.

MARVIN L. BELGUM, BY AND THROUGH HIS WIFE AND NEXT FRIEND, LOREEN L. BELGUM, CONSERVATOR OF THE ESTATE OF MARVIN L. BELGUM, APPELLANT, V. MITSUO KAWAMOTO & ASSOCIATES, INC., AND DENNIS PETERS, APPELLEES.

459 N.W.2d 226

Filed August 17, 1990. No. 88-572.

1. **Directed Verdict: Appeal and Error.** On appeal from the granting of a motion for a directed verdict, the Supreme Court reviews the evidence in the light most favorable to the party against whom the motion is directed, and that party is entitled to have all controverted facts resolved in his favor and to have the benefit of all inferences which can reasonably be drawn from the evidence.
2. **Negligence: 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.
3. **Negligence: Words and Phrases.** An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
4. **Trial: Juries: Directed Verdict.** When reasonable minds can draw but one conclusion from the facts, the trial court must decide the issue as a matter of law and not submit it to a jury.

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

Richard A. Douglas, of Winner, Nichols, Douglas, Kelly and Arfmann, P.C., for appellant.

Joy Shiffermiller and J.L. Zimmerman, of Atkins Ferguson Zimmerman Carney, P.C., for appellees.

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

GRANT, J.

Plaintiff-appellant, Marvin L. Belgum, filed an amended petition in the Scotts Bluff County District Court against several defendants, including defendants-appellees, Dennis Peters and his employer, Mitsuo Kawamoto & Associates, Inc. (Kawamoto). Defendant Kawamoto is an architectural firm hired by Monument Mall Associates, Inc., to plan the building of a mall in Scotts Bluff County. Defendant Peters was Kawamoto's project representative. Only Kawamoto and Peters are appellees in this appeal.

Belgum alleged in his petition that he worked on the mall's construction as an employee of B.W. Harris Masonry Construction (Harris). Harris was a subcontractor hired to install masonry at the mall. Belgum further alleged that as a result of the negligent acts and omissions of the defendants, he fell from a scaffold and sustained serious personal injuries on January 22, 1986.

Kawamoto and Peters separately answered. Each denied any negligence and alleged that Belgum assumed the risk of his injuries and, in any event, Belgum's injuries were caused by the intervening negligence of Belgum's employer and by Belgum's own contributory negligence. In a trial before a jury, appellees moved for a directed verdict at the close of Belgum's evidence. The court granted appellees' motion, stating orally that even if appellees had breached a duty owed Belgum, Belgum failed to show appellees' negligence was a proximate cause of his injuries.

Belgum timely appealed, setting out four assignments of error, which may be consolidated into three, alleging that the trial court erred (1) in finding that appellees' contract with the owner did not create a duty on the part of appellees to ensure the safety of the workers, (2) in finding that appellees' professional standard of care was different from that shown in the evidence offered by Belgum's experts, and (3) in finding that

the acts and omissions of appellees were not the proximate cause of Belgum's injuries as a matter of law.

On appeal from the granting of a motion for a directed verdict, the Supreme Court reviews the evidence in the light most favorable to the party against whom the motion is directed, and that party is entitled to have all controverted facts resolved in his favor and to have the benefit of all inferences which can reasonably be drawn from the evidence. *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990).

The record shows the following facts as resolved in favor of Belgum. Peters had prepared the specifications, bids, and various contracts on the mall project for Kawamoto and had visited the construction site at least monthly. The contract between Kawamoto and the owner of the building provided, in part:

> The Architect shall not have control or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, for the acts or omissions of the Contractor, Subcontractors or any other persons performing any of the Work, or for the failure of any of them to carry out the Work in accordance with the Contract Documents.

There was testimony that architect-owner contracts before 1976 gave the architect authority to stop construction work, but after 1976, that authority was taken from the architect and given to the owner, while the architect was given "authority to reject Work which does not conform to the Contract Documents."

When Peters was at the construction site in November or December 1985, a superintendent for a dry wall subcontractor also working on the mall told Peters that the scaffold, which had been rented and primarily used by Harris, was shaky and substandard. In December 1985, the same superintendent informed Peters that the scaffold was deficient and without "any safety ends." No guardrails were affixed to the scaffold following these conversations.

On the morning of January 22, 1986, Belgum was performing masonry work approximately 15 to 18 feet above

the ground on an outrigger section of the scaffold. The scaffold was positioned next to a building wall that was under construction at the time. The scaffold was not in any way attached or tied to the wall, nor were there any guardrails or toeboards on the scaffold. The outrigger on which Belgum was working before the accident consisted of a triangular brace attached to the scaffold, with two planks laid across it. Belgum had been standing on the planks marking off hangers on the wall in preparation for brickwork just before he fell. Three witnesses observed Belgum as he fell to the ground, but did not see the start of the fall.

Peters had been on the scaffold within a week before the accident. The scaffold on that day, like on the day of the accident, was open ended. Peters testified by deposition that he did not observe any guardrails or toeboards on the scaffold. The lack of guardrails constituted violations of industry standards, Occupational Safety and Health Administration standards, and the local building code. Peters admitted he did not inquire into whether safety precautions were being met because he did not consider himself qualified to advise on safety matters. Peters was not a licensed architect, but considered himself an architectural technician. He stated he was unaware of OSHA requirements on safety and unfamiliar with the industry standards concerning scaffolding. Peters testified that he felt it was the responsibility of the individual contractors to take care of safety.

Other testimony showed that during the 2 1/2 months before the accident, the project manager for the contractor, the site superintendent for the contractor, and the owner of the masonry company which furnished the scaffold had discussions concerning complaints about the scaffolding. The project manager testified that he relied on the site superintendent to see that the problem was corrected. The site superintendent testified that he told the owner of the masonry company during the course of the project to affix guardrails to the scaffold, but it was never done. The city building inspector, who had authority to stop work if he saw safety deficiencies, testified that he was at the construction site two to three times a day, but that he never noticed the unsafe scaffold.

With respect to Belgum's first two assignments of error, we will assume, as the trial court specifically did, that appellees owed a duty to Belgum. The situation presented in this case is far different from the facts in *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972), relied on by Belgum. In the *Simon* case, the architect had accepted a substantial obligation on safety matters not only by written contract, but by the architect's supervisory conduct. The *Simon* architect acted as onsite supervisor of the construction project and assumed the responsibility for conducting safety meetings and daily safety inspections throughout the course of the construction project in that case.

Nonetheless, we assume, without deciding, that the evidence shows that appellees owed a duty to Belgum in this case.

Belgum contends:

> It was the failure of the architect in allowing this unsafe condition to exist and by failing to warn the owner and others of unsafe conditions and by failing to perform the architect's supervisory activities in a reasonable manner which resulted in the unsafe condition being present on the morning of January 22, 1986, which unsafe condition caused Mr. Belgum's fall.

Brief for appellant at 27-28.

Assuming appellees breached the standard of care required by the architectural community, it is fundamental in a negligence action that Belgum establish that appellees' negligence is the proximate cause of the damage sued upon. See *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989).

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. *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989). We have phrased proximate cause another way, in terms of three requirements. The first requirement is that the negligence be the cause in fact or be such that without it the injury would not have occurred, commonly known as the "but for" rule. The second requirement is that the injury be the natural and probable result of the negligence. The

third requirement is that there be no efficient intervening cause. See *Worth v. Schillereff, supra.*

Ordinarily, the determination of proximate cause is a matter for the trier of fact. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990). The reason the issue of proximate cause was not submitted to the jury in this case is that Belgum did not prove by a preponderance of the evidence that appellees' negligence was the proximate cause of his injury.

In defining "efficient intervening cause," we stated in *Shelton v. Board of Regents*, 211 Neb. 820, 825, 320 N.W.2d 748, 752 (1982):

> An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Coyle v. Stopak, supra.* In *Coyle, supra* at 606-07, 86 N.W.2d at 768, we further said: " 'The causal connection is broken if between the defendant's negligent act and the plaintiff's injury "there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff." ' "

The record in this case contains much evidence with regard to intervening acts of negligence of others. Other individuals had "full control of the situation." The project manager, site superintendent, and masonry subcontractor were all aware of the unsafe nature of the scaffold before Belgum's accident occurred. In addition, the building inspector visited the site at least daily, but failed to notice the scaffold in its unsafe condition. We determine that these acts or omissions of others were sufficient to break the causal connection between any acts of the appellees and Belgum's injury, particularly in view of the fact that the architects had no authority to stop work on the job, which resulted in a situation where if appellees had given warnings to all concerned, it is only speculation to believe that such warnings would have been heeded.

On a defendant's motion for a directed verdict in a jury trial of a negligence action, the trial court must decide whether the defendant is guilty of negligence, and, if so, must then decide

whether evidence is such that only one reasonable conclusion is permissible. *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988). If there is any evidence which will sustain a finding for the party against whom the motion was made, the case may not be decided as a matter of law. *Bray v. Kate, Inc.*, 235 Neb. 315, 454 N.W.2d 698 (1990). However, " '[w]hen reasonable minds can draw but one conclusion from the facts, the trial court must decide the issue as a matter of law and not submit it to a jury.' " *Elson v. Pool*, 235 Neb. 469, 471, 455 N.W.2d 783, 785 (1990). Based on the evidence provided at trial, we determine that the trial court acted properly in deciding the issue as a matter of law. Even if appellees were negligent, it cannot be said that appellees' alleged negligence was the proximate cause of Belgum's injury.

The judgment of the district court is affirmed.

AFFIRMED.

JOSEPH MATRISCIANO, APPELLANT, V. BOARD OF EDUCATION OF BRADY SCHOOL DISTRICT NO. 6, LINCOLN COUNTY, NEBRASKA, APPELLEE.

459 N.W.2d 230

Filed August 17, 1990. No. 88-643.

1. **Schools and School Districts: Teacher Contracts.** Under Neb. Rev. Stat. § 79-12,107 (Reissue 1987), a superintendent of schools is a probationary certificated employee.
2. **Schools and School Districts: Teacher Contracts: Notice.** The notice required under Neb. Rev. Stat. § 79-12,111(3) (Reissue 1987) refers to nonrenewal or amendment of the contract of a probationary certificated employee for the next school year.
3. **Schools and School Districts: Teacher Contracts: Due Process.** Under Neb. Rev. Stat. § 79-12,111(8) (Reissue 1987), a probationary employee is entitled to only an informal hearing, not a formal due process hearing.
4. **Statutes.** Courts must not read into a statute a meaning which is not warranted by the legislative language.
5. **Statutes: Appeal and Error.** This court will not resort to interpretation to ascertain the meaning of statutory language which is plain, direct, and unambiguous.

6. **Schools and School Districts: Teacher Contracts: Notice.** Under Neb. Rev. Stat. § 79-12,111(6) and (7) (Reissue 1987), relating to amendment or nonrenewal of the contract of employment of a probationary certificated employee, the employee is entitled to confidential treatment of the notice and reasons supporting possible amendment or nonrenewal of the contract of employment only if requested by the employee.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Steven D. Burns and Beverly Evans Grenier, of Burns & Grenier, P.C., for appellant.

Kay & Kay for appellee.

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

BOSLAUGH, J.

This case arose out of a controversy between the plaintiff, Joseph Matrisciano, and the defendant, the board of education of Brady School District No. 6, Lincoln County, Nebraska, concerning a contract of employment. On September 9, 1985, the parties entered into a written contract for the employment of the plaintiff as superintendent of schools for a period of 2 years commencing July 1, 1985, and expiring July 1, 1987.

Section 15 of the contract provided: "Failure to notify the SUPERINTENDENT in writing no later than one full year prior to the termination of the contract of the Board's intent not to renew the contract shall automatically result in a one-year extension of the existing contract." Since the district did not notify the plaintiff "one full year" prior to July 1, 1987, the contract automatically was extended to July 1, 1988.

At a regular meeting held on June 8, 1987, the board of education voted unanimously to not renew the plaintiff's contract. On June 15, 1987, the board notified the plaintiff in writing of its decision not to renew his contract. This notice satisfied the requirement of section 15 of the contract and avoided a second automatic extension of the contract to July 1, 1989. The notice, however, had no effect on the plaintiff's employment for the 1987-88 school year.

In a letter to the board dated June 12, 1987, the plaintiff

requested a hearing. In a letter dated June 29, the board responded that a hearing was premature because the action at the meeting of June 8 and the letter of June 15 were notice of the board's intent not to renew in satisfaction of section 15 of the contract and that the board was not required to give notice of an intent not to offer a contract of employment for the 1988-89 school year until April 15, 1988.

In a letter to the plaintiff dated February 1988, the board notified the plaintiff that it was considering nonrenewal of his contract for the 1988-89 school year. In a letter to the board dated February 16, 1988, the plaintiff requested a due process hearing regarding his employment for the 1988-89 school term.

In a letter to the plaintiff dated March 9, 1988, the board notified the plaintiff that an informal hearing regarding nonrenewal of his contract for the 1988-89 school year would be held on March 14. The letter further advised the plaintiff of the reasons for consideration of nonrenewal of his contract.

Matrisciano filed this action in the district court on March 9, 1988. The petition alleged four causes of action.

Cause of action I prayed for a judgment declaring that the defendant had breached the contract. Cause of action II prayed for an injunction restraining the defendant from conducting an informal hearing. Cause of action III prayed for damages for breach of contract. Cause of action IV prayed for damages for oppression under color of office, in violation of Neb. Rev. Stat. § 28-926 (Reissue 1989).

On March 14, the trial court granted a temporary injunction restraining the board from holding the hearing that had been scheduled for that day and set the case for trial on June 1, 1988. Trial on the first two causes of action commenced on June 1.

The trial court found that the notice to the plaintiff on June 15, 1987, prevented an automatic extension of the contract under section 15 of the contract beyond July 1, 1988. The trial court further found that the district had complied with Neb. Rev. Stat. § 79-12,114 (Reissue 1987), dismissed the first two causes of action, and dissolved the temporary injunction. On June 3, 1988, the trial court dismissed the last two causes of action.

The plaintiff has appealed and contends the trial court erred

in finding that Neb. Rev. Stat. § 79-12,111(3) (Reissue 1987) did not apply to section 15 of the contract.

The statutes provide separate procedures for nonrenewal of contracts of probationary and tenured employees. Since the plaintiff was employed as a superintendent of schools, he is considered to be a probationary certificated employee. Neb. Rev. Stat. § 79-12,107 (Reissue 1987).

Section 79-12,111 provides the procedures relating to the nonrenewal of contracts of probationary certificated employees in Nebraska's public schools, in pertinent part, as follows:

> (3) In the event that the school board or superintendent or superintendent's designee should determine that it is appropriate to consider whether the contract of a probationary certificated employee or the superintendent should be amended or not renewed *for the next school year*, such certificated employee shall be given written notice that the school board will consider the amendment or nonrenewal of such certificated employee's contract for the ensuing school year. Upon request of the certificated employee, notice shall be provided which shall contain the written reasons for such proposed amendment or nonrenewal and shall be sufficiently specific so as to provide such employee the opportunity to prepare a response and the reasons set forth in the notice shall be employment related.
>
> . . . .
>
> (5) Within seven calendar days after receipt of the notice, the probationary certificated employee may make a written request to the secretary of the school board or the superintendent or the superintendent's designee for a hearing before the school board.
>
> (6) Prior to scheduling of action or a hearing on the matter, *if requested*, the notice of possible amendment or nonrenewal and the reasons supporting possible amendment or nonrenewal shall be considered a confidential employment matter as provided in sections 79-4,156 to 79-4,158 and 84-1410 and shall not be released to the public or any news media.

(7) At any time prior to the holding of a hearing or prior to final determination by the school board to amend or not renew the contract involved, the probationary certificated employee *may* submit a letter of resignation for the ensuing year, which resignation shall be accepted by the school board.

(8) The probationary certificated employee shall be afforded a hearing *which shall not be required to meet the requirements of a formal due process hearing* as set forth in section 79-12,115, but shall be subject to *section 79-12,116.*

(Emphasis supplied.)

The notice referred to in § 79-12,111(3) relates to nonrenewal of a contract of employment *for the next school year.* The notice referred to in section 15 of the contract relates to the school year following the next school year. The finding of the trial court was correct, and the plaintiff's assignment of error is without merit.

Under § 79-12,111(8), a probationary employee is entitled to only an informal hearing, not a formal due process hearing as the plaintiff contends. There is no merit in the plaintiff's contention to the contrary.

The language of the statute is direct and its meaning is clear. Courts must not read into a statute a meaning which is not warranted by the legislative language. *Anderson v. Autocrat Corp.*, 194 Neb. 278, 231 N.W.2d 560 (1975). This court will not resort to interpretation to ascertain the meaning of statutory language which is plain, direct, and unambiguous. *In re Interest of G.B., M.B., and T.B.*, 227 Neb. 512, 418 N.W.2d 258 (1988).

The district court properly construed the contract and the applicable Nebraska statutes. Section 79-12,111(3) applies only to nonrenewal for the next school year. That language is clear and unambiguous. The action of the board at its regular meeting on June 8, 1987, and the June 15, 1987, letter to the plaintiff related solely to the renewal provision in the contract for the 1988-89 school year, and not to the next school year, which was the 1987-88 school year.

The plaintiff argues that he was entitled to notice and a hearing prior to the action taken by the board on June 8, 1987.

However, since the action of the board at its June 8 meeting was not final action on the plaintiff's employment for the 1988-89 school year, there was no statutory requirement of notice and hearing. The action related solely to section 15 of the contract. The board was complying with the notification requirement in section 15 of the contract, so as to prevent an automatic 1-year extension of the contract.

Section 79-12,111(3) pertains to nonrenewal "for the next school year." The action taken by the board on June 8, 1987, involved the 1988-89 school year. It did not involve the next school year, which was the 1987-88 school year. Accordingly, § 79-12,111(3) did not apply to the action by the board on June 8.

The board complied with §§ 79-12,111(3) and 79-12,114 by giving notice to the plaintiff in February 1988 that it was considering nonrenewal of his contract of employment with the school district for the 1988-89 school year.

The plaintiff contends that the district court's decision "destroyed statutory rights to confidentiality and private resignation; rights to which [he] was otherwise entitled" under §§ 79-12,111(6) and (7). Brief for appellant at 7. Section 79-12,111 applies to action by the board concerning the next school year. The action taken on June 8, 1987, did not concern the next school year.

Furthermore, § 79-12,111(6) provides for confidentiality of the notice of nonrenewal and the reasons supporting such decision *if requested* by the employee. There is nothing in the record to show that the plaintiff made such a request.

Section 79-12,111(7) provides that an employee *may* resign at any time prior to the hearing or prior to final determination by the school board and that such a resignation shall be accepted by the board. There is nothing in the record showing that the plaintiff tendered his resignation to the board prior to the hearing that was scheduled on this matter.

The district court was correct in finding that § 79-12,111 did not apply to the board's action on June 8, 1987, and the letter of June 15, 1987, and that the board had complied with the appropriate statutory requirements in February and March 1988. The plaintiff's causes of action for damages for breach of

contract and for oppression under color of office, which causes included breach of the duty of confidentiality and the right of resignation, were properly dismissed.

The judgment of the district court is affirmed in all respects.

AFFIRMED.

ROBERT PARRETT, APPELLANT, V. PLATTE VALLEY STATE BANK & TRUST CO., APPELLEE.

459 N.W.2d 371

Filed August 17, 1990. No. 88-654.

1. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Uniform Commercial Code: Banks and Banking: Corporations: Liability.** Under Neb. U.C.C. § 4-402 (Reissue 1980), a depository bank's liability, under certain circumstances, may extend to a corporate officer as a "customer" who has signed a check drawn on the bank when the bank dishonors the check signed by the corporate officer on behalf of the corporation.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with direction.

Michael G. Helms and Mark R. Scherer, of Schmid, Mooney & Frederick, P.C., for appellant.

William T. Wright, of Jacobsen, Orr, Nelson, Wright & Harder, P.C., for appellee.

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

PER CURIAM.

Robert Parrett appeals from the judgment of the district court for Buffalo County which sustained the demurrer of Platte Valley State Bank & Trust Co. and dismissed Parrett's suit.

> "When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial."

Security Inv. Co. v. State, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989); *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988).

Parrett was the principal shareholder, president, and chief operating officer of P & P Machinery, Inc., a Nebraska corporation engaged in the business of buying and selling farm machinery. P & P Machinery had its principal place of business in Kearney, Nebraska, where the bank was located.

For several years before March 1984, the bank provided operating loans and financing to P & P Machinery, which had its checking account at the bank. Parrett personally participated in the business relationship between P & P Machinery and the bank, including Parrett's personal guaranty to the bank for all obligations owed by P & P Machinery to the bank. Also, Parrett was authorized to sign checks drawn on P & P Machinery's account at the bank.

On March 1, 1984, Parrett signed and delivered a check from P & P Machinery to Nelson Farm Equipment at Madison, South Dakota, for the purchase of farm machinery and equipment. Later, on March 7, the bank dishonored the check to Nelson Farm Equipment and returned the check without payment, although, when the check was presented for payment, P & P Machinery had sufficient funds in its account with the bank to pay the check. As a result of the dishonored check, Parrett was charged with felony theft in South Dakota and was extradited from Nebraska to stand trial in Lake County, South Dakota. Parrett went to trial on the charge in South Dakota. However, at trial the court dismissed the charge against Parrett.

Parrett sued the bank for damages proximately caused by the bank's dishonor of the P & P Machinery check signed by Parrett and alleged three causes of action: (1) the bank's negligence in

failing to pay the check to Nelson Farm Equipment; (2) the bank's wrongful dishonor of the check, which, pursuant to Neb. U.C.C. § 4-402 (Reissue 1980), resulted in the bank's liability to Parrett for damages; and (3) the bank's breach of its duty of good faith performance under Neb. U.C.C. § 1-203 (Reissue 1980).

The bank filed a demurrer to Parrett's amended petition, alleging that Parrett had not pled facts sufficient to constitute a cause of action against the bank. After the hearing on the bank's demurrer, the court stated:

> It is the conclusion of this Court that the Plaintiff has no standing to maintain the action in his own name. The Plaintiff was not the account holder nor the "customer" in the statutory meaning. If the negligence of the Defendant Bank caused damage to its customer, the corporation, or if the wrongful dishonor resulted in damages to the customer, the corporation is the sole and only entity capable of bringing the action. The officer or shareholder of the corporation is not authorized to recover in a derivative sense and therefore the Demurrer must be sustained.

The district court then sustained the demurrer and dismissed Parrett's petition.

In Parrett's appeal, the sole issue is whether Parrett, as president and principal shareholder of P & P Machinery, is the bank's "customer" under § 4-402, which provides in part: "A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item." "Customer" is defined as "any person having an account with a bank or for whom a bank has agreed to collect items . . . ." Neb. U.C.C. § 4-104(1)(e) (Reissue 1980).

In *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966), Loucks and Martinez, as partners, had a partnership checking account at Albuquerque National. The bank dishonored the partnership's check after it had improperly charged the partnership account with a payment on a debt owed by Martinez. Loucks and Martinez individually sued the bank for wrongful dishonor of the partnership check. Under New Mexico law, a partnership was a legal entity distinct

from the partners and was entitled to sue in the partnership name. New Mexico, which had adopted the Uniform Commercial Code, had statutes containing the same language as Neb. U.C.C. §§ 4-402 and 4-104(1)(e). In determining that Loucks and Martinez, as individuals, had no cause of action against the bank for the alleged wrongful dishonor, the court stated:

> It would seem that logically the "customer" in this case to whom the bank was required to respond in damages for any wrongful dishonor was the partnership. . . .
>
> . . . .
>
> The question of whether a wrongful dishonor is to be considered as a breach of contract or as a breach of a tort duty was apparently avoided by the drafters of the Uniform Commercial Code by using the words "wrongful dishonor." . . .
>
> We have not overlooked the fact that tortious conduct may be tortious as to two or more persons, and that these persons may be the partnership and one or more of the individual partners. [Citation omitted.]
>
> The relationship, in connection with which the wrongful conduct of the bank arose, was the relationship between the bank and the partnership. The partnership was the customer, and any damages arising from the dishonor belonged to the partnership and not to the partners individually.
>
> . . . .
>
> . . . No duty was owed to [Loucks] personally by reason of the debtor-creditor relationship between the bank and the partnership.

76 N.M. at 742, 744, 418 P.2d at 196-97.

A cause of action for a bank's wrongful dishonor of checks was presented in *Kendall Yacht Corp. v. United California Bank*, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975). Lawrence and Linda Kendall were officers and prospective principal shareholders of Kendall Yacht Corporation, which maintained its checking accounts at United California Bank. The corporation never issued stock. Both Kendalls executed their personal guaranties for the bank's loans to the corporation.

Under the financing arrangements approved by one Ron Lamperts, a bank loan officer, the bank honored the corporation's checks, although there were sometimes insufficient funds in the corporation's account to pay the checks. The bank dishonored checks from the corporation. After the corporation collapsed, criminal charges were brought against Linda Kendall, but the charges were dismissed before trial. Kendalls sued the bank for its wrongful dishonor of the corporation's checks and were awarded a judgment for damages. The bank appealed. In affirming the judgment for the Kendalls, the court stated:

> The Bank contends first that under Commercial Code section 4402 the wrongful dishonor of a check of a *corporation* does not give a cause of action for damages to individual officers and shareholders of the corporation. California Uniform Commercial Code section 4402, which represents section 4-402 of the Uniform Commercial Code, reads as follows: "A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved." The Bank relies on *Loucks v. Albuquerque National Bank* 76 N.M. 735 [418 P.2d 191], where it was held that under Uniform Commercial Code section 4-402 individuals doing business as partners could not recover for damages to their personal credit, good reputation, and business standing which resulted from the wrongful dishonor of checks written on the partnership account....
>
> It is not clear whether the New Mexico court meant to say that in every case where an account stands in the name of a partnership or a corporation, only the business entity may recover under section 4-402, regardless of the circumstances. Such a narrow and technical reading of the statute and the term "customer" does not seem warranted. The purpose of the statute—to hold banks accountable for damages proximately caused by wrongful dishonors—is more readily served by allowing a flexible and reasonable interpretation of the word "customer."

> We would certainly not hold as a general proposition that the shareholders or officers of a corporation could recover under section 4402 for the wrongful dishonor of a corporation check. Here, however, it is difficult to avoid the conclusion that Mr. and Mrs. Kendall were as much "customers" of the Bank within the contemplation of the statute as was the Corporation. Lamperts and the Bank looked directly to the Kendalls to satisfy the obligations of the Corporation. They were required to execute a personal guarantee of the initial $14,000 loan, and later they were required to increase that guarantee to $20,000 to cover the additional credit the Bank was extending to the Corporation in the form of honoring its overdrafts. The reason the Bank required the guarantees is obvious. The Corporation had never issued shares and was undercapitalized; it was, in effect, nothing but a transparent shell, having no viability as a separate and distinct legal entity. The Kendalls alone were controlling its financial affairs and were personally vouching for its fiscal responsibility. Not only the Bank, but also the suppliers and employees of the Corporation knew that this was the situation. . . . Thus it was entirely foreseeable that the dishonoring of the Corporation's checks would reflect directly on the personal credit and reputation of the Kendalls and that they would suffer the adverse personal consequences which resulted when the Bank [dishonored the checks]. Under these circumstances we would elevate form over substance if we were to hold that the wrong defined by section 4402 was done only to the Corporation and that the Kendalls as individuals could not recover.

(Emphasis in original.) 50 Cal. App. 3d at 955-56, 123 Cal. Rptr. at 852-53.

In *Murdaugh Volkswagen v. First Nat. Bank of S.C.*, 801 F.2d 719 (4th Cir. 1986), the court of appeals affirmed a judgment for Eunice Murdaugh, who had sued the bank for wrongful dishonor of corporate checks drawn on the bank. Murdaugh, as the president and sole shareholder of Murdaugh Volkswagen, Inc., contacted the bank for a Small Business Administration loan to the corporation. In connection with the

loan, the bank obtained a mortgage on Murdaugh's home. In the course of its financial transactions with Murdaugh, the bank used moneys from the corporate reserve accounts, without authorization or accounting, to pay loan payments of the corporation and the debts of Murdaugh's husband. An assistant vice president of the bank was assigned to monitor the corporate checking account of Murdaugh Volkswagen, Inc., and to decide daily which corporate checks would be paid and which deposits were credited to the corporation's account. Only checks approved by the bank's officer were honored. Although the balance in the corporate account exceeded the amount of certain checks drawn by Murdaugh Volkswagen, Inc., the bank dishonored the corporation's checks, which was the first time in 20 years of business with the bank that any check had been returned to Murdaugh Volkswagen, Inc. Eunice Murdaugh sued the bank and claimed that the bank's wrongful dishonor of the checks led to ruination of her automobile dealership, which eventually filed for bankruptcy. Also, the mortgage on the Murdaugh home was foreclosed. In *Murdaugh Volkswagen*, the court concluded:

> According to the Bank, Mrs. Murdaugh has no standing to assert a claim for wrongful dishonor or defamation because there was no proof that she had an account with the Bank and she was not a customer of the Bank within the meaning of S.C.Code Ann. §§ 36-4-402 and 36-4-104. We conclude that the Bank's construction of the South Carolina statutes is unjustifiably narrow. In this case, the evidence demonstrates the close intertwinement between Mrs. Murdaugh and her company, of which she was president and sole stockholder. Moreover, the Bank clearly treated Mrs. Murdaugh and the corporate depositor as one entity. . . . More importantly, the Bank consistently and repeatedly looked to Mrs. Murdaugh to assume the corporation's obligations by requiring her to mortgage her own home and personally borrow funds for the company's benefit. At least under the facts presented by this case, we hold that Mrs. Murdaugh was a customer of the Bank under South Carolina law . . . .

801 F.2d at 725.

A result similar to that in *Kendall Yacht Corp. v. United California Bank*, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975), and *Murdaugh Volkswagen v. First Nat. Bank of S.C., supra*, is found in *C-K Enterprises v. Depositors Trust Co.*, 438 A.2d 262 (Me. 1981), in which Christine Kyllonen owned two businesses which were transferred to C-K Enterprises, Inc. Kyllonen opened a checking account at Depositors Trust for C-K Enterprises and was the person empowered to draw checks on the corporate account. The court affirmed a verdict for Kyllonen in her action against the bank for wrongful dishonor of checks drawn on the account of C-K Enterprises, stating:

> [Depositors Trust] argues that plaintiff Kyllonen had no standing to sue because she had conveyed all of her interests in the two businesses to C-K Enterprises, Inc. four years before the commencement of this action. We disagree. Although the names on the accounts did not accurately reflect the business status of plaintiff, she was the depositor and signer of the checks as well as the person regarded by the bank as its customer. Damages caused by any mishandling of the accounts by the bank would necessarily have redounded to Kyllonen. As she alleged and subsequently proved, her individual business reputation and peace of mind were damaged by defendant's actions. Without doubt plaintiff Kyllonen's "definite and personal legal rights" are sufficiently at stake in this action to establish her standing.

438 A.2d at 264.

A corporate officer's cause of action against a bank for wrongful dishonor of checks signed by the officer and drawn on the corporation's account was recognized in *Karsh v. American City Bank*, 113 Cal. App. 3d 419, 169 Cal. Rptr. 851 (1980). Karsh was the president and sole owner of the corporation, Trio Consolidated Corporation, which, apparently, never issued stock. When the bank dishonored Trio's checks, Karsh sued for wrongful dishonor. The bank's demurrer was sustained on the theory that only the corporation, which was the nominal depositor, could maintain an action against the bank for wrongful dishonor. However, the court in *Karsh* reversed the dismissal by the trial court and

stated:

> In the case at bench, as in *Kendall*, it is alleged that the nominal depositor corporation "had not issued any stock of said corporation, was undercapitalized and was a transprent [sic] shell, having no viability as a separate and distinct legal entity, and plaintiff is informed and believes and based upon such information and belief all to the knowledge of defendants, and each of them. Plaintiff, alone, controlled the corporation's financial affairs and personally vouched for its fiscal responsibility both to defendant BANK through its employees, including but not limited to, defendant SEEMAN and to the public at large" and that "At all times mentioned herein, defendant BANK dealt directly with plaintiff, looked personally to plaintiff and required plaintiff to personally guarantee and satisfy all obligations of TRIO to defendant BANK as they would arise. . . . Plaintiff personally, and not in the capacity of a corporate officer, satisfied corporate debts to defendant BANK through the use of plaintiff's own personal monies as defendant BANK required and plaintiff guaranteed to do."

113 Cal. App. 3d at 421-22, 169 Cal. Rptr. at 852. See, also, *First Nat'l Bank of Springdale v. Hobbs*, 248 Ark. 76, 450 S.W.2d 298 (1970) (corporation's president was a customer of the bank, which was liable to the corporation's president when the bank wrongfully honored unauthorized checks written on the corporation's account).

However, several courts have refused to recognize a corporate officer's cause of action for a bank's wrongful dishonor of a check signed by the officer and drawn on the corporation's account. For example, in *Farmers Bank v. Sinwellan Corporation*, 367 A.2d 180 (Del. 1976), Sinwellan Corporation had a checking account at Farmers Bank. P.A. Sinclair, president of Sinwellan, sued the bank for its wrongful dishonor of Sinwellan checks. The Supreme Court of Delaware held that Sinclair was not a "customer" of Farmers Bank and, therefore, did not have a cause of action, and stated:

> 6 Del.C. § 4-402 provides that a "bank is liable to its customer for damages proximately caused by the

> wrongful dishonor of" a check. And in § 4-104(1)(e) a "customer" is defined as ". . . any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank."
>
> Relying on *First National Bank of Springdale v. Hobbs*, 248 Ark. 76, 450 S.W.2d 298 (1970), the Superior Court concluded that Sinclair was "undoubtedly considered" by Farmers to be the "customer" because he opened the account, determined who would draw on it and had a personal account with the Bank. There is a double difficulty with the Court's conclusion: First, the statutory definition includes only a person having an account with a bank; the language is plain and does not require construction *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966); here, the account in question was that of Sinwellan—it was the "person," not Sinclair. The second problem with the Court's ruling is that we are unable to find any record support for its finding that Farmers regarded Sinclair as its customer.

367 A.2d at 183.

In *Kesner v. Liberty Bank & Trust Co.*, 7 Mass. App. 934, 390 N.E.2d 259 (1979), the court considered a corporate treasurer's cause of action to recover damages for the depository bank's wrongful dishonor of corporate checks. In affirming a summary judgment for the bank, the *Kesner* court stated:

> The plaintiff, who was the treasurer of Hereford Realty, Inc., could not recover damages under G.L. c. 106, § 4-402, for the bank's wrongful dishonor of the corporation's checks because the corporation, and not the plaintiff, was the "customer" of the bank within the meaning of that section. See *Farmers Bank v. Sinwellan Corp.*, 367 A.2d 180 (Del.1976); *Loucks v. Albuquerque Natl. Bank*, 76 N.M. 735, 418 P.2d 191 (1966). General Laws c. 106, § 4-104(e), inserted by St.1957, c. 765, § 1, defines "customer", in relevant part, as "any person having an account with a bank." There is no ambiguity here as to who had the account with the bank, as there was

> in *First Natl. Bank of Springdale v. Hobbs*, 248 Ark. 76, 450 S.W.2d 298 (1970); nor is it suggested that the corporation "was, in effect, nothing but a transparent shell, having no viability as a separate and distinct legal entity," as was the case in *Kendall Yacht Corp. v. United Cal. Bank*, 50 Cal.App.3d 949, 956, 123 Cal.Rptr. 848, 853 (1975).

390 N.E.2d at 259.

In construing Fla. Stat. Ann. § 674.402 (West 1966), which is identical to Neb. U.C.C. § 4-402, the court in *Koger v. East First Nat. Bank*, 443 So. 2d 141 (Fla. App. 1983), affirmed dismissal of Koger's complaint based on a bank's wrongful dishonor of the checks of a corporation in which Koger was a shareholder. For the checking account, the named customer was Kenny and Koger Construction, Inc. (KKCI), in which Koger was a principal stockholder. When the bank refused to honor KKCI's checks, Koger sued and contended that he sustained damage when KKCI defaulted on numerous construction projects. In *Koger*, the court found that Koger was not entitled to maintain the action against the bank and stated:

> We choose to adhere to the more literal interpretation of section 674.402, which follows the interpretation given to section 4-402 in *Kesner v. Liberty Bank & Trust Company*, 7 Mass.App. 934, 390 N.E.2d 259 (1979); *Farmers Bank v. Sinwellan Corporation*, 367 A.2d 180 (Del. 1976), and *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966). These cases hold that a bank's liability extends only to the corporation or partnership which is its "customer," rather than to the individual partner or member of that corporation or partnership.
>
> In the instant case, appellant was not the proper party to bring an action against appellee. The named customer of the bank was the corporation KKCI. Thus, according to the above authorities, KKCI would have been the only party entitled to institute a cause of action against appellee under the provisions of section 674.402.
>
> Appellant cites to *Karsh v. American City Bank*, 113 Cal.App.3d 419, 169 Cal. Rptr. 851 (1980), and *Kendall*

> *Yacht Corporation v. United California Bank*, 50 Cal.App.3d 949, 123 Cal.Rptr. 848 (1975), for the proposition that individual members of a business entity, that is the customer of a bank, are entitled to obtain relief under section 4-402.
>
> Although the language of section 4-402 is identical to that of section 674.402, we choose to disagree with the liberal interpretation given it by the California courts. Both the *Karsh* and *Kendall* cases refer to corporations that were "undercapitalized" or mere "transparent shells." Appellant did not allege that KKCI was in the same position as the corporations in *Karsh* and *Kendall*. Accordingly, we affirm the decision of the trial court.

143 So. 2d at 142-43.

In *Schoenfelder v. Arizona Bank*, 161 Ariz. 601, 780 P.2d 434 (1989), the question was whether Schoenfelder was the bank's "customer" and, therefore, entitled to have his account recredited as the result of a forged signature on a check drawn on the account of the corporation for which Schoenfelder was an officer. In deciding that Schoenfelder had no standing to bring the action, the court stated:

> [W]e believe the better reasoned cases support a conclusion that, under the facts of this case, Schoenfelder is not a customer of the Bank, and thus has no standing to seek recrediting of the account.
>
> Similar facts were before the court in *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966). In that case, the court held that the individual partners who had opened a partnership account at defendant bank were not the bank's customers, and therefore could not bring an action against the bank for wrongful dishonor of partnership checks. Rather, the partnership was the customer to whom the bank was liable for the wrongful dishonor. . . .
>
> Schoenfelder urges us to follow the reasoning of cases which appear to interpret the definition of "customer" more broadly than *Loucks*. . . .
>
> In our opinion, *Hobbs* [*First Nat'l Bank of Springdale v. Hobbs*, 248 Ark. 76, 450 S.W.2d 298 (1970)] and the

other cases on which Schoenfelder relies to establish his standing as a "customer" are inapposite. In *Hobbs*, the bank's president was personally aware that Hobbs was the person mainly interested in setting up the account. He testified that he assumed Hobbs and Starnes owned the account. 450 S.W.2d at 301. Similarly, in *Kendall Yacht Corp. v. United California Bank*, 50 Cal.App.3d 949, 123 Cal.Rptr. 848 (4th Dist.1975), the evidence indicated that the Kendalls (officers and principal shareholders of a corporation which never issued stock and was undercapitalized) were as much "customers" of defendant bank as was the corporation in whose name the account was opened. In *Kendall*, the court found that the corporation was a "transparent shell," controlled and financed solely by the Kendalls, and that the bank *knew* this was the case. The bank looked directly to the Kendalls to satisfy the corporation's debts, and even required them to execute personal guarantees to cover credit extended to the corporation for corporate overdrafts. Thus, the Kendalls themselves could recover for wrongful dishonor of the corporation's checks. *Id.* at 956, 123 Cal. Rptr. at 853. *Cf. Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 801 F.2d 719, 725 (4th Cir.1986) (bank clearly treated president and sole stockholder of corporate depositor as the bank's customer and repeatedly looked to her to assume corporation's obligations).

The record in this case does not establish that the Bank regarded Schoenfelder as its customer. . . .

. . . There is no evidence that, *at the time the account was actually opened or at any time thereafter*, the Bank was aware that Schoenfelder's relationship with it was anything more than a mandatory signatory on a corporate account. Undoubtedly many corporate accounts are opened in bank branches on which a person, often an officer or trusted employee of the corporation, is named a mandatory signatory. A mandatory signatory on a corporate account does not thereby become a customer under A.R.S. §§ 47-4104 and 47-4401. We hold that the evidence in this case is insufficient to establish that

> Schoenfelder was the Bank's customer under A.R.S. § 47-4401(A). Thus, Schoenfelder has no standing to bring this action.

(Emphasis in original.) 161 Ariz. at 605-07, 780 P.2d at 438-40. See, also, *Thrash v. Georgia State Bank of Rome*, 189 Ga. App. 21, 375 S.E.2d 112 (1988) (corporation's president, who was one of four shareholders and who owned minority of shares, was not a "customer" of the bank in which the corporation was a depositor and, therefore, could not maintain a "wrongful dishonor" action against the bank notwithstanding that the plaintiff president guaranteed the corporation's debt to the bank).

After considering the preceding cases, we find the reasoning expressed in *Kendall Yacht Corp. v. United California Bank*, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975), to be persuasive. Directing the *Kendall* rationale to Parrett's case, and accepting Parrett's alleged facts to be true with reasonable inferences drawn therefrom, see *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989), we find that Parrett was a "customer" of the bank within the meaning of § 4-402 and that Parrett's petition does state a cause of action for the bank's wrongful dishonor of the P & P Machinery check signed by Parrett. As reflected by Parrett's petition, the parties' business relationship, which included Parrett's personal guaranty for P & P Machinery's obligations to the bank, was such that it was foreseeable that dishonoring the corporation's check would reflect directly on Parrett. This is borne out by the fact that a criminal charge based on the dishonored check was brought against Parrett, but was dismissed during Parrett's trial. Since the consequences of the wrongful dishonor fell upon Parrett, it would elevate form over substance to say that he was not the bank's "customer" within the meaning of § 4-402. This is not to say that in every case a corporate officer has a wrongful dishonor action against the depository bank on which the corporation's check has been drawn and later dishonored. However, in view of the facts of this case alleged in Parrett's petition, Parrett has a cause of action against the bank.

The bank argues that it owed no special duty to Parrett, who has based his suit on a transaction which occurred by reason of

Parrett's being the principal shareholder of P & P Machinery and an officer who signed the corporate check which was dishonored by the bank.

Recently, in *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 762, 448 N.W.2d 129, 133 (1989), we stated:

> As a general rule a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation. [Citations omitted.]
>
> There is a well-recognized exception to the general rule: If the shareholder properly establishes an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, rather than as a shareholder, such individual action may be maintained. [Citations omitted.]
>
> The courts generally are in agreement that to come within this exception, the shareholder must demonstrate that there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder or that the shareholder suffered an injury separate and distinct from that suffered by other shareholders. [Citations omitted.]

If the facts alleged in Parrett's petition are true, which we must assume for the purposes of our review in this case, Parrett, as a shareholder of P & P Machinery, has established an individual cause of action because any harm to P & P Machinery also damaged Parrett in his individual capacity, rather than as a shareholder. See *Meyerson v. Coopers & Lybrand, supra*. The history of the business relationship between the bank and P & P Machinery, which included Parrett's personal guaranty for P & P Machinery's obligations to the bank, provides special circumstances and, therefore, a special duty owed by the bank to Parrett as the principal shareholder of P & P Machinery. Thus, according to Parrett's petition, Parrett is not only a customer of Platte Valley State Bank & Trust Co., but has an individual cause of action based on the bank's special duty to Parrett under the circumstances.

Therefore, we reverse the judgment of the district court and remand this matter to the district court for further proceedings.

REVERSED AND REMANDED WITH DIRECTION.

SHANAHAN, J., dissenting.

Although I agree with the general proposition of law that a corporate officer, as a signatory for a check drawn on the corporation's account, may, under certain circumstances, be a "customer" within Neb. U.C.C. § 4-402 (Reissue 1980) for the purpose of a depository bank's liability for wrongful dishonor of the corporation's check, the facts alleged by Parrett fail to provide the circumstances necessary for application of that general proposition of law.

The allegations of Parrett's amended petition supply the following facts: Parrett was an authorized signatory on the checking account of P & P Machinery; there was a history of credit transactions between P & P Machinery and the bank; Parrett had given the bank his personal guaranty for obligations of P & P Machinery; and Parrett was a corporate officer and the principal shareholder of P & P Machinery.

What is not supplied in Parrett's petition, and cannot be reasonably inferred from the allegations, are those facts which permit application of the general proposition of law regarding a corporate officer as a "customer" of a bank in reference to the bank's wrongful dishonor of a corporate check signed by the officer.

Although *Kendall Yacht Corp. v. United California Bank*, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975), seems to be the basis for determining whether Parrett was the bank's customer, the salient facts found in *Kendall* are absent from Parrett's case. The checking account stood in the name of P & P Machinery, an existing corporation with a long history of credit transactions with the bank. However, in those transactions nothing indicates that the bank ever disregarded the corporate existence of P & P Machinery and treated Parrett as the principal or otherwise identified Parrett as the individual responsible for satisfaction of the corporation's obligations to the bank. Actually, the facts alleged and inferences therefrom are to the contrary. Although Parrett gave his guaranty for P & P Machinery's obligations to the bank, on no occasion did the bank enforce, or threaten to

enforce, Parrett's guaranty. Mere existence of the guaranty is neutral in Parrett's case. Moreover, Parrett did not, either voluntarily or in response to the bank's request or demand, use his funds or property to pay P & P Machinery's indebtedness to the bank. Regarding P & P Machinery, there is no allegation or justifiable inference that the corporation was "undercapitalized," a "transparent shell" as a corporation in name only without the issuance of stock, or lacked "viability as a separate and distinct legal entity." *Kendall, supra.* None of those *Kendall* conditions exist in Parrett's situation. Hence, there is no basis to conclude that Parrett was the bank's customer at the time the check was dishonored. The district court was correct in sustaining the bank's demurrer and dismissing Parrett's action.

Since Parrett was not the bank's customer in the subject transaction, there is no need to consider the question about special duty in relation to a shareholder's cause of action. Consequently, the judgment of the district court should have been affirmed.

STATE OF NEBRASKA, APPELLEE, V. JAMES D. WALKER, APPELLANT.

459 N.W.2d 527

Filed August 24, 1990. No. 89-1193.

1. **Constitutional Law: Search and Seizure.** Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures.
2. **Search and Seizure.** A search implies some exploratory investigation. It is not a search to observe that which is open and patent, in either sunlight or artificial light.
3. **Search and Seizure: Police Officers and Sheriffs: Evidence.** An officer may seize evidence and contraband which is in "plain view" without a warrant if he has the right to be in the position where he has such a view. Such activity does not constitute a search.
4. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from unreasonable searches and seizures may be waived by consent of a citizen.

Affirmative consent may be established by acts entirely aside from the use of words.

5. **Constitutional Law: Search and Seizure.** Consent may be obtained from one who possesses common authority over, or other sufficient relationship to, the premises sought to be inspected.
6. _____: _____. It is clear that the fourth amendment prohibition against unreasonable searches and seizures is inapplicable to the conduct of private parties.
7. _____: _____. Whether a private person's search is actually a search by the State depends on whether the private person must be regarded as having acted as an instrument or agent of the State.
8. **Constitutional Law: Search and Seizure: Arrests: Standing.** An individual's status as an overnight guest is alone enough to show that he or she has a legitimate expectation of privacy in the premises which is protected by the fourth amendment, and, thus, the person has standing to challenge a warrantless entry to effect his or her arrest.
9. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** A search by an off-duty law enforcement officer in his or her capacity as a private citizen, and not as a law enforcement officer, does not violate the prohibition against unreasonable searches and seizures.
10. **Motions to Suppress: Appeal and Error.** Findings of fact reached by a trial court on a motion to suppress will not be overturned on appeal unless those findings are clearly erroneous.
11. **Search and Seizure: Trial.** A trial court's finding on whether a search by a private person is actually a search by the State constitutes a factual finding.
12. **Motions to Suppress: Appeal and Error.** In making a determination as to a trial court's ruling on a motion to suppress, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motions.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

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

Claiming that the trial court should have sustained his motion to suppress evidence obtained from a bedroom he was

temporarily occupying in a friend's home, James D. Walker appeals his conviction for illegal possession of methamphetamine.

We affirm the finding of the district court for Douglas County that the evidence upon which Walker was convicted was legally seized.

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 wrong. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989); *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988).

Approximately October 1, 1988, Joseph M. Davitt, a lieutenant with the Omaha Police Division, in his private capacity as a landlord, rented a two-bedroom house he owned in Omaha to Milton Garrison. Anne Opsatnick resided in the house with Garrison. Because of marital problems, Walker was temporarily staying at the residence.

About 4:30 p.m. on November 16, 1988, Davitt informed Garrison by telephone that he "wanted to come over and talk to him" around 5:30 that afternoon. Garrison agreed with that arrangement. Although Davitt did not inform Garrison of the specific reason for his visit, he testified he wanted to talk with Garrison about the utility billings, which had not been changed into Garrison's name; a delinquent security deposit; and an overdue rent payment. Davitt testified that one of the reasons for his visit was to check on the status of bedroom repairs which Garrison had agreed to perform in exchange for a reduction in the rent.

About 5:30 p.m., Davitt arrived at the leased premises. He was not dressed as a police officer, but did carry a weapon which was not displayed. After Davitt rang the doorbell several times and knocked loudly on the door, Walker answered the door. Davitt explained to Walker that he had made arrangements to meet Garrison at the home at 5:30. Walker informed Davitt that Garrison was not at home, stepped back, and held the door open allowing Davitt to enter the house.

Davitt told Walker that while he was waiting for Garrison, he wanted to check on the bedroom where some repairs were to be

performed and began walking toward the bedroom. In that bedroom, the wallpaper was to be removed and the room painted. Walker followed Davitt to the bedroom.

Upon reaching the room, Davitt asked Walker to turn on the light activated by a pull chain switch because Davitt was too short to reach it. The defendant entered the bedroom, stood there for a moment, and asked Davitt if he minded if defendant cleaned up. Davitt stated that he did not mind and stepped back from the bedroom door. Davitt, who was not watching Walker the entire time, saw Walker straighten "a quilt or something on the bed." At that point, Walker reached up and turned on the light. Thereupon, Davitt walked into the bedroom and observed a balance beam scale on the floor, with a white powdery residue on it.

After obtaining permission from Walker to use the telephone, Davitt telephoned the narcotics unit of the Omaha Police Division and requested assistance. He advised Walker to have a seat in the living room until the officers arrived. Approximately 2 to 3 minutes later, Garrison arrived at the residence. Davitt informed Garrison that he had found a scale and that police officers were en route. He told Garrison to take a seat in the living room until the police officers arrived. When Opsatnick came out of the bathroom, Davitt asked her to also wait in the living room for the police officers' arrival.

After the police officers arrived, Garrison and Walker were frisked. Garrison gave permission to one of the police officers to search the house. The house was not searched at that time because Walker refused permission to search his bedroom. Walker, Garrison, and Opsatnick were eventually arrested and taken to the police station.

The police officers later obtained a search warrant, and the house was searched. Davitt testified that for the most part, he did not participate in the search. He had never been a member of the police narcotics squad. A number of used syringes, objects with an unknown residue, and baggies containing suspected methamphetamine were found in the house. Through laboratory analysis, it was determined that some of the baggies contained methamphetamine and that the residue on certain spoons was methamphetamine.

By amended information, Walker was charged in the district court for Douglas County with possession of methamphetamine. Walker's motion to suppress the evidence seized pursuant to the search was overruled. Walker waived his right to a jury trial.

At trial, Walker unsuccessfully renewed his objections to the admission of the evidence seized. The court found him guilty beyond a reasonable doubt of unlawful possession of a controlled substance other than marijuana, to wit, methamphetamine. Walker was sentenced to a term of imprisonment of not less than 18 nor more than 36 months, with credit for time served.

The defendant's sole assignment of error alleges that the district court erred in overruling his motion to suppress evidence.

Both the U.S. and Nebraska Constitutions guarantee an individual the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Neb. Const. art. I, § 7. As an initial matter, it is therefore considered whether Davitt's actions constituted a search. "A search implies some exploratory investigation. It is not a search to observe that which is open and patent, in either sunlight or artificial light." *State v. Howard*, 184 Neb. 274, 278, 167 N.W.2d 80, 84 (1969). In *State v. Searles*, 214 Neb. 849, 853, 336 N.W.2d 571, 575 (1983), this court stated: "An officer may seize evidence and contraband which is in 'plain view' without a warrant, if he has the right to be in the position where he has such a view. Such activity does not constitute a search."

Davitt notified his tenant Garrison that he would be arriving at 5:30 p.m. to speak with him, and Garrison agreed to the visit. When Davitt arrived at the house, Walker opened the door and allowed him to enter. After Davitt entered the house and indicated his desire to inspect the bedroom for repairs, Walker followed Davitt to the bedroom, straightened up the room, and turned on the light for him. It can reasonably be inferred that Walker consented to Davitt's entry into his bedroom. The right to be free from unreasonable searches and seizures may be waived by consent of a citizen. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). "Affirmative consent may be

established by acts entirely aside from the use of words." *State v. Romonto*, 190 Neb. 825, 831, 212 N.W.2d 641, 645 (1973). Walker had authority to consent to the search of his own bedroom. See *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978) (consent may be obtained from one who possesses common authority over, or other sufficient relationship to, the premises sought to be inspected). Upon his consensual entry into the bedroom, Davitt observed the balance beam scale and residue, which were open to view. Davitt had a right to be in the bedroom where he observed the contraband, which was in plain view. Under these circumstances, it could be argued that no search occurred. It follows that if there was no search, the constitutional prohibition against unreasonable searches has no application.

Assuming arguendo that Davitt's activities on the premises did constitute a search, we next consider whether the trial court was clearly wrong in finding that Davitt was acting as a landlord when the search occurred. "It is clear that the fourth amendment prohibition against unreasonable searches and seizures is inapplicable to the conduct of private parties." *State v. Ware*, 219 Neb. 594, 599, 365 N.W.2d 418, 422 (1985) (citing *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921)). Whether a private person's search is actually a search by the State depends on whether the private person must be regarded as having acted as an instrument or agent of the State. *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989). The defendant claims that when Davitt entered the dwelling on November 16, 1988, he was acting in his capacity as a police officer and not as a landlord and that his warrantless search was therefore improper.

Initially, it must be determined whether Walker, who was arguably not a tenant in the premises searched, has standing to challenge the search. In *Minnesota v. Olson*, ____ U.S. ____, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), the U.S. Supreme Court held that an individual's status as an overnight guest is alone enough to show that he or she has a legitimate expectation of privacy in the premises which is protected by the fourth amendment, and, thus, the person has standing to challenge a warrantless entry to effect his or her arrest. Under the same

reasoning, Walker, who was at least an overnight guest, has standing to challenge the search involved here as violating his right to be free from unreasonable searches and seizures.

At issue in this case is whether a person who is a law enforcement officer may, under certain circumstances when he or she is not on duty, be deemed to have made a purely private search because he or she at that time was not acting in his or her capacity as a law enforcement officer. This is a question of first impression in this jurisdiction.

Other courts which have been confronted with this issue have upheld the search if the individual was acting in his or her private capacity and not functioning as a law enforcement officer. See, *People v. Wachter*, 58 Cal. App. 3d 911, 130 Cal. Rptr. 279 (1976) (determining that an off-duty deputy sheriff who was visiting a farm with a friend and who discovered marijuana growing on the farm was not acting in his capacity as a law enforcement officer); *State v. Pearson*, 15 Or. App. 1, 514 P.2d 884 (1973) (upholding a search where an off-duty police reserve officer discovered marijuana in a car on which he was working in his employment as a mechanic). We reject the notion that solely because one is a police officer, the officer acts in that capacity at all times. See *Moore v. State*, 562 S.W.2d 484 (Tex. Crim. App. 1978) (holding that off-duty police officer's search was not a private search, as an officer is for many purposes on duty 24 hours a day). The rationale for excluding the fruits of improper searches is often explained on grounds of deterrence of police illegalities. See, e.g., *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990); *State v. Poit*, 216 Neb. 635, 344 N.W.2d 914 (1984). However, the exclusionary rule would unlikely deter the private individual, who is not usually motivated by reasons of gathering evidence for purposes of prosecution and who seldom engages in searches upon a sufficiently regular basis to be affected by the exclusionary rule. See 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.8(a) (West 2d ed. 1987). A proper rule is one which protects citizens from unreasonable searches and seizures by police officials and which, at the same time, does not needlessly exclude the fruits of nonpolice searches. Therefore, we hold that a search by an off-duty law enforcement officer in his or her capacity as a

private citizen, and not as a law enforcement officer, does not violate the prohibition against unreasonable searches and seizures.

The trial court specifically found that Davitt went to his rental property in his capacity as a landlord and not as a police officer. In disputing this factual finding, Walker primarily argues that because Davitt was aware of suspected drug activity at the house, he had to be acting as a law enforcement officer.

We reiterate that findings of fact reached by a trial court on a motion to suppress will not be overturned on appeal unless those findings are clearly erroneous. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). A trial court's finding on whether a search by a private person is actually a search by the State constitutes a factual finding. See *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989). In making a determination as to a trial court's ruling on a motion to suppress, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motions. *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990).

The record reflects that approximately 1 week prior to November 16, Davitt had been informed by Garrison's neighbor that narcotics activity may have been occurring at the house. Additionally, it is unexplained why Davitt carried a weapon with him to the premises, and there was some confusion in the record whether Garrison was late with his rent, one of the purposes for Davitt's visit. However, Davitt testified that his purpose in entering the residence was to speak with Garrison about some problems in regard to Garrison's tenancy. When Davitt was asked as to what the problems were, he responded, "[T]he utility bills hadn't been changed into his name yet. He was late with his second installment on the security deposit, and he was late on his first month's rent. And the repairs, I wanted to talk to him about those." Davitt specifically denied that one of his reasons for going to the house was because of suspected drug activity. He stated that although he wanted to see what was going on at the home, he did not expect it to be related to narcotics.

Davitt's actions were consistent with his explanation. The only room he ventured into was the room in which the repairs were to be performed. It is inconceivable that had Davitt wished to enter the home to search for suspected drug activity, he would have given Garrison 1 hour's notice of his visit or allowed Walker to tidy up the bedroom before he entered. While Davitt may have relied on his professional training in recognizing the significance of the balance beam scale and the substance on it, that factor is unimportant. See, *People v. Wachter*, 58 Cal. App. 3d 911, 130 Cal. Rptr. 279 (1976); *State v. Pearson*, 15 Or. App. 1, 514 P.2d 884 (1973). In substance, Walker asks this court to find Davitt's testimony not credible. It is not this court's function to reweigh the evidence or the credibility of the witnesses.

Although after discovering the illegal activity, Davitt detained the suspects, this action does not show that he was acting as a police officer when he entered the bedroom. First, his post facto conduct is irrelevant under the circumstances as to what his capacity was at the time of his entry into the bedroom. Second, even a private citizen may make a warrantless arrest if a petit larceny or a felony has been committed and there are reasonable grounds to believe the person arrested is guilty of such offense. See Neb. Rev. Stat. § 29-402 (Reissue 1989). Davitt's actions after he noticed the suspected contraband were entirely proper. He ceased his search and informed the police of his discovery, actions conforming to those of a private citizen. After reviewing the record, we cannot say that the trial court was clearly wrong in finding that Davitt was acting in his capacity as a landlord. That being the case, the search warrant, which was based upon information gained by Davitt in his individual capacity, was not violative of Walker's constitutional rights. The trial court did not err in overruling Walker's motion to suppress the evidence seized.

The defendant's conviction of possession of a controlled substance other than marijuana is affirmed.

AFFIRMED.

JOSE L. CANAS, APPELLEE, V. MARYLAND CASUALTY COMPANY AND F & S SAUSAGE COMPANY, APPELLANTS.

459 N.W.2d 533

Filed August 24, 1990. No. 89-1374.

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. The findings of fact made by the compensation court after rehearing will not be set aside unless clearly wrong.
2. **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 their testimony.
3. **Workers' Compensation: Wages.** The calculation of the wages received at the time of injury is prescribed in Neb. Rev. Stat. § 48-126 (Reissue 1988). In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour, the employee's weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, using as the basis of calculation his or her earnings during as much of the preceding 6 months as he or she worked.
4. **Statutes.** Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
5. **Appeal and Error.** Although the Supreme Court will not consider assignments of error which are not discussed in the briefs, it always reserves the right to note plain error which was uncomplained of at trial or on appeal but is plainly evident from the record, and which is of such nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Workers' Compensation: Statutes: Time.** In making the calculations under Neb. Rev. Stat. § 48-121 (Reissue 1988), an amendatory statute may not be applied retroactively, and the statute as it existed at the time of injury governs.
7. **Workers' Compensation.** The employer shall be liable for all reasonable medical, surgical, and hospital services, appliances, supplies, prosthetic devices, and medicines, as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment.
8. **Workers' Compensation: Trial.** Whether an injury is caused by a work-related accident is a question of fact.
9. **Workers' Compensation.** In a workers' compensation case, compensation is not restricted to physical pain.
10. **Trial: Expert Witnesses.** Expert opinion testimony is not required just because the case may concern a matter of science or special knowledge. The test is whether the particular issue can be determined from the evidence presented and the common knowledge and usual experience of the fact finders.

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

Stephen L. Ahl, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellants.

Claude E. Berreckman, of Berreckman & Berreckman, P.C., for appellee.

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

FAHRNBRUCH, J.

An employer and its insurer appeal a Workers' Compensation Court finding that an injured worker's temporary total disability benefits were incorrectly computed and that the cost of a penile implant is a compensable medical procedure. We affirm in part, and in part reverse and remand.

The determinations were made by a majority of a three-judge Workers' Compensation Court panel upon rehearing.

"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 of fact made by the compensation court after rehearing will not be set aside unless clearly wrong." *Snyder v. IBP, inc.*, 235 Neb. 319, 320, 455 N.W.2d 157, 159 (1990). As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Brazee v. City of Lincoln*, 234 Neb. 680, 452 N.W.2d 529 (1990).

On May 16, 1978, Jose L. Canas was employed as a boner at F & S Sausage Company in Cozad, Nebraska. A "boner" removes the bones from a carcass. On that date, Canas slipped and fell to a concrete floor on his back while carrying a quarter side of beef. There is no dispute that the injury arose out of and in the course of Canas' employment with F & S Sausage Company. The defendant Maryland Casualty Company is the employer's workers' compensation insurance carrier.

Following the accident, Canas experienced acute low back

and left leg pain and numbness in his left leg, and his left leg would give way. In July 1978, Canas underwent a lumbosacral fusion in Hastings. After the surgery, he continued to experience pain and weakness and his left leg continued to give way. Shortly after the surgery, Canas began having problems with his sexual functioning. It gradually worsened. On March 24, 1981, Canas had a second lumbosacral fusion performed in Lincoln. Medical records document Canas' continuing problems with his back and legs in the years following the second surgery. A Cozad physician reported on April 11, 1989, that Canas had spinal stenosis and used two canes for walking. At the time of the rehearing, he was completely impotent. Since the accident, Canas has not been able to work. The compensation court found that Canas has been totally disabled from and including May 17, 1978, to and including the date of the rehearing and that Canas would remain totally disabled indefinitely. That finding has not been challenged. At the time of rehearing, Canas was 59 years of age and married.

Prior to the commencement of this action, Canas was receiving temporary total disability benefits of $148.19 per week from the date of the accident. Penile implant surgery was scheduled for Canas on August 22, 1986, but he canceled the surgery after the appellants denied coverage. The compensation court panel majority determined that Canas was entitled to receive $168.08 per week in temporary total disability benefits from and including May 17, 1978, to and including the date of the rehearing and for so long as Canas remains totally disabled. In determining the average weekly wage, the majority excluded from the 26 weeks preceding the accident those weeks during which Canas worked fewer than 40 hours due to holidays, vacation, and sick leave. The majority further determined that the penile implant was a compensable procedure.

AVERAGE WEEKLY WAGE

Under the schedule of compensation as set forth in Neb. Rev. Stat. § 48-121 (Reissue 1988), the compensation during a period of total disability is $66^2/_3$ percent of the wages the employee received at the time of injury up to a maximum limit

and not below a minimum amount. The calculation of the wages received at the time of injury is prescribed in Neb. Rev. Stat. § 48-126 (Reissue 1988). In relevant part, § 48-126 states:

> Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. . . . In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour [the employee's] weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked . . . .

Canas was receiving a wage of $5.25 per hour at the time of his injury. The president of F & S Sausage testified that he did not guarantee Canas a certain number of hours of work per week but that Canas was paid on the number of hours Canas actually worked in a week. He further testified that Canas' *ordinary* workweek was 45 to 50 hours. In the 26 weeks preceding the accident, each of Canas' workweeks was not less than 44.03 hours or more than 50.87 hours, with seven exceptions. In those 7 weeks, Canas worked 20.77, 37.43, 34.75, 14.35, 36.63, 7.78, and 36.75 hours, respectively. It is uncontroverted that Canas' shortened workweeks were due to vacation time incurred in moving his family from Texas to Nebraska, sick leave, and holidays. The parties do not dispute that Canas' employment was continuous, nor do they dispute his hourly wage under the contract of hire. In their first assignment of error, the appellants claim that the majority of the panel erred in computing Canas' average weekly wage under § 48-126. It is their position that in making the computation under § 48-126, one multiplies the actual number of hours worked by an injured employee in the 26-week period preceding the accident by the employee's hourly wage during that period. That number is then divided by 26 to arrive at the average weekly wage. The appellants further assert that the Legislature inserted the term "average" in recognition of the fact that there would be fluctuations in an employee's

workweeks preceding an accident.

The fallacy of the appellants' argument can be demonstrated by deleting the following language from § 48-126: "for the period of time ordinarily constituting his or her week's work." Without that clause, the sentence at issue would read: "[W]eekly wages shall be taken to be his or her average weekly income . . . and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer." If the statute so read, one would determine the average weekly wage just as the appellants suggest. Thus, the appellants' calculation would be the same even if the foregoing language were deleted. However, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). We conclude that by inclusion of the clause "for the period of time ordinarily constituting his or her week's work," the Legislature sought to exclude those abnormally low workweeks from the 26-week period used for the calculation. The appellants' reading of the statute would lead to harsh and oppressive results where, for example, an employee was ill during much or all of the 6 months preceding his or her work-related accident. Our conclusion in this case is further dictated by the result in the recent case of *Clifford v. Harchelroad Chevrolet*, 229 Neb. 78, 425 N.W.2d 331 (1988).

In *Clifford, supra*, Clifford's compensation was based on output, or a percentage of sales made, and he was paid commissions earned on a monthly basis at the end of each month. In late May 1984, Clifford became ill, and over the course of the remaining months of 1984, he was subjected to treatment and testing which resulted in numerous hospitalizations and absences from employment. The illness prevented Clifford from working the latter part of May, as well as most of June and July. In December 1984, he underwent surgery. Clifford resumed employment in his old position on June 15, 1985, and was killed 2 days later in an auto accident which arose out of and in the course of his employment with the defendant. No commissions were earned by Clifford in 1985.

Thus, the problem was in determining the period of time which was appropriate for calculating Clifford's average weekly wage. Neither the single judge at the one-judge hearing nor the three judges on rehearing used the period of time from December 1984 to June 1985 to calculate the amount of compensation due the decedent's widow and son. On rehearing, a majority of the three-judge panel used the 6-month period preceding December 1984 but excluded 10 weeks during that period when the decedent did not work. This court approved, holding that "[t]he finding of the majority of the three-judge panel is based on the language of the statute and is supported by the record." *Id.* at 82, 425 N.W.2d at 334. The fact that Clifford was paid on commissions and Canas on an hourly basis is unimportant. Section 48-126 makes no distinction between wages fixed by hour and those by output under continuous employments.

For the reasons stated in the foregoing discussion, we conclude that the decision of the compensation court panel majority to exclude 7 weeks in computing Canas' average weekly income was correct.

Nonetheless, the workers' compensation panel committed plain error in computing Canas' benefits. See *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989) (asserting that although the Supreme Court will not consider assignments of error which are not discussed in the briefs, it always reserves the right to note plain error which was uncomplained of at trial or on appeal but is plainly evident from the record, and which is of such nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process). In computing Canas' benefits, the panel relied on § 48-121 as it existed at the time of rehearing. However, this amendatory act was not the applicable statute. See *Chadd v. Western Cas. & Sur. Co.*, 166 Neb. 483, 89 N.W.2d 586 (1958) (holding that in making the calculations under § 48-121, an amendatory statute may not be applied retroactively, and the statute as it existed at the time of injury governs). See, also, § 48-126; 2 A. Larson, The Law of Workmen's Compensation § 60.50 (1989) (benefit level in effect at the time of injury controls). Section 48-121 (Reissue 1978), as it existed on May 16, 1978, provided, "For total disability, the

compensation during such disability shall be sixty-six and two-thirds per cent of the wages received at the time of injury, but such compensation shall not be more than one hundred fifty-five dollars per week . . . ." Therefore, the correct amount to award Canas is $155 per week, not $168.08 per week as the panel's majority determined.

PENILE IMPLANT

The appellants' final assignment of error claims that the compensation court erred in determining that Canas is entitled to have a penile implant paid for by the appellants. Appellants argue (1) that due to the length of time between the date of the injury and the onset of Canas' impotency the medical evidence was insufficient to demonstrate that Canas' impotency was related to the accident, and (2) that even assuming that medical causation was established, a penile implant is not designed to either relieve pain or promote or hasten the employee's restoration to health and employment.

The issue of a penile implant under this state's workers' compensation statute is one of first impression. Although the statutes under which they were operating are not identical to Nebraska's, other courts which have been confronted with an employer's refusal to compensate a worker for a penile implant necessitated by an accident arising out of and in the course of employment have ruled in favor of the worker. See, *Jackson v. Greyhound Lines, Inc.*, 734 S.W.2d 617 (Tenn. 1987); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984); *Freeman United Coal Mining Co. v. Ind. Com.*, 81 Ill. 2d 335, 410 N.E.2d 48 (1980).

Neb. Rev. Stat. § 48-120 (Reissue 1988) provides: "The employer shall be liable for all reasonable medical, surgical, and hospital services . . . appliances, supplies, prosthetic devices, and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . ."

The appellants' argument that Canas' proof was insufficient to show that his impotence was caused by his work-related accident is without merit. Canas testified that he first noticed a

lessening in sexual functioning within 2 to 3 months of his work-related accident and that this was after his first surgery. The medical evidence that Canas' back surgery, which was necessitated by his work-related accident, caused his impotence is uncontradicted. Whether an injury is caused by a work-related accident is a question of fact. See, *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985); *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985). In view of the uncontroverted medical evidence, the workers' compensation court panel majority's finding that Canas' impotency was a result of the appellee's work-related accident is not clearly wrong.

We next consider whether the evidence supports the panel majority's finding that a penile implant would relieve Canas of pain, as required by § 48-120.

Canas testified that due to his impotency, he and his wife had contemplated divorce. Canas further testified that before the accident, he was perfectly compatible and sexually active with his wife. Nine children were born to the Canases, one of whom is still dependent upon the appellee. Four doctors informed Canas that his impotency could be corrected with a penile implant.

It was on this evidence and the common knowledge of the fact finder that the majority of the workers' compensation court panel found that a penile implant was "a reasonable procedure for the purpose of making [Canas] whole and reducing his '*pain*.' " (Emphasis supplied.)

The appellants argue that a penile implant is not designed to either relieve pain or promote or hasten the employee's restoration to health and employment. The appellants further claim that there is no evidence in the record that Canas suffers any physical pain. They further contend that there is no testimony or evidence in the record that Canas suffers any mental pain, psychological or emotional, as a result of his impotency.

This court has held that in a workers' compensation case, compensation is not restricted to physical pain. See *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985) (holding that where the evidence is sufficient to permit the triers of fact to find that

the psychological injury is directly related to the accident and the employee is unable to work, the employee is entitled to be compensated). We have further held that "expert opinion testimony . . . is not required just because the case may concern a matter of science or special knowledge. . . . The test is whether . . . the particular issue can be determined from the evidence presented and the common knowledge and usual experience" of the fact finders. *Yount v. Seager*, 181 Neb. 665, 670-71, 150 N.W.2d 245, 250-51 (1967) (holding that expert testimony was not necessary in that case to prove future pain, disability, and medical expense). See, also, *Clark v. Village of Hemingford*, 147 Neb. 1044, 26 N.W.2d 15 (1947) (a workers' compensation case holding that where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary).

Obviously, the "pain" referred to by the majority of the workers' compensation court panel is mental anguish or pain that the panel found Canas suffers by reason of his impotency. It is uncontroverted that Canas' impotency, which was caused by his work-related accident, once threatened to destroy his marriage. The workers' compensation court majority could, and apparently did, infer that as long as Canas is impotent, his marriage remains in jeopardy and that in turn causes Canas to suffer mentally.

It cannot be said that the majority of the workers' compensation court panel, as the fact finder, using its common knowledge and usual experiences, was clearly wrong in determining that Canas is entitled to a penile implant under Nebraska's Workers' Compensation Act. All of the appellants' assignments of error are without merit.

The decision of the panel of the Workers' Compensation Court is affirmed in part and in part reversed and remanded to enter an order consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CHADRON ENERGY CORPORATION, A NEBRASKA CORPORATION, APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, A NATIONAL BANK, APPELLANT.

459 N.W.2d 718

Filed August 31, 1990. No. 88-095.

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 the 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. **Verdicts: Appeal and Error.** As a general rule, in determining the sufficiency of the evidence to sustain a verdict in a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
4. _____: _____. A civil jury verdict will not be disturbed on appeal unless clearly wrong. A verdict is not to be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
5. **Uniform Commercial Code: Sales: Juries.** The issue of whether a sale was commercially reasonable under the Uniform Commercial Code is a question of fact for a jury to decide.
6. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
7. **Uniform Commercial Code: Sales: Words and Phrases.** Additional surplus is the difference between the price actually received and the price that could have been obtained if the sale had been conducted in a commercially reasonable manner.
8. **Appeal and Error.** This court will not consider assignments of error which are not discussed in the brief.
9. **Jury Instructions: Proof: Appeal and Error.** In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case.
10. **Uniform Commercial Code: Sales: Debtors and Creditors: Notice.** A creditor conducting a sale under the Uniform Commercial Code must give the debtor reasonable notice, and, ordinarily, a minimum of 3 business days is required.
11. **Uniform Commercial Code: Security Interests.** Under Neb. U.C.C. § 9-503 (Reissue 1980), unless otherwise agreed, on default a secured party has the right to take possession of the collateral securing the indebtedness.

12. _____: _____. Under Neb. U.C.C. § 9-504(2) (Reissue 1980), after default a secured party may sell, lease, or otherwise dispose of any or all of the collateral, and no distinction is made between secured parties of graduated priorities. There is no requirement that the secured party hold first priority status.
13. **Uniform Commercial Code: Foreclosure: Security Interests: Notice.** After a foreclosure sale under Neb. U.C.C. § 9-504(1) (Reissue 1980), the proceeds are to be applied to the reasonable expenses of the sale, the satisfaction of the indebtedness secured by the security interest under which the disposition is made, and the satisfaction of indebtedness secured by any *subordinate* security interest in the collateral if written notice of demand is made before distribution of the proceeds is completed. The code does not require distribution of proceeds to the satisfaction of senior security interests when a junior secured party conducts a foreclosure sale.
14. **Contracts: Bailment: Liability: Conversion.** A special contract of bailment prevails in determining the liabilities of the parties, as against general principles of law applicable in the absence of express agreement. When a bailee disposes of property without authority of the bailor, the bailee may be guilty of conversion.
15. **Uniform Commercial Code: Security Interests: Liens: Foreclosure.** Under Neb. U.C.C. § 9-504(4) (Reissue 1980), only subordinate security interests and liens are cut off. A senior party's interest in the collateral is not discharged by a junior secured party's foreclosure sale, and, generally, the collateral in the hands of the purchaser is subject to the senior secured interest.
16. **Uniform Commercial Code: Security Interests: Foreclosure.** Unlike the continuing security interest in the collateral, under Neb. U.C.C. § 9-306(2) (Reissue 1980) whether a sale was authorized does not affect the secured party's continuing interest in the proceeds of a foreclosure sale.
17. _____: _____: _____. When the disposition of the collateral is by a junior secured party, generally the security interest of the senior secured party continues only in those proceeds of the disposition that are received by the debtor.
18. **Subrogation: Words and Phrases.** Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.
19. _____: _____. Subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
20. **Subrogation: Liability.** The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making payment and in discharge of an existing liability.
21. **Subrogation.** The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his or her own rights or interest, or to save his or her own property.
22. **Subrogation: Liability.** Subrogation is not allowed where the debt paid is one for which the payor is primarily liable.

23. **Trial: Evidence.** The admission or exclusion of evidence is initially left to the discretion of the trial court, which must determine the relevancy and possible prejudicial effects of the proffered evidence.
24. **Trial: Evidence: Damages.** Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise generally cannot be set up by the wrongdoer in mitigation of damages.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for a new trial on the issue of damages.

James B. Cavanagh, of Erickson & Sederstrom, P.C., for appellant.

M.J. Bruckner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

HASTINGS, C.J.

This is the second appearance of this case in this court. Our former opinion may be found in *Chadron Energy Corp. v. First Nat. Bank*, 221 Neb. 590, 379 N.W.2d 742 (1986) (*CEC I*). As a result of that opinion, the cause was remanded to the district court for trial on two general issues: (1) whether the sale of secured stock by the defendant here was conducted in a commercially reasonable manner and, if not, the damages, if any, sustained by Chadron Energy Corporation (CEC), and (2) a redetermination of the damages for conversion sustained by Gordon C. Shaffer, Jr., Marian Shaffer, and Leslie Kleman, to be computed as of October 1982 rather than November 1980. Before the new second trial, the Shaffers and Kleman settled their claims against the First National Bank of Omaha (FNBO) and are no longer parties to this litigation.

At the trial out of which this appeal arises, the jury found that FNBO failed to conduct a commercially reasonable foreclosure sale and that the reasonable value of the stock had the sale been commercially reasonable would have been $2,353,200, rather than the $1,410,000 which the sale actually brought. Following that verdict, the district court determined

that FNBO had no claim to certain interpleaded funds.

This litigation is based on a series of involved and somewhat complicated transactions.

In March 1979, the First National Bank of Chadron (FNB-Chadron) was a national banking corporation which had issued and outstanding 2,000 shares of capital stock. On March 6, 1979, six individuals represented by George Wulf (Wulf Group) entered into a stock purchase agreement for 1,990 shares of FNB-Chadron stock. The sale price was $5 million, part of which was to be paid in cash at the time of the closing and the balance of which was to be represented by notes from the individual members of the Wulf Group. Of the 1,990 shares of stock to be purchased, 1,815 would be purchased from the Shaffers and Kleman. In order to obtain the necessary cash to make the downpayment to the Shaffers and Kleman, the Wulf Group borrowed $2.1 million from FNBO. The Shaffers received $860,000 in cash plus notes totaling $2,102,500, and Kleman received $1,180,000 in cash plus notes totaling $395,000.

Both the loan from FNBO and the notes to the Shaffers and Kleman were secured by 1,850 shares of FNB-Chadron stock. (The discrepancy between the number of shares purchased from the Shaffers and Kleman and the number of shares securing the debts to FNBO, the Shaffers, and Kleman is unexplained in the record.) By agreement among all parties, FNBO was designated as the senior lienholder at that time and the Shaffers and Kleman as junior lienholders.

FNBO took physical control of six individual stock certificates, each issued in the name of one of the six members of the Wulf Group. FNBO assured the Shaffers and Kleman in writing that "[w]e will not release such collateral from our possession until you have notified us that your security interest has been released or discharged."

Later in 1979, the Wulf Group formed a corporation under the name of First of Chadron Bank Corporation, and received approval of the Federal Reserve Bank of Kansas City to become a one-bank holding company and to acquire the capital stock of FNB-Chadron. The holding company's name was later changed to Chadron Energy Corporation.

Beginning in March 1980, it was necessary for the Wulf Group to secure various extensions on the loans and notes from FNBO and the Shaffers and Kleman. Finally, a public offering of CEC stock was conducted during the summer of 1980. The purpose of the offering was to secure sufficient funds to allow CEC to purchase the FNB-Chadron stock from the Wulf Group. The members of the Wulf Group would then pay off their debts to FNBO and the Shaffers and Kleman and would recover the FNB-Chadron stock being held as collateral.

The public offering was not completely successful, although there was approximately $1.6 million in proceeds which were used to pay down the debts of the Wulf Group to FNBO. Other financing was obtained in order to complete the sale of the FNB-Chadron stock from the Wulf Group to CEC.

The Wulf Group then sought to have CEC assume their loans with FNBO by having FNBO rewrite them in CEC's name in the amount of $600,000 and then discharge the individual debts of the Wulf Group. FNBO, although agreeable to this arrangement, insisted that both the Shaffers and Kleman would have to consent to the transference of the stock from the names of the six individuals in the Wulf Group to CEC before the transaction could be completed. Under this plan, once all of this was accomplished, a single stock certificate in the name of CEC would be returned to FNBO, which would continue to hold the certificate in its possession as security for its loan and the debts owed to the Shaffers and Kleman.

The Shaffers and Kleman refused to sign the consent forms. Despite this lack of consent and although an assumption agreement was never executed by CEC to FNBO, nevertheless FNBO accepted a new note from CEC, delivered the six stock certificates to the individuals in the Wulf Group, permitted the stock to be reregistered in a single certificate in the name of CEC, and accepted back the new stock certificate. "The notes from the six members of the Wulf Group [to FNBO] were, in effect, marked 'paid' and returned to them." *CEC I, supra* at 602, 379 N.W.2d at 750.

As the result of pay downs and additional borrowing, the amount owed by CEC to FNBO varied over time. On March 29, 1982, CEC's note was renewed in the amount of $666,000.

Because of various difficulties experienced throughout 1982, CEC was unable to make the September 27, 1982, payment due on the March 29 note held by FNBO.

FNBO notified CEC that it was in default on the note for nonpayment in the total amount of $720,767.10 principal and accrued interest and that the collateral (stock) would be sold on October 28, 1982. In a notice dated October 18, 1982, FNBO notified CEC that the sale would occur on October 29, 1982. FNBO then sent notice of the sale to approximately 110 people.

Prior to the sale, FNB-Chadron, CEC, and the Shaffers filed a petition to restrain the sale. Although a temporary restraining order was granted on October 28, 1982, the required bond was never posted and FNBO proceeded with the sale.

Only three people participated in the bidding during the October 29, 1982, auction/sale of the 1,850 shares of FNB-Chadron stock. The highest bid obtained during the public bidding was $1,450,000. However, a representative of FNBO held private discussions with each of the three bidders as to the amount each was willing to pay down as a nonrefundable deposit on his bid. As a result of those discussions, the second highest bidder agreed to put down $500,000, as compared to $10,000 by the highest bidder. Therefore, FNBO declared the bid of the second highest bidder to be the highest and best bid and accepted $1,410,000 for the stock.

On October 29, 1982, the $500,000 downpayment was applied to CEC's debt to FNBO, and when the balance of $910,000 was paid on December 10, 1982, FNBO took out its claimed expenses of the sale and the remaining principal and interest owed by CEC.

After the sale, FNB-Chadron dismissed itself from the pending lawsuit, and CEC and the Shaffers proceeded against FNBO for damages, CEC maintaining that the stock was not sold in a commercially reasonable manner and the Shaffers maintaining that stock in which they had a security interest had been converted by FNBO. Several weeks later, Kleman first learned that the stock in which he claimed a security interest had been sold, and he joined the Shaffers in seeking damages for conversion. Before trial, FNBO filed a "counterclaim (interpleader)," interpleading the balance of $661,154.99

remaining from the proceeds of the sale. In an order entered March 8, 1983, the district court stated that FNBO impleaded $654,154.99, which the parties jointly agreed to invest during the pendency of the action, subject to the control and jurisdiction of the court as an interpleaded fund. (The balance remaining after principal, accrued interest, and FNBO's claimed expenses are deducted from the proceeds is $654,154.99, not $661,154.99.)

In *CEC I*, the district court decided as a matter of law that the claim of CEC against FNBO was moot because the stock sold for more than CEC owed to FNBO and thus no deficiency was created. Regarding the claims of the Shaffers and Kleman, after trial the district court found that when FNBO returned the six individual certificates of stock to the individual members of the Wulf Group and permitted the certificates to be canceled and the stock transferred to the name of CEC, FNBO converted the stock of the Shaffers and Kleman. The district court entered judgment for damages for such conversion against FNBO in favor of the Shaffers and Kleman, basing the damages award on the value of the stock as of November 1980, the date of the tender of the six stock certificates and the acceptance of the reissued single certificate by FNBO.

On appeal this court reversed the judgment of the district court, declaring that (1) CEC's claim was not moot because

> [e]ven though the sale may produce a surplus, if in fact a sale in a commercially reasonable manner would have produced a larger surplus, the failure of the [creditor] to sell the security in a commercially reasonable manner has caused the debtor damages which the debtor has a right to recover in a proper action,

CEC I, supra at 599, 379 N.W.2d at 748, and that (2) the date of the conversion as to the Shaffers and Kleman was October 29, 1982, the date of the sale. The cause was remanded for a determination of the damages for conversion as of the date of the sale and to determine "whether the sale of the stock belonging to Chadron Energy was conducted in a commercially reasonable manner and, if not, what, if any, damages Chadron Energy sustained thereby." *Id.*

After the decision in *CEC I*, FNBO settled the claims of the

Shaffers and Kleman and received back assignments of their rights. Thereafter, FNBO, in the trial court, moved to dismiss its counterclaim (interpleader) and to have the interpleaded funds paid to it, claiming it was entitled to the funds by virtue of its assignments from the Shaffers and Kleman and by virtue of subrogation. The district court overruled these motions, but sustained the motion to strike the Shaffers and Kleman from the lawsuit on the grounds that their claims had been settled.

During the trial on remand, both sides presented witnesses who testified on the issue of commercial reasonableness of the sale. Perhaps of particular significance was evidence that FNBO had included in the notice of sale that the total equity capital of FNB-Chadron was $648,000, as opposed to testimony that FNBO knew, from an internal memo from its accountants, Touche Ross & Co., that there could be a tax refund of approximately $500,000 which would enhance the equity capital by that amount.

The jury decided that the sale was not commercially reasonable and that "[t]he fair and reasonable value of the [collateral] in its then condition at a commercially reasonable disposition and sale" was $2,353,200. After the $1,410,000 proceeds of the sale and the $4,500 the jury determined to be the reasonable amount of FNBO's expenses were subtracted out, the amount of CEC's damages was determined to be $938,700. Subsequent to the jury's verdict, the district court entered an order holding that FNBO had no claim to the interpleaded funds and ordered the funds distributed to CEC.

FNBO's 12 assignments of error may be consolidated and summarized as alleging: (1) The district court erred in failing to grant FNBO's motion for directed verdict; (2) the verdict of the jury is contrary to the facts and the law and is not supported by sufficient evidence; (3) the district court erred in giving certain jury instructions and in refusing to give certain jury instructions requested by FNBO; (4) the district court erred in finding that the Shaffers and Kleman had no security interest in the collateral and proceeds of the sale; in finding that, therefore, FNBO had no subrogation rights to and could not acquire any assignment of the interpleaded funds through its settlement with the Shaffers and Kleman; in failing to sustain

the motions of FNBO to dismiss the interpleader and release the moneys to FNBO; and in finding that CEC was entitled to the interpleaded funds; (5) the district court erred in excluding certain exhibits, in excluding testimony of CEC's attorney, in excluding evidence of CEC's suit against and recovery from former directors of CEC and FNB-Chadron, and in allowing testimony regarding a July 1982 agreement for the sale of the FNB-Chadron stock; and (6) the district court erred in finding that CEC was not estopped from asserting facts other than those relied upon by FNBO. Finding some merit in FNBO's fourth assignment of error and having determined that CEC's damages were calculated incorrectly, we reverse and remand for a new trial on the issue of damages only.

FNBO's complaints will be discussed in the order of the consolidated and summarized assignments of error.

FNBO'S MOTION FOR 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. *Ginn v. Lamp*, 234 Neb. 198, 450 N.W.2d 388 (1990). In considering the evidence for the purpose of a motion for directed verdict, the party against whom the 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.*

As will be set out more fully in the discussion of the next assignment of error, the facts were not such that reasonable minds could draw but one conclusion, that is, that FNBO conducted a commercially reasonable sale. The district court, therefore, did not err in failing to grant FNBO's motion for a directed verdict.

THE JURY'S VERDICT

As a general rule, in determining the sufficiency of the evidence to sustain a verdict in a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Vanek*

v. Prohaska, 233 Neb. 848, 448 N.W.2d 573 (1989).

A civil jury verdict will not be disturbed on appeal unless clearly wrong. *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989). A verdict is not to be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Id.*

At issue is the commercial reasonableness of the sale. Under the Nebraska version of the Uniform Commercial Code, after default by the debtor a secured party may dispose of the collateral and apply the proceeds toward satisfaction of the indebtedness. See Neb. U.C.C. § 9-504(1) (Reissue 1980). Section 9-504(3) provides in part:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but *every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.*

(Emphasis supplied.)

We have previously referred to the dispute as to the total equity capital of FNB-Chadron and the failure of FNBO to disclose the possibility of a $500,000 tax refund. Suffice it to say that conflicting testimony presented a question of fact which was decided adversely to FNBO by the jury. The issue of whether a sale was commercially reasonable is a question of fact for the jury to decide. See *Kearney State Bank & Trust v. Scheer-Williams*, 229 Neb. 705, 428 N.W.2d 888 (1988). It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989).

Having disposed of FNBO's challenge of the jury's determination that FNBO failed to conduct a commercially reasonable sale, we turn now to the jury's determination of CEC's damages.

The measure of damages sustained by CEC because the sale was not commercially reasonable is the *additional* surplus CEC

would have received if the sale had been conducted in a commercially reasonable manner. Additional surplus is the difference between the price actually received and the price that could have been obtained if the sale had been conducted in a commercially reasonable manner.

In instruction No. 26, if the jury found that the sale was not made in a commercially reasonable manner and that CEC was damaged by the sale, the jury was instructed to determine "[t]he fair and reasonable value of the 1,850 shares in The First National Bank of Chadron in its then condition at a commercially reasonable disposition and sale . . . ." The problem is not in how the jury was told to calculate CEC's damages, but in the evidence available to the jury with which it could calculate CEC's damages. Although the jury heard evidence that the Shaffers and Kleman also had liens against the FNB-Chadron stock, the district court excluded evidence of the amount of their liens and the fact that their liens had priority over the lien of FNBO.

In a commercially reasonable sale, the bidders would have been informed that the stock was being sold subject to first liens in the total amount of $1,903,408.61. Such information would of course affect the amount that could be realized in a commercially reasonable sale. Although it is possible that CEC suffered no damage due to FNBO's failure to conduct a commercially reasonable sale because a sale of the stock subject to the liens of the Shaffers and Kleman would not produce as much as was actually realized by the sale, this is for a jury, not this court, to decide.

Due to the exclusion of evidence regarding the liens of the Shaffers and Kleman, the $2,353,200 found by the jury to be the "fair and reasonable value" of the stock at a commercially reasonable sale cannot be accepted. In addition, the district court instructed the jury to determine the reasonable expenses of the sale and subtract that amount from the difference between "the fair and reasonable value" of the stock and what was actually realized. In so instructing the jury the district court erred because the effect was to give FNBO double credit for expenses, since FNBO deducted expenses from the proceeds of the sale before interpleading the surplus. If on retrial the jury

determines that the reasonable expenses of the sale were less than the amount FNBO deducted, the difference becomes part of the surplus and is to be added to the interpleaded funds which represent the surplus.

JURY INSTRUCTIONS

FNBO assigns as error the giving of jury instructions Nos. 2, 15, 16, and 17. However, nowhere in the argument section of FNBO's brief is there a discussion of its complaints about those instructions. This court will not consider assignments of error which are not discussed in the brief. *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989); *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989).

FNBO assigns as error the refusal to give jury instructions Nos. 6, 6A, 7, 9, 10, 11, and 12 requested by FNBO. FNBO does not discuss requested instruction No. 7 in its brief, and that instruction will not be considered.

In order to establish as error the trial court's refusal to give a requested instruction, an appellant is under a threefold burden to show that he or she was prejudiced by the court's refusal, that the tendered instruction is a correct statement of the law, and that the instruction is applicable to the evidence in the case. *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989); *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989).

FNBO's proposed instruction No. 6 states, in effect, that CEC and FNBO had agreed in the promissory note evidencing the debt that 5 days' notice of any sale of the stock would be commercially reasonable notice, that FNBO had given CEC more than 5 days' notice, and that, as a matter of law, the notice given was commercially reasonable.

That instruction covers only part of FNBO's duty in this case. Section 9-504(3) gives the debtor the right to notice of the time and place of the public sale. Nowhere in the proposed instruction is it stated that the notice notified CEC of the time and place of the public sale. Furthermore, the complaint as to the unreasonableness of the sale did not go to the days of notice to CEC. The defect in the notice alleged, and CEC's evidence supported, the proposition that there was not sufficient notice to prospective bidders and that the facts contained in the notice

relating to the sale were not accurate.

Proposed instruction No. 6A states that to constitute a commercially reasonable sale the notice should be in written form and should be sent in such time that the debtor would have a minimum of 3 business days to arrange to protect his interests and that because the notice in this case was given more than 3 days prior to the sale, it was commercially reasonable as a matter of law.

The proposed instruction does not correctly state the law. This court has established the rule that a debtor must be given reasonable notice and that ordinarily a minimum of 3 business days is required. See, *First Nat. Bank of Bellevue v. Rose*, 197 Neb. 392, 249 N.W.2d 723 (1977); *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). However, as stated by the court in *First Nat. Bank of Bellevue v. Rose, supra* at 397, 249 N.W.2d at 726, "the ordinary 3-day rule set forth in DeLay is a minimum requirement, and such notice is not necessarily sufficient in all cases." Therefore, the language in the proposed instruction that "[t]he notice which was given to Chadron Energy Corporation in this case was given more than three days prior to the sale, and was commercially reasonable as a matter of law" is clearly not a correct statement of the law.

FNBO's proposed instruction No. 9 attempts to define the rule relating to any damages to be awarded to CEC. After stating that the measure of damages is the amount of surplus, if any, that would have been obtained if the sale had been conducted in a commercially reasonable manner, it goes on to state:

> The surplus is defined as the amount of money that would have been available after the sale of the 1,850 shares of stock of First National Bank of Chadron after payment of all reasonable expenses of sale and payment of all liens held by First National Bank of Omaha, Gordon and Marian Shaffer, and Leslie Kleman against the stock, which liens were in the total amount of $2,631,586.43 on the date of the sale. Surplus is the amount by which the sale price at a commercially [reasonable] sale would have exceeded those liens and expenses.

This proposed instruction did not correctly state the law. As discussed previously, the measure of CEC's damages is additional surplus, not surplus. Furthermore, in this case the surplus was the remainder of the proceeds of the sale after payment of the reasonable expenses of the sale and FNBO's lien. As will be set out more fully in the discussion of the consolidated and summarized assignment of error No. 4, proceeds of the sale did not have to be applied to the liens of the Shaffers and Kleman. Therefore, the amount of the liens of the Shaffers and Kleman would not be deducted from the proceeds to determine the amount of surplus.

FNBO's proposed instruction No. 10 referred to evidence of an agreement between CEC and Pine Ridge Management for the sale of 1,940 shares of FNB-Chadron. It then went on to state that the jury may not award damages based upon the failure or inability of CEC to complete that contract and to state that because of certain requirements contained in the agreement which were not accomplished and because the agreement had not yet been approved by the shareholders, the agreement was not binding upon CEC or Pine Ridge Management.

FNBO was not prejudiced by the court's refusal to give this instruction. Instruction No. 23, given by the trial court, stated how damages were to be calculated if the jury found that the sale had not been conducted in a commercially reasonable manner. That instruction was sufficient to ensure that the jury did not award damages based on the alleged contract between CEC and Pine Ridge Management.

Proposed instruction No. 11 discussed the so-called Pine Ridge Management agreement. It would have told the jury that in using that agreement, it would be necessary to deduct certain loans that were agreed to be charged off and to consider an amount of $870,000 that was to be placed in escrow for a period of 1 year to be used to satisfy any loan losses.

Again, FNBO was not prejudiced by the district court's refusal to give this instruction. It is unclear what purpose this instruction would have served other than to have confused the jury. Clearly, the jury did not need to make the calculations called for by the proposed instruction in following the

instructions given by the court that the measure of CEC's damages, if any, would not be the loss of the sale price if the contract with Pine Ridge Management had been fulfilled.

Finally, proposed instruction No. 12 made reference to the doctrine of estoppel. It recited that FNBO had alleged that it acted in reliance upon information provided to it by CEC relating to a call report that would reflect equity capital of $648,000. It then attempted to define "equitable estoppel or estoppel by misrepresentation," followed by instructions that if the jury found that FNBO had acted in reliance upon the representations of CEC regarding its call report, "then Chadron Energy Corporation is estopped from bringing this action against First National Bank of Omaha."

It is apparent that, even if FNBO was entitled to an instruction on estoppel, this proposed instruction does not correctly state the law. One of the key issues in dispute was whether the representations FNBO claimed were made by representatives of CEC had in fact been made. FNBO's proposed instruction assumes the truth of the fact that the representations were made and only instructs the jury to determine if FNBO relied upon the representations. Additionally, the alleged representations affect the reasonableness of the notice sent to potential bidders. Since the jury could find from the evidence introduced that other aspects of the sale were not commercially reasonable, a finding that CEC is estopped from denying the representations would not estop CEC from bringing this lawsuit, nor would it automatically entitle FNBO to a verdict in its favor.

SECURITY INTERESTS OF SHAFFERS AND KLEMAN

The district court reasoned that FNBO's conversion of the stock in which the Shaffers and Kleman had security interests cut off the security interests, leaving the Shaffers and Kleman with tort claims for conversion against FNBO and no claims to the collateral or the proceeds of the sale. Therefore, according to the district court, FNBO could acquire no subrogation right to the proceeds by virtue of having settled the claims of the Shaffers and Kleman and acquired no right to the proceeds by virtue of the assignments from the Shaffers and Kleman.

Disputing the correctness of the district court's analysis, FNBO claims that the court should have dismissed the interpleader and released the money to it rather than releasing the money to CEC. FNBO argues that it is entitled to all of the sale proceeds, including the interpleaded funds, for the following reasons: (1) The senior security interests of the Shaffers and Kleman continued in the sale proceeds, and because of the nature of conversion, those security interests became the property of FNBO; (2) the Shaffers and Kleman assigned their interests to FNBO; and (3) FNBO was subrogated to the rights of the Shaffers and Kleman.

FNBO contends that the true holding of *CEC I* is that retention of proceeds from the sale constituted a conversion as to the senior lienholders, the Shaffers and Kleman. According to FNBO, a junior secured party has an obligation to turn over proceeds of a sale to the senior secured party and failure to do so constitutes a conversion. Therefore, argues FNBO, if it converted property rights of the Shaffers and Kleman and paid its liability to those parties, it is entitled to retain the benefit of the property rights which it allegedly converted, i.e., the sale proceeds, including the interpleaded funds.

In *CEC I*, this court concluded that FNBO's conversion of the stock occurred in October 1982 rather than November 1980. The court reasoned that in November 1980 FNBO did not in any manner diminish or extinguish the security interests of the Shaffers and Kleman when it exchanged the six stock certificates for one stock certificate and therefore the act of transfer did not constitute a conversion. The court also stated:

> Furthermore, although First National-Omaha did release the bank stock from its possession, ostensibly in derogation of its written assurance not to do so unless the Shaffers and Kleman gave written consent, this did not amount to a conversion on the part of First National-Omaha. First National-Omaha, by agreeing to hold the collateral for the benefit of the Shaffers and Kleman, the junior lienholders, created a bailor/bailee relationship between itself and Shaffers and Kleman. [Citation omitted.] While it is true that strict adherence to a formal contract for bailment establishes the obligation

> of the bailee, *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.*, 162 Neb. 47, 75 N.W.2d 366 (1956), First National-Omaha's technical breach of the agreement did not amount to a conversion. A bailee may satisfy his obligation by a return of certificates of like kind, there being no obligation to return the identical certificates. [Citations omitted.] The agreement merely obligated First National-Omaha to hold 1,850 shares of First National-Chadron bank stock, and although there was a gap of time when First National-Omaha did not have possession of the stock, this does not mean that First National-Omaha converted the stock. When First National-Omaha recovered the stock, though it had been reregistered, it remained 1,850 shares of First National-Chadron bank stock.
>
> For these reasons, then, the finding by the district court was in error. However, as we have indicated, the subsequent sale by First National-Omaha of this stock did constitute a conversion for which Shaffers and Kleman were entitled to seek damages.

CEC I, supra at 601-02, 379 N.W.2d at 749.

FNBO sold the stock over the protest of the Shaffers and without notice to Kleman. Unlike after the November 1980 transfer, after the October 1982 sale FNBO no longer held 1,850 shares of FNB-Chadron stock, and therefore FNBO's breach of the agreement was more than just a technical breach and did amount to a conversion of the stock in which the Shaffers and Kleman held security interests.

While it is true that this court did determine that after November 1980 the security interests of the Shaffers and Kleman were senior to the security interest of FNBO, this court did not say that FNBO was guilty of conversion because it failed to turn over proceeds of the sale to the senior secured parties. Such a holding would be unsupported by the Uniform Commercial Code.

Despite the senior secured status of the Shaffers and Kleman, when CEC defaulted, *under the code* FNBO was entitled to sell the 1,850 shares of FNB-Chadron securing CEC's debt. Neb.

U.C.C. § 9-503 (Reissue 1980) provides in part that "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral." Section 9-504(1) provides that "[a] secured party after default may sell, lease or otherwise dispose of any or all of the collateral . . . ." These sections make no distinction between secured parties of graduated priorities; they authorize "*a* secured party" to repossess the collateral upon default via self-help, if repossession is necessary, and to dispose of the collateral. There is no requirement that the secured party hold first priority status.

When CEC defaulted, FNBO, as a secured party, albeit a junior secured party, was authorized under the code to sell the collateral. FNBO was not guilty of conversion because it retained proceeds of the sale in satisfaction of CEC's indebtedness without first applying proceeds to the satisfaction of the security interests of the Shaffers and Kleman. Section 9-504(1) provides that proceeds of a foreclosure sale are to be applied in the following order: (1) to the reasonable expenses of the sale, (2) to the satisfaction of the indebtedness secured by the security interest under which the disposition is made, and (3) to the satisfaction of indebtedness secured by any *subordinate* security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If there are any proceeds remaining, they go to the debtor. § 9-504(2). The code does not require distribution of proceeds to the satisfaction of senior security interests when a junior secured party conducts a foreclosure sale.

However, despite the right FNBO had under the code to sell the collateral, it had created a bailor/bailee relationship between itself and the Shaffers and Kleman and had agreed not to release the collateral from its possession until notified by the Shaffers and Kleman that their security interests had been released or discharged. This court has previously held that a special contract of bailment prevails in determining the liabilities of the parties, as against general principles of law applicable in the absence of express agreement. *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.*, 162 Neb. 47, 75 N.W.2d 366 (1956). When FNBO sold the stock in breach of the bailment agreement, it was guilty of conversion whether the

security interests of the Shaffers and Kleman were junior or senior to the security interest of FNBO.

In settling the conversion claims of the Shaffers and Kleman, FNBO in effect purchased their interests in the stock. As a general rule, one converting the property of another who pays to the owner the value of the property converted becomes, by operation of law, the owner of the property. See, *Foley v. Dick*, 436 So. 2d 139 (Fla. App. 1983); *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989). To determine what interests FNBO thereby acquired, it is necessary to determine the interests of the Shaffers and Kleman after the sale.

The Interests of the Shaffers and Kleman in the Collateral After the Sale.

Neb. U.C.C. § 9-306 (Reissue 1980) deals with a secured party's rights upon disposition of the collateral other than by the secured party. Section 9-306(2) provides:

> Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

In 1980, the Nebraska Legislature amended § 9-306(2) by deleting the phrase "by the debtor" following "sale, exchange or other disposition thereof." Therefore, even if the disposition is not by the debtor, a secured party's security interest continues in the collateral unless one of the conditions specified in § 9-306(2) for cutting off the security interest is satisfied. See *El Paso County Bank v. Charles R. Milisen & Co.*, 622 P.2d 594 (Colo. App. 1980).

Section 9-306(2) provides that a security interest continues in the collateral after a sale, exchange, or other disposition unless (1) otherwise provided in article 9 of the code or (2) the secured party authorized the disposition.

Article 9 does not "otherwise" provide that a senior secured party's security interest in the collateral is cut off by a disposition by a junior secured party. Section 9-504(4) provides:

> When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien *subordinate* thereto. The purchaser takes free of all such rights and interests . . . .

(Emphasis supplied.) Under § 9-504(4) only subordinate security interests and liens are cut off. A senior secured party's interest in the collateral is not discharged by a junior secured party's foreclosure sale, and the collateral in the hands of the purchaser is subject to the senior secured interest. See, 2 J. White & R. Summers, Uniform Commercial Code § 27-9 (3d ed. 1988); R. Duncan & W. Lyons, The Law and Practice of Secured Transactions: Working with Article 9 § 5.04[4] (1990).

FNBO's sale of the stock was not authorized by the Shaffers and Kleman, either in the security agreements or "otherwise."

Neither of the conditions specified in § 9-306(2) for cutting off a security interest in collateral having been satisfied, the security interests of the Shaffers and Kleman continued in the stock after the sale. By settling the conversion claims of the Shaffers and Kleman, FNBO acquired their continuing security interests in the stock. This, however, does not support FNBO's claim of entitlement to the proceeds of the sale, including the interpleaded funds.

The Interests of the Shaffers and Kleman in the Proceeds After the Sale.

Section 9-306(2) provides that after sale, exchange, or other disposition, a security interest continues "in any identifiable proceeds including collections received by the debtor." Unlike the continuing security interest in the collateral, whether the sale was authorized does not affect the secured party's continuing interest in the proceeds. See, *Norfolk Prod. Credit Assn. v. Bank of Norfolk*, 220 Neb. 593, 371 N.W.2d 276 (1985); 9 R. Anderson, Uniform Commercial Code §§ 9-306:11 and 9-306:23 (3d ed. 1985).

When the disposition of the collateral is by a junior secured party, what is the interest of a senior secured party in the proceeds of the disposition? The security interest of the senior

secured party continues only in those proceeds of the disposition that are received by the debtor.

As previously stated, the distribution scheme specified in § 9-504(1) does not provide for distribution of any of the proceeds to the satisfaction of indebtedness secured by a senior security interest. Therefore, a continuing security interest of the senior secured party in proceeds of the sale properly distributed to other secured parties pursuant to § 9-504(1) would be inconsistent with the distribution scheme of § 9-504(1). However, if the disposition of the collateral by a junior secured party produces a surplus which the debtor is entitled to receive pursuant to § 9-504(2), such proceeds are subject to the continuing security interest of the senior secured party.

Despite FNBO's contention to the contrary, the security interests of the Shaffers and Kleman did not continue in the proceeds of the sale retained by FNBO as reimbursement for the expenses of the sale and in satisfaction of CEC's debt. However, the Shaffers and Kleman did have continuing security interests in those proceeds of the sale to which CEC was entitled, i.e., the surplus proceeds represented by the interpleaded funds.

By settling the conversion claims of the Shaffers and Kleman, FNBO acquired their continuing security interests in the surplus proceeds/interpleaded funds.

Furthermore, in their settlements with FNBO, the Shaffers and Kleman assigned to FNBO the promissory notes from the members of the Wulf Group and their rights to and interests in the proceeds of the sale of the FNB-Chadron stock. Since the security interests of the Shaffers and Kleman continued in the surplus proceeds/interpleaded funds, FNBO also has an interest in the interpleaded funds by virtue of the assignments.

FNBO also argues that it is entitled to the proceeds, including the interpleaded funds, because the theory of subrogation would clearly give it the right to the sale proceeds because it was compelled to pay a debt that was owed to the Shaffers and Kleman and which was to be paid from the proceeds of the sale of the stock.

As discussed above, FNBO is incorrect in asserting that proceeds of the sale had to be paid to the Shaffers and Kleman

to pay the debt of the Wulf Group. Furthermore, the doctrine of equitable subrogation is inapplicable in this case.

Subrogation is defined as the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988). " ' "Subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other." ' " (Emphasis omitted.) *Id.* at 591, 428 N.W.2d at 192 (quoting *State Auto. & Cas. Underwriters v. Farmers Ins. Exchange*, 204 Neb. 414, 282 N.W.2d 601 (1979)). The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank, supra*. The doctrine applies where a party is compelled to pay the debt of a third person to protect his own rights or interest, or to save his own property. *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982). Subrogation is not allowed where the debt paid is one for which the payor is primarily liable. See, *J. J. Schaefer Livestock Hauling v. Gretna St. Bank, supra*; *Luikart v. Buck*, 131 Neb. 866, 270 N.W. 495 (1936).

The money FNBO paid to the Shaffers and Kleman was in payment of their conversion claims. Equitable subrogation does not apply in this case because FNBO was itself "primarily liable" for the debt it paid, since FNBO and FNBO alone was liable for conversion. It simply paid its own debt and is not to be subrogated to anyone's rights. See *J. J. Schaefer Livestock Hauling v. Gretna St. Bank, supra*.

From the foregoing discussion it is clear that the district court erred in ordering the interpleaded funds released to CEC. Despite FNBO's conversion, the security interests of the Shaffers and Kleman continued in the collateral and the surplus proceeds of the sale. FNBO acquired the security interests of the

Shaffers and Kleman in the surplus proceeds/interpleaded funds when it settled their conversion claims and by virtue of the assignments.

It must, however, be remembered that the security interests of the Shaffers and Kleman in the FNB-Chadron stock gave them a secured position in the event of nonpayment by the Wulf Group. There having been no default by the Wulf Group when the stock was sold, the Shaffers and Kleman could have claimed the surplus proceeds/interpleaded funds only by virtue of their continuing security interests which, given that the proceeds were money, could be perfected only by possession. They could not have applied the proceeds to the debts of the Wulf Group; they could only have held the proceeds as security against nonpayment by the Wulf Group. In the event the members of the Wulf Group paid off their debts to the Shaffers and Kleman, CEC would then be entitled to the surplus proceeds/interpleaded funds.

FNBO having acquired, by settlement of the conversion claims and by virtue of the assignments, the security interests of the Shaffers and Kleman and the promissory notes representing the debts those security interests secured, FNBO is entitled to hold the interpleaded funds in order to perfect its security interests but can only hold the money as security against nonpayment by the Wulf Group. Therefore, whether FNBO or CEC is ultimately entitled to the interpleaded funds depends on whether the members of the Wulf Group default on their debts and the extent of any defaults, and the entitlement to the funds cannot be decided by this court in this appeal.

In the event the jury on retrial determines that CEC did suffer a loss of additional surplus because FNBO failed to conduct a commercially reasonable sale, the additional surplus recovered by CEC is not subject to the continuing security interests in the surplus proceeds/interpleaded funds now held by FNBO. Although such additional surplus is proceeds that should have been received from the sale, it is not proceeds actually received from the sale and therefore does not come within § 9-306.

EXCLUSION OF CERTAIN EVIDENCE

The admission or exclusion of evidence is initially left to the discretion of the trial court, which must determine the relevancy and possible prejudicial effects of the proffered evidence. *Wright v. Forney*, 233 Neb. 258, 444 N.W.2d 895 (1989).

FNBO contends that the district court erred in excluding exhibits 245, 249, 258, and 259. It did not argue its complaint about exhibit 245 in its brief, and therefore we will not consider it.

Exhibit 249 is a letter written by one of CEC's attorneys to Larry Tarrant. The letter, written after the sale, was sent to Craig Madson, a representative of CEC, for his review, with instructions to send it on if it met with his approval. There is no evidence the letter was ever sent on to Tarrant, and the letter was cumulative evidence. To the extent that it therefore cannot be said that the trial court abused its discretion in excluding the letter, we need not address whether the letter was properly excluded because it was privileged or work product.

Testimony sought to be elicited from one of CEC's attorneys, the same person who authored the letter mentioned above, was also cumulative to evidence elicited from other witnesses throughout the trial, and its exclusion was not error.

Exhibit 258 related to evidence of a lawsuit filed by CEC against former directors of CEC and FNB-Chadron in which CEC claimed that all of its losses and damages resulted from the negligence of the directors, and exhibit 259 related to evidence of settlement of the suit for $800,000. According to FNBO, CEC's recovery was not from a collateral source and CEC's claims in that lawsuit were contradictory to CEC's claims in this lawsuit.

Under the collateral source rule adopted by this court, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages. See, *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986); *Huenink v. Collins*, 181 Neb. 195, 147 N.W.2d 508 (1966). According to this court:

> This rule [the collateral source rule] provides that benefits

> received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The theory underlying the adoption of this rule by a majority of jurisdictions is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.

Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc., 232 Neb. 763, 767, 443 N.W.2d 872, 875 (1989).

FNBO is correct inasmuch as it asserts that the collateral source rule is inapplicable in this case. However, for the same reason that the collateral source rule is inapplicable, evidence of the lawsuit by CEC against former directors is irrelevant.

Contrary to FNBO's contention, CEC was not seeking recovery for the same losses and damages in the lawsuit against former directors for which it is seeking recovery in this lawsuit. By virtue of the conduct of the former directors and by virtue of the conduct of FNBO, CEC suffered two separate and distinct losses. The actions of the former directors, including the making of some illegal loans tangentially related to an effort by the Wulf Group to sell its stock to CEC, resulted in difficulties for FNB-Chadron which affected the bank's earnings. This in turn resulted in loss of dividends for CEC, which rendered CEC unable to pay off the debt to FNBO and resulted in FNBO's sale of the FNB-Chadron stock. CEC instituted suit against the former directors to recover for the loss of CEC's primary asset, the FNB-Chadron stock.

On the other hand, CEC alleges that the actions of FNBO in failing to conduct a commercially reasonable sale of the FNB-Chadron stock resulted in a sale of the stock at a price lower than it should have been. CEC instituted suit against FNBO to recover for the loss of additional surplus proceeds.

Since CEC's recovery from the former directors does not compensate CEC for the alleged loss of additional surplus proceeds due to the commercially unreasonable sale of the FNB-Chadron stock, the collateral source rule is inapplicable. Additionally, because the recovery from the former directors was for a different loss, evidence of the lawsuit and recovery

was irrelevant to the issues of the commercial reasonableness of the sale and the amount of loss suffered by CEC if the sale was commercially unreasonable.

The exclusion of exhibits 258 and 259, the petition and the settlement agreement and release in the suit against the directors, was not erroneous.

Finally, FNBO objects to the admission of testimony as to what Robert Isham was willing to pay for the stock a few months prior to the forced sale. If the jury found that the sale was not commercially reasonable, this evidence would be relevant as to fair and reasonable value. FNBO was allowed ample opportunity to present evidence that CEC was or would be unable to fulfill the conditions set out in the agreement before the sale would go through. FNBO was also allowed to present evidence regarding the effect of subsequent events, i.e., losses due to write-offs of bad loans, etc. The district court did not err in receiving this evidence.

ESTOPPEL OF CEC

The claim as to estoppel of CEC from asserting facts other than those relied on by FNBO has been discussed earlier in respect to a tendered instruction by FNBO. FNBO argues that Madson represented to representatives of FNBO that the September 30, 1982, call report, to be published on November 1, 1982, would reflect capital of $648,000. FNBO contends that it then gave notice and conducted the sale in reliance upon this information and that therefore CEC should not be allowed to assert an action against FNBO, because FNBO acted in reliance upon information given by CEC. There are two flaws in FNBO's reasoning. First, whether Madson made the representations FNBO claims he made was a hotly contested issue at trial. Whether the representations were made and, if they were, whether FNBO relied upon them were questions for the jury to decide, not the judge. Second, even if CEC were estopped from asserting that the representations FNBO attributed to representatives of CEC were not made, the issue went to only one aspect of the sale. There are other factors that go into the determination of whether the sale was commercially reasonable, and therefore CEC would still be entitled to bring

an action against FNBO even if FNBO did give notice and conduct the sale in reliance on the disputed representations.

The judgment of the district court is reversed and the cause remanded for a new trial on damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

FIRST NATIONAL BANK OF OMAHA, A NATIONAL BANK, APPELLANT, V. CHADRON ENERGY CORPORATION, A NEBRASKA CORPORATION, APPELLEE.

459 N.W.2d 736

Filed August 31, 1990. No. 88-435.

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 an appellate review of a summary judgment, the court reviews 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. **Courts: Judgments: Judicial Notice: Res Judicata.** Where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
4. **Attorney Fees: Appeal and Error.** Neb. Rev. Stat. § 25-824(2) (Reissue 1989) authorizes attorney fees for services in defending against a frivolous appeal to the Supreme Court whether or not fees were requested or ordered in the trial court.
5. **Actions: Words and Phrases.** All doubts as to whether an action is frivolous should be resolved in favor of the petitioner, and sanctions should not be imposed except in the clearest cases.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James B. Cavanagh, of Erickson & Sederstrom, P.C., for appellant.

M.J. Bruckner and W. Scott Davis, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

HASTINGS, C.J.

The First National Bank of Omaha (FNBO) brought suit against Chadron Energy Corporation (CEC) to collect the amount alleged to be due on a promissory note dated March 29, 1982. FNBO appeals the order of the district court, which held that the promissory note had been paid and granted summary judgment in favor of CEC. This case, although briefed separately, was consolidated for argument with *Chadron Energy Corp. v. First Nat. Bank, ante* p. 173, 459 N.W.2d 718 (1990) (*CEC II*). Most of the facts essential to a determination of this appeal will be found in that opinion. We affirm.

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. *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990). In an appellate review of a summary judgment, the court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

The note which FNBO is trying to collect is one executed on March 29, 1982, by CEC in the amount of $666,000. It was secured by certain shares of the capital stock of First National Bank of Chadron, owned by CEC. We find it unnecessary to relate or discuss the various errors assigned by FNBO, because the disposition of this case is fully embodied in our decision in *CEC II*. Reference to that decision leaves no question that the note which FNBO is trying to collect here has been fully paid as the result of FNBO's action in selling the collateral and retaining the proceeds in an amount covering the debt of the note. Therefore, the question presented by this appeal is now

moot, and the judgment of the district court is affirmed.

Where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. *In re Estate of Casselman*, 219 Neb. 653, 365 N.W.2d 805 (1985).

CEC, although not cross-appealing from the failure of the trial court to award attorney fees, nevertheless requests this court to enter an order taxing attorney fees to FNBO for services rendered during this appeal because of the claimed frivolous nature of FNBO's appeal. FNBO takes the position that CEC may not request attorney fees because it did not cross-appeal the issue.

Neb. Rev. Stat. § 25-824(2) (Reissue 1989) provides in part as follows:

> [I]n any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

It seems apparent that § 25-824(2) authorizes attorney fees for services in defending against a frivolous appeal to this court whether or not fees were requested or ordered in the trial court. See, *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988); *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985).

This court has adopted the position that all doubts as to whether an action is frivolous should be resolved in favor of the petitioner, and sanctions should not be imposed except in the clearest cases. See *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987).

Given the complexity of the facts involved and the problems both parties, as well as the trial court and this court, have had in resolving this matter, it is not clear that FNBO did not commence this action in good faith or that its present litigation

was an effort to harass or delay CEC. CEC's request for attorney fees is denied.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN R. GARZA, APPELLANT.

459 N.W.2d 739

Filed August 31, 1990. No. 89-469.

1. **Indictments and Informations: Lesser-Included Offenses.** When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, may constitute another crime or crimes, such other crime or crimes are included within the crime charged.
2. _____: _____. Whether a particular offense is a lesser offense included in the offense with which the defendant is charged is determined by examining the allegations in the information and the evidence offered in support of the charge.
3. **Lesser-Included Offenses: Case Disapproved.** The statement in *State v. Lovelace*, 212 Neb. 356, 360, 322 N.W.2d 673, 675 (1982), that "[t]o determine whether one statutory offense is a lesser-included offense of the greater, we look [only] to the elements of the crime and not to the facts of the case" is expressly disapproved.
4. **Criminal Attempt: Lesser-Included Offenses: Case Overruled.** To the extent *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), overrules the holding in *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), that there are no lesser-included offenses of attempted crime prosecuted under Neb. Rev. Stat. § 28-201 (Reissue 1989), *Jackson* is expressly overruled.
5. **Rules of Evidence: Witnesses: Prior Convictions.** In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1989) by establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for a new trial.

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

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

PER CURIAM.

Following a jury trial in district court, the defendant, Steven R. Garza, was found guilty of attempted first degree sexual assault and sentenced to 4 to 6 years in prison. He has appealed and assigned as error the trial court's refusal to instruct the jury on what Garza claims are the lesser-included offenses contained within the attempted first degree sexual assault charge and the court's overruling the defendant's motion for mistrial.

The record shows that on the night of September 20, 1988, a group of teenagers were drinking beer at Carl Ziemba's apartment. At some point during the evening, two of the girls got into a fight over Michael Garza, the defendant's cousin, who was charged with attempted first degree sexual assault. See *State v. Garza, post* p. 215, 459 N.W.2d 747 (1990). The defendant took one of the girls outside to calm her down.

The victim lived in the third story of an adjacent apartment building. The victim had been sleeping since about 4:30 that afternoon because she had been drinking wine earlier in the day, celebrating her birthday. When she woke up around 9:20 that night, she was still feeling the effects of alcohol. She went out onto her balcony to look for her cat. While on the balcony she saw the defendant and the girl arguing loudly and saw the defendant slap the girl. The victim took a paring knife and went outside to try to help the girl. The girl told her not to get involved and that everything was fine. The victim told the girl to "get away from this asshole."

The defendant hit the victim in the face, knocking her down. The victim testified that the defendant dragged her to the side of the building with the help of his cousin Michael and that the defendant told her he was going to "fuck [her] in the ass." She further testified that while the cousin held her by the elbows, the defendant pulled down her pants, pulled out her tampon, and then started to unbutton his pants, when she struggled enough to get free.

A neighbor testified that she heard a woman screaming and saw two men holding a woman with no pants on. She called the

police.

After the victim broke away, she ran back to her apartment. The police arrived shortly after that in response to the neighbor's call. The victim suffered two black eyes and lost the feeling in her face for approximately 3 months. She also had scrapes and bruises on her arms and legs.

The victim positively identified the defendant from a photo array as the man who attempted to assault her. The photo array consisted of pictures of Hispanic males, because the victim had described her attackers as Mexican. Later, when the victim was shown a photograph of Ziemba, she stated that he was not one of her assailants.

The defendant testified that he did not pull down the victim's pants and did not threaten to have sex with her. He and the girl he was arguing with in the parking lot testified that the girl dragged the victim to the side of the apartment building after the defendant hit the victim, knocking her down. The defendant further testified that he encountered the victim for a second time while he and Ziemba were standing at the corner of the building. He stated that she started hugging Ziemba, telling him that the defendant hit her. According to the defendant, he then left Ziemba with the victim and started walking toward the wall when he heard the victim yelling at Ziemba. He turned around and saw the victim standing with her pants down. He stated he tried to calm her down, and she became irate and started trying to stab him with the knife, when Ziemba grabbed her from behind. According to the defendant, he grabbed the victim's legs and took the knife away from her while Ziemba started dragging her along the side of the building. At that point the defendant left the scene.

Defendant, relying on *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989), and *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), first alleges that the trial court erred in failing to instruct the jury, as he had requested, as to what he claims are the lesser-included offenses of attempted first degree sexual assault: third degree assault, third degree sexual assault, and attempted third degree sexual assault.

In *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), we held that it was error for the trial court to instruct the jury

that first degree assault was a lesser-included offense of attempted murder in the second degree. We recognized that although "the elements of first degree assault *may* be present in a case of attempted second degree murder, it is likewise clear that one may nevertheless be guilty of attempted second degree murder without having committed first degree assault." (Emphasis in original.) *Id.* at 359, 322 N.W.2d at 674. We then stated the following rule, which is sometimes described as the common-law or strict statutory approach: "To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser." *Id.* at 359, 322 N.W.2d at 675.

In the *Lovelace* case the defendant had shot the victim in the stomach. We held the facts were unimportant because under the rule adopted in that case, "we look to the elements of the crime and not to the facts of the case." *Id.* at 360, 322 N.W.2d at 675.

In the *Lovelace* case we abandoned the rule which had been followed for many years in Nebraska and which is known as the cognate theory and appears to be followed in a majority of jurisdictions. See Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445, 449 (1984). That rule is illustrated by our decision in *Alyea v. State*, 62 Neb. 143, 86 N.W. 1066 (1901), in which we relied upon the allegations in the information and the proof offered in support of the allegations in determining that assault and battery was not a lesser-included offense of assault with intent to inflict great bodily injury. Because the information in that case alleged an assault, but not a battery, the defendant could not be convicted of assault and battery. The opinion stated: "The information alleges an assault, but not a battery. If the latter had been averred in the information, the charge would have been sufficiently broad to have sustained a conviction for an assault and battery." *Id.* at 144, 86 N.W. at 1067.

While *Lovelace* changed somewhat the rule set forth in *Alyea*, our decisions since the *Lovelace* case have not followed the *Lovelace* rule. See, e.g., *Jackson, supra*, and *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987).

In *Jackson*, the defendant was charged with attempted

sexual assault in the first degree. The evidence showed that while the defendant was visiting the victim in her apartment, he left the living room several times to use the bathroom, and after his last trip to the bathroom, he returned to the living room naked and asked the victim if he " 'could have a little.' " *Id.* at 845, 408 N.W.2d at 724. The victim told the defendant to put on his clothes and get out of her apartment. The defendant repeated his request, and after the victim refused, the defendant approached the victim and asked to touch her breasts. The victim began to fight the defendant, and the defendant was unable to touch her breasts, genital area, or any other intimate area of the victim's body. Sometime during the struggle with the victim, the defendant ejaculated on the victim's pant leg, and when the victim started screaming and ran to the door, the defendant covered her mouth, pulled her arm behind her back, and told her, " 'Shut up, or I'll kill you.' " *State v. Jackson*, 225 Neb. 843, 846, 408 N.W.2d 720, 724 (1987). After the victim quieted, the defendant apologized, put on his clothes, and left.

The defendant in *Jackson* admitted that he was naked when he asked the victim to have sex; however, he denied that he, by use of force, attempted to have sex with her and that he attempted to touch the victim's genital area or other intimate parts of the victim's body or attempted in any manner to penetrate the victim's body. The defendant also testified that he " 'might have' " ejaculated on the victim's pant leg, *id.*, and that he had grabbed the victim, covered her mouth, and dragged her to the couch. He stated it was " 'possible' " that he told the victim to " '[s]hut up, or I'll kill you.' " *Id.* at 847, 408 N.W.2d at 724.

This court held that under the circumstances in *Jackson*, where the defendant was charged with attempted sexual assault in the first degree, attempted sexual assault in the second degree was a lesser-included offense.

" ' "When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, *may* constitute another crime or crimes, such other crime or crimes are included within the crime charged." . . .' " (Emphasis in original.) *Id.* at 855, 408 N.W.2d at 729, quoting *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543

(1986), quoting *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966).

In the *Jackson* case we applied the pre-*Lovelace* rule and held that the trial court did not err in submitting attempted second degree sexual assault as a lesser-included offense of attempted sexual assault in the first degree.

In *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989), we followed the *Jackson* case and held that the trial court had erred in failing to instruct the jury on the lesser-included offenses of attempted sexual assault in the second and third degree and reversed the judgment.

However, we also stated in *Jackson*:

> "The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Miller*, 215 Neb. 145, 337 N.W.2d 424 (1983); *State v. Ebert*, 212 Neb. 629, 324 N.W.2d 812 (1982); *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982)."

Jackson, supra at 855, 408 N.W.2d at 729, quoting *State v. White*, 217 Neb. 783, 351 N.W.2d 83 (1984).

This is the "test" which we adopted in *State v. Lovelace*, 212 Neb. 356, 360, 322 N.W.2d 673, 675 (1982), where we stated, "To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case."

However, as shown by the quotation from *State v. McClarity, supra*, cases prior to *Lovelace* determined whether a lesser-included offense existed based on the elements of the crime as charged in the information and the evidence supporting the charge. See, e.g., *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980).

While cases since the *Lovelace* decision have cited the rule of looking only to the elements specified by statute in determining the existence of lesser-included offenses, in deciding the case we have looked in some degree to the facts of the case. See, e.g.,

State v. Jackson, supra; *State v. Sutton, supra*; *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). To the extent that the quoted language from *State v. Lovelace* conflicts with the previously discussed cognate-evidence approach to lesser-included offenses, the language quoted from *State v. Lovelace* is expressly disapproved.

We also deem it appropriate to reexamine our rules concerning lesser-included offenses of attempted crimes. In *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), we noted that under Neb. Rev. Stat. § 28-201(1) (Reissue 1989), an actor attempts to commit a crime if he or she intentionally engages in conduct which (1) would constitute a crime if the attendant circumstances were as the actor believes them to be, or (2) under the circumstances as the actor believes them to be, would constitute a substantial step in the course of conduct intended to culminate in the commission of the crime. We then concluded that because an attempted crime could be committed without the crime that was attempted itself being committed, no offense could be a lesser-included offense of an attempted crime prosecuted under § 28-201. In *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), we reappraised the situation and overruled *Swoopes* to the extent it indicated that an attempt to commit a sexual assault in a degree less than first degree could not be a lesser-included offense in a prosecution for an attempt to commit a sexual assault in the first degree.

In now rethinking the role of the lesser-included offense doctrine in this jurisdiction, a doctrine described as a " 'Gordian [k]not' " and " 'many-headed hydra' " " 'not without difficulty in any area of the criminal law' " and one which " 'has challenged the effective administration of criminal justice for centuries,' " Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445, 445-46 (1984), we conclude that overruling *Swoopes* was improvident. As an attempted crime may be committed in an infinite variety of ways by acts which without the requisite intent are entirely innocent, the doctrine, under the cognate theory readopted earlier, simply becomes unworkable in the context of attempted crimes. Accordingly, that portion of *State v. Jackson, supra*, which overrules *Swoopes* is now

expressly overruled.

Accordingly, the trial court did not err in refusing to instruct the jury as to any lesser-included offenses.

The defendant also contends that the trial court erred in refusing to declare a mistrial after the conduct by the prosecutor set out below.

The defendant admitted on direct examination that he had previously been convicted of a misdemeanor, "false information." On cross-examination, the following ensued:

> Q. You say you were convicted of false information. You said it was in March. The incident was in March, but you were actually sentenced in, I believe, August of '88; is that correct?
>
> A. That is correct.
>
> Q. And false information is a charge which basically involves —
>
> MR. STOLER [attorney for Michael Garza]: Objection, Your Honor, as to going any further.
>
> THE COURT: Sustained.
>
> MR. CRYNE [prosecutor]: He brought it up.
>
> THE COURT: I don't want details of what the crime was, but if you're talking about the general information of what false information is.
>
> Q. (Mr. Cryne) You lied to a police officer, right?
>
> MR. SLADEK [attorney for defendant]: I would object. That's still improper impeachment. May I approach the bench.
>
> THE COURT: Well, yes. As to what the actual charge or what the actual offense was, the objection is sustained and the jury is instructed to disregard the last question.
>
> MR. CRYNE: Can I ask the gist of the offense?
>
> THE COURT: You can ask what the nature, what the statute is.
>
> Q. (Mr. Cryne) Is this a violation which involves giving information to a law enforcement officer?
>
> MR. SLADEK: Objection. It's still improper impeachment.
>
> THE COURT: Overruled.
>
> Q. (Mr. Cryne) You may answer the question.

A. Yes, it is. And as far as I understand, Carl Ziemba was arrested on that same charge when he was questioned.

Q. He gave false information to his parole officer, right?

A. I do not know.

Q. The gist of the offense is giving false information to a law enforcement officer?

MR. SLADEK: Continuing objection.

THE COURT: Well, it's noted, but I will sustain the objection as to already asked and answered.

. . . .

MR. SLADEK: Your Honor, may I approach the bench, Your Honor.

THE COURT: All right.

(Bench conference, and the following was heard out of the presence of the jury:)

MR. SLADEK: Your Honor, at this time I make a motion for a mistrial, the fact that the prosecution went further than has already been asked. There's been two recent cases that came down from the supreme court stating they can go no further than ask if he's convicted of false information. That question was already asked. They went further into explaining what false information is.

THE COURT: I think the wording of the statute is false information of a police officer, is it not, or other officials? I don't have a statute in front of me.

MR. STOLER: False information to a law enforcement officer is what the statute reads.

THE COURT: That's the name of the statute, and that's what it is. All right.

MR. CRYNE: In fact, I would like to mark this and offer this as a court exhibit only in support of my objection of his motion for a mistrial.

THE COURT: Why don't we mark it and offer it so it would be Exhibit A.

(Exhibit A was marked for identification)

MR. SLADEK: Your Honor, I'm objecting that it was improper impeachment, that all that can be gone into by the prosecutor or the State of Nebraska is when convicted

of a prior felony within the last 10 years, was he convicted of a misdemeanor or involving —

MR. CRYNE: Dishonesty or false statement.

THE COURT: Which is what he did.

MR. SLADEK: Right. And I asked and answered the question. The prosecutor continued to ask and answer the question.

THE COURT: Well, they can ask the same question. The fact that you ask it doesn't preclude him from asking it.

MR. SLADEK: But they went further than asking.

THE COURT: I don't think they did. I don't think they did. I think they asked if he was convicted of this. Now, if it were a felony, I don't think they can go into the type of felony, for example, burglary, rape, robbery, whatever.

MR. STOLER: Just the number of felonies.

THE COURT: Yes. But you're talking about a crime of false information. I think that's a different ballgame. I think they're entitled to say what do you mean by false information, in other words, false information to a person in authority or whatever the statute is.

MR. CRYNE: With respect to that, the language of the statute requires that it be to a law enforcement officer or a sheriff or police officer.

THE COURT: Motion is overruled.

> In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by establishing that such witness has previously committed a felony *or a crime involving dishonesty or a false statement*, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.

(Emphasis supplied.) (Syllabus of the court.) *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987).

In this case, the prosecutor's further inquiry as to the nature of false information after the defendant admitted his conviction of the crime was clearly improper. "Once the

defendant answers in the affirmative a question as to a prior conviction, further inquiry is not permitted." *State v. Friend*, 230 Neb. 765, 772, 433 N.W.2d 512, 517 (1988).

The purpose of Neb. Rev. Stat. § 27-609 (Reissue 1989) is to allow the prosecutor to attack the credibility of a witness. The reason the scope of the inquiry is limited is to not confuse the jury with facts of another crime or have the defendant convicted based on the fact that he has previously been convicted of another crime. See, *State v. Daugherty*, 215 Neb. 45, 337 N.W.2d 128 (1983); *State v. Gore*, 212 Neb. 287, 322 N.W.2d 438 (1982) (McCown, J., dissenting).

The error in permitting the State to cross-examine the defendant concerning his prior conviction for giving false information to a police officer requires that the judgment be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

FAHRNBRUCH, J., concurs in the result.

BOSLAUGH, J., dissenting.

I dissent from that part of the opinion which holds that the cross-examination of the defendant by the State concerning his prior conviction for giving false information to a police officer requires that the judgment be reversed.

First of all, the defendant, on direct examination, did not correctly identify the crime. It seems to me that the State should be able to correctly identify the misdemeanor of which the defendant had been convicted.

More importantly, it seems to me there was no prejudice to the defendant. The defendant has the burden to prove that the claimed error actually prejudiced him instead of creating the possibility of prejudice. *State v. Gore*, 212 Neb. 287, 322 N.W.2d 438 (1982). Although the credibility of the defendant was an important issue, there was an abundance of testimony that the jury had to disbelieve before it could find the defendant guilty. Under the circumstances of this case, the conduct of the prosecutor and the trial court's failure to declare a mistrial did not "materially influence the jury in a verdict adverse to a substantial right of the defendant." *State v. Friend*, 230 Neb. 765, 769, 433 N.W.2d 512, 515 (1988). Furthermore, the trial

court sustained the defendant's objection to the prosecutor's improper impeachment and instructed the jury to disregard the prosecutor's question of whether the defendant lied to a police officer. I would affirm the judgment.

WHITE, J., dissenting.

I agree that in our attempts to understand those amorphous crimes borrowed from the Model Penal Code, i.e., attempted crimes, we have failed to follow the rationale and logic of *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), and its successors. We correct that situation in the majority opinion by unequivocally holding that attempt crimes have a parent, but *no* offspring.

I disagree strongly with the majority that the mature *Lovelace*, which has served us well, should now be discarded in favor of the perceived superior doctrine of the faceless "majority of courts," the "cognate" approach. I prefer to call the new approach the stream-of-consciousness lesser-included offense doctrine.

The Iowa Supreme Court, in rejecting the cognate approach, explained the theory behind it:

> Under the cognate approach, a defendant may be convicted of a lesser offense that, under the strict statutory-elements approach, is not necessarily committed in the course of committing the greater offense. The lesser offense is related and, hence, "cognate" in the sense that it has several elements in common with the greater offense but may have one or two elements not essential to the greater crime.

State v. Jeffries, 430 N.W.2d 728, 731 (Iowa 1988).

The Iowa court retained its use of the strict statutory-elements approach, finding among other reasons that it offers more clarity, is easier to apply, is more logical, and "better comports with the constitutional requirement for adequate notice of charges than the cognate-evidence and Model Penal Code approaches do." *Id.* at 738. The court stated that under its approach, "the charge against the defendant necessarily implies whether and which lesser-included offenses come into play. . . . With the cognate-evidence and Model Penal

Code approaches, the defendant must await the evidence before knowing what, if any, lesser-included offenses are implicated." *Id.*

The majority's adoption of the cognate approach allows the determination of lesser-included offenses based on the elements of the crime as charged in the information and the evidence supporting the charge. Looking to the complaint and the facts, one could logically conceive of the following scenario:

> Complaint
>
> On or about the 9th day of August, 1990, the defendant, a 17-year-old male, while operating his unregistered automobile at a time when his license was suspended, and after ingesting a quantity of marijuana and alcohol, observed the victim on the sidewalk adjacent, took a pistol from a place under the driver's seat, and intentionally, deliberately, and with malice aforethought, took aim and shot and killed the victim; all of these acts occurring within the city limits of Lincoln, Lancaster County, Nebraska.

In the application of *Lovelace* and the Nebraska statutes, the principal charge of first degree murder has as its lesser-included offenses second degree murder and manslaughter.

In the cognate approach (assuming appropriate proof), the trial court on its own motion is authorized to charge as lesser-included offenses of the crime of first degree murder the following: (1) operation of an unregistered automobile, (2) operation of a vehicle during a period of suspension or revocation of a driver's license, (3) operation of a vehicle without an operator's license, (4) possession of a controlled substance, (5) minor in possession of alcohol, and (6) carrying a concealed weapon.

By following the cognate approach, this court will allow prosecutors to list any conceivable lesser-included offense on the information, which in turn will force defendants to prepare to defend against each of those crimes. As the U.S. Supreme Court stated in adopting the statutory-elements approach at the federal level:

> [T]he elements test is far more certain and predictable in its application than the inherent relationship approach. . . .

> [It] permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly. The objective elements approach, moreover, promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference.

Schmuck v. United States, 489 U.S. 705, 720-21, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

I dissent.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL G. GARZA, APPELLANT.

459 N.W.2d 747

Filed August 31, 1990. No. 89-692.

1. **Trial: Joinder: Appeal and Error.** The right to a separate trial depends on a showing that a joint trial will result in prejudice. Absent a showing of an abuse of discretion, the trial court's denial of separate trials will not be disturbed on appeal.
2. **Trial: Testimony: Witnesses.** Opinion testimony by a lay witness is permitted only where it is rationally based on the perception of the witness and it is helpful to a clear understanding of his or her testimony or the determination of a fact in issue. It is generally admissible where it is necessary and advisable as an aid to the jury.
3. **Trial: Jury Instructions.** The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given.
4. **Trial: Juries: Appeal and Error.** Without a showing in the record that an improper communication with the jury took place, there can be no finding of error.
5. **Sentences: Appeal and Error.** An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion.

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

Alan G. Stoler for appellant.

Robert M. Spire, Attorney General, and Alfonza Whitaker for appellee.

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

BOSLAUGH, J.

Following a jury trial in district court, the defendant, Michael G. Garza, was found guilty of attempted first degree sexual assault and sentenced to 4 to 6 years in prison. He now appeals to this court.

This case was consolidated for trial with a companion case, in which the defendant's cousin, Steven R. Garza, was charged with and found guilty of attempted first degree sexual assault and sentenced to 4 to 6 years in prison. A detailed statement of the facts may be found in that opinion. See *State v. Garza, ante* p. 202, 459 N.W.2d 739 (1990).

The defendant contends the trial court erred in not severing the two cases. He claims he was prejudiced because the defendants had conflicting defenses in that Steven claimed that although he was involved in an assault on the victim, he did not attempt a sexual assault on her, and Michael claimed in this case that he was not involved in any altercation with the victim because he was not there. The defendant also claims that he was prejudiced by the joint trial because Steven's credibility was attacked by the prosecutor's questioning regarding Steven's conviction for giving false information to a police officer.

The defendant made no factual showing that prejudice would result from failure to grant his motion for severance, and his argument that the jury was confused by the defenses of the codefendants is merely speculation. There was no testimony by Steven which tended to implicate Michael. In fact, Steven's testimony tended to exculpate Michael.

The right to a separate trial depends on a showing that a joint trial will result in prejudice. *State v. Clark*, 189 Neb. 109, 201 N.W.2d 205 (1972). Absent a showing of an abuse of discretion, the trial court's denial of separate trials will not be disturbed on appeal. See *State v. Clark, supra.*

The defendant also claims that he was prejudiced because of the trial court's failure to declare a mistrial following the prosecutor's further inquiry into Steven's conviction of giving false information to a police officer because the credibility of Steven's testimony that the defendant had no involvement was called into question. The defendant's claim is without merit.

Under Neb. Rev. Stat. § 27-609 (Reissue 1989), the credibility of a witness may be attacked by establishing that the witness was previously convicted of a felony or a crime involving dishonesty or a false statement; however, "the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof." *State v. Johnson*, 226 Neb. 618, 621, 413 N.W.2d 897, 898 (1987).

Although the prosecutor's further inquiry into Steven's conviction was improper, the error was harmless beyond a reasonable doubt as to the defendant in this case. The purpose of § 27-609 is to allow the credibility of a witness' testimony to be attacked. Steven himself admitted on direct examination that he had been convicted of "false information," thus casting doubt as to his credibility.

The prosecutor's further inquiry into Steven's conviction was not unfairly prejudicial to the defendant in this case. It cannot be said that the conduct of the prosecutor and the trial court's failure to declare a mistrial "materially influence[d] the jury in a verdict adverse to a substantial right of the defendant." See *State v. Friend*, 230 Neb. 765, 769, 433 N.W.2d 512, 515 (1988).

The defendant also alleges it was error for the trial court to allow Officer Michael Hoch to testify regarding Carl Ziemba's race and whether Ziemba was a suspect. He argues Hoch's testimony goes to an ultimate issue in the case and should not have been allowed, citing *State v. William*, 231 Neb. 84, 91, 435 N.W.2d 174, 179 (1989), which held:

> "Opinion testimony by a lay witness is permitted only where it is rationally based on the perception of the witness and it is helpful to a clear understanding of his [or her] testimony or the determination of a fact in issue. . . . It is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the

> point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. . . ."

However, the codefendant made the question of whether Ziemba was involved an issue. Hoch testified as to why Ziemba was not considered a suspect by the police in the case, the reason being that the victim had described her attackers as Hispanic, and Ziemba was not Hispanic but Caucasian. This testimony was relevant to a determination of a fact put in issue by the codefendant.

The defendant proposed the following instruction, which was refused by the trial court:

> The identity of the Defendant as the perpetrator of the crime charged is a material element of the offense herein. The State has the burden of proving identity beyond a reasonable doubt. Therefore, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant as the perpetrator of the offense before you can convict him.
>
> Identification testimony is an expression of belief or impression by a witness. In evaluating the identification testimony of a witness, you should consider, among other things, (1) the opportunity and capacity each witness had to observe the offender; (2) whether the identification made by the witness subsequent to the offense was the product of his own recollection; (3) whether a witness's identification testimony at trial is affected by a prior identification of the Defendant, or prior failure to identify the Defendant; (4) the length of time that elapsed between the occurrence of the crime and the first opportunity of the witness to see the Defendant or his photograph; (5) the credibility of each witness pursuant to Instruction No. ——.
>
> The burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the Defendant as the perpetrator of the crime or crimes with which he stands charged. If, after examining all the testimony, you are satisfied as to the accuracy of the identification of the Defendant, you

> should find him guilty; on the other hand, if you have a reasonable doubt as to the accuracy of the identification of the Defendant, you must find him not guilty.

The defendant contends the trial court erred in refusing the requested instruction; however, " '[t]he trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given.' " *State v. Samuels*, 205 Neb. 585, 594, 289 N.W.2d 183, 188 (1980) (quoting *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977)). The trial court instructed on the material elements of the crime, proof beyond a reasonable doubt, credibility of the witnesses, and alibi. The substance of the defendant's requested instruction was covered by these instructions, and it was not error to refuse it.

The defendant contends the trial court erred in failing to grant his motion for new trial. The basis for the motion was alleged irregularities occurring in the jury deliberations and instructions from the court. The defendant alleges the jury had concluded that they could not reach a verdict, and that information was not conveyed to his counsel. There is nothing in the motion or the record to substantiate the defendant's claim. Without a showing in the record that an improper communication with the jury took place, there can be no finding of error. See *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984). The trial court did not abuse its discretion in refusing to grant a new trial on that basis.

The defendant also contends that the trial court erred in failing to submit to the jury instructions on the lesser-included offenses to attempted first degree sexual assault. For the reasons set forth in *State v. Garza, ante* p. 202, 459 N.W.2d 739 (1990), this assignment is without merit.

Finally, the defendant contends that the sentence imposed by the trial court is excessive. The jury found the defendant guilty of a crime of violence in which the victim was injured. An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Johnson*, 234 Neb. 110, 449 N.W.2d 232 (1989). The defendant was convicted of a Class III felony, for which the statute provides 1 to 20 years' imprisonment. See

Neb. Rev. Stat. § 28-105 (Reissue 1985). The defendant was sentenced to 4 to 6 years' imprisonment. We find no abuse of discretion.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF A.B., A.B., J.B., J.B., AND J.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. J.E., APPELLANT.

460 N.W.2d 114

Filed September 14, 1990. No. 90-051.

1. **Parental Rights: Appeal and Error.** This court reviews factual questions de novo on the record in an appeal from a judgment terminating parental rights. We are required to reach a conclusion independent of the findings of the trial court; however, where the evidence is conflicting, the Supreme Court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights.** There is no requirement that a parent's failure to comply with a plan for rehabilitation be willful.
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 is an independent reason to justify termination of parental rights, and when a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.
4. **Parental Rights.** Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the County Court for Clay County: HARRY C. HAVERLY, Judge. Affirmed.

Dean N. Hansen for appellant.

Ted S. Griess, Clay County Attorney, and Jay J. Sullivan, guardian ad litem, for appellee.

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

BOSLAUGH, J.

This is an appeal in a termination of parental rights case. The appellant's parental rights to her five children were terminated by an order of the county court on November 28, 1989. She has appealed from the judgment and has assigned as error the trial court's finding that the State had proved by clear and convincing evidence that the appellant had failed to comply with the plan for rehabilitation and the court's determination that it was in the children's best interests that the appellant's parental rights be terminated. The appellant argues that the trial court erred in finding that she failed to comply with the plan because her failure to comply, if any, was not "willful" and because she was not given enough time to comply with the plan.

This court reviews factual questions de novo on the record in an appeal from a judgment terminating parental rights. We are required to reach a conclusion independent of the findings of the trial court; however, where the evidence is conflicting, the Supreme Court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of V.M.*, 235 Neb. 724, 457 N.W.2d 288 (1990).

The father relinquished his parental rights on August 11, 1989, and his rights are not involved in this appeal.

The record shows that on January 17, 1989, all five children were removed from the family home and placed in the temporary custody of the State following an investigation by the Nebraska Department of Social Services of the oldest child's complaint to school authorities that her stepfather had been sexually abusing her. The oldest child is a daughter born August 30, 1977.

Following an adjudication hearing on March 21, 1989, the children were found to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), being under 18 years of age and lacking proper parental care by reason of the fault or habits of their parents.

A plan for reunification was ordered on March 28, 1989, and a second plan, extending the time requirements of the original plan, was ordered on June 6, 1989. The appellant was required to (1) undergo a psychological and drug/alcohol evaluation to

assess her needs and problems in parenting; (2) begin counseling with a therapist, Sandy Kroeker, and the oldest child to work on sexual abuse issues; (3) begin counseling with the stepfather to determine what role he plays in the family; (4) continue visitation in a therapeutic situation, increasing her parental skills in appropriate discipline; (5) take and successfully complete a parenting class; and (6) continue to work with a family support provider on parenting skills including budgeting, meal planning, and housekeeping.

The petition to terminate the appellant's parental rights was filed on September 12, 1989, and alleged that the appellant had failed to correct the conditions which led to the court's determination that her children were children as described in § 43-247(3)(a).

Following an evidential hearing on November 7, 1989, the trial court found that the State had proved by clear and convincing evidence that the appellant's parental rights should be terminated and that it was in the children's best interests that the appellant's parental rights be terminated.

As to the appellant's compliance or lack of compliance with the plan for rehabilitation, the evidence shows the appellant failed to undergo any drug/alcohol evaluation, that she failed to visit with her children on a consistent basis, that she did not take a parenting class, and that she was hostile and not cooperative with most of the professionals involved in the case. She was unable to take counseling with her husband because he was incarcerated most of the time due to the sexual abuse charges; however, after his release from jail he moved back into her home, and they had not begun counseling at the time of the hearing.

At the time of the termination order, the stepfather had entered a plea of nolo contendere to the charge of sexual abuse and was awaiting sentencing.

The appellant refused to counsel with her daughter and Kroeker because she refused to believe that her daughter had been sexually abused by the stepfather. Even after he had pled no contest to the charges and was about to be sentenced, the appellant continued to deny that the daughter had been abused, and she blamed the child for the problems of the family. The

appellant would have nothing to do with her daughter at any of the visits, rejecting her in front of the other children. The appellant later refused to see the daughter at all because she was so angry that she thought she might strangle the child.

Dr. Rita Parle, who performed an informal psychological evaluation on the appellant, diagnosed the appellant as having a personality disorder not otherwise specified. Dr. Parle testified that this personality disorder would not prevent the appellant from recognizing reality. According to Dr. Parle, the appellant is in touch with reality, but is very stubborn and determined to get what she wants at any cost.

The appellant admitted that she had not complied with provisions (5) and (6) of the plan. She also continued to deny her daughter had been sexually abused even though all of the professionals involved had evaluated the child and believed that she was abused; however, the appellant testified that she would say her daughter was abused if "that's all you want."

Neb. Rev. Stat. § 43-292(6) (Reissue 1988) provides for termination of parental rights when the court finds such action to be in the best interests of the juvenile and "[f]ollowing a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, and reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." There is no requirement that the parent's failure to comply with the plan for rehabilitation be willful.

> 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 is an independent reason to justify termination of parental rights, and when a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.

In re Interest of V.M., 235 Neb. 724, 727, 457 N.W.2d 288, 291 (1990).

At the termination hearing, the witnesses were sequestered. The testimony from the caseworkers and psychologists was that the appellant's denial of her daughter's sexual abuse causes the family to be dysfunctional and that all of the children are at risk

because of the appellant's behavior. No one who testified believed the children could safely be returned home in the near future or that there was much possibility that the mother would ever comply with the plan for rehabilitation. All of the professionals were in agreement that because the appellant's denial of the sexual abuse and the other problems within the family were so deeply entrenched, it would be years before there would be any chance of the children's being returned to the appellant.

The appellant's denial that any sexual abuse had occurred prevented any plan of rehabilitation from succeeding. It is clear from the record that the appellant prefers the company of the abusive stepfather to that of her children.

Under the facts and circumstances of this case, the evidence is clear and convincing that it is in the children's best interests to terminate the appellant's parental rights because she is unwilling to rehabilitate herself within any reasonable period of time. It is very doubtful whether the appellant will ever be able to comply with a plan for rehabilitation. The children " ' "cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." ' " *Id.* at 730, 457 N.W.2d at 292.

The judgment is affirmed.

AFFIRMED.

JEFFRY AND CAROLYN PATTERSON, APPELLEES, V. HMO NEBRASKA, INC., A NEBRASKA BUSINESS CORPORATION, APPELLANT.

460 N.W.2d 650

Filed September 28, 1990. Nos. 88-204, 88-297.

Appeal from the District Court for Lancaster County, ROBERT R. CAMP, Judge, upon the recommendation of the Appellate Division of the District Court, MORAN, WOLF, and HANNON, District Judges. Reversed and remanded for further proceedings.

Scott J. Norby, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Lavern R. Holdeman, of Peterson Nelson Johanns Morris & Holdeman, for appellees.

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

PER CURIAM.

On the bases of the briefs, the record, and the recommendation of the Appellate Division of the District Court, we find that questions of fact exist and the trial court erred in granting summary judgment. Accordingly, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MARGARET ESTHER HANTHORN, APPELLANT, V. ELLIS OLIVER HANTHORN, APPELLEE.

460 N.W.2d 650

Filed September 28, 1990. No. 88-709.

1. **Child Support: Appeal and Error.** The standard of review of this court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Child Support: Social Security.** Social Security payments made to a parent's child on account of the parent's disability should be considered as credits toward the parent's court-ordered support obligation, in the absence of circumstances making the allowance of such a credit inequitable.
3. **Laches.** The defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary.
4. _____. Laches must be founded upon the inequity of permitting a claim to be enforced—an inequity which arises out of some change in the condition or relation of the parties.

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

William J. Ross, of Ross, Schroeder & Fritzler, for appellant.

Michael J. O'Bradovich for appellee.

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

GRANT, J.

Margaret Esther Hanthorn appeals from a July 21, 1988, order of the district court for Buffalo County allowing appellee Ellis Oliver Hanthorn to credit Social Security disability benefits paid for the benefit of his dependent children toward his court-ordered child support judgment.

The record shows that on November 20, 1981, appellant filed a petition for dissolution of her marriage to appellee. On September 2, 1982, after an uncontested hearing, a divorce decree was entered by the district court for Buffalo County. The decree approved the property settlement agreement of the parties, granted appellant custody of the parties' two children, and ordered appellee to pay $100 monthly for the support of each child.

At the time of the divorce decree, appellee had been unemployed since September 1981. Some months after appellant filed her dissolution petition, but before the final decree was entered, appellee applied for Social Security disability benefits on the grounds that he had been diagnosed as a manic-depressive and was totally disabled from employment.

During the divorce proceedings, appellee testified that he had applied for Social Security disability benefits, but that he did not know if he would be found eligible and that if he were found eligible, he did not know to what extent his dependent children might receive benefits.

After entry of the decree, appellee made child support payments to the court through February 1983. In December 1982, appellee was notified that his claim had been approved and that both he and his dependents would receive Social Security benefits, commencing January 3, 1983. In January and February, each of the children received from Social

Security an amount less than $100 because part of the auxiliary benefits at that time were paid directly to the appellant mother. Beginning in March 1983, all benefits were paid for the children's benefit. At all times after February 1983, the Social Security benefits paid for the children were in excess of the $100-per-month support which was ordered for each child in the divorce decree.

Appellee himself made no support payments for any months after February 1983. He testified that he stopped paying "[b]ecause we were notified by North Platte office of Social Security to write the Clerk of District Court and we would cease because she would receive Social Security payments."

During February 1983, the attorney who had been retained by appellee at the time sought to have both parties sign a stipulation that payments received by the children from Social Security would discharge appellee's child support obligation. Appellant refused to sign the stipulation. Her attorney stated in the letter rejecting the stipulation that appellant was having "a very difficult time getting along" financially and should be entitled to both disability payments and child support. No further action was taken by either party for the next 5 years.

Since the divorce, appellee has lived on his mother's farm near Indianola. His sole sources of income consist of the disability payments he receives from Social Security and interest from some investments. The investments apparently were amounts appellee received pursuant to the property settlement agreement at the time of the dissolution.

Appellee testified that sometime in late 1987 or early 1988, he was informed by appellant that he owed thousands of dollars in child support arrearages. Appellee testified that soon thereafter, the parties went to the office of the clerk of the district court for Buffalo County in Kearney and found that the records did show that arrearages had been accumulating since 1983. In May 1988, appellee filed his "Application for Credit for Social Security Payments on Child Support." After a hearing at which each party adduced evidence, the court granted the application.

Appellant's assignments of error can be summarized as follows: The district court erred (1) in awarding the credit,

especially considering that appellee was disabled and benefits were contemplated at the time of the divorce decree, and (2) in failing to find that appellant was prejudiced by the appellee's more-than-5-year delay in seeking a credit and that therefore laches should have barred the application for credit.

The standard of review of this court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Sanchez v. Sanchez*, 231 Neb. 963, 439 N.W.2d 82 (1989).

This court has considered the applicability of Social Security payments made for the benefit of dependent children to a father's child support obligations. In *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974), we determined that Social Security beneficiary payments made to dependent children of a disabled father could be credited against the father's child support obligations. In *Schulze* the father suffered injuries in a car accident which left him totally disabled. Both he and his dependent children began receiving Social Security disability benefits. The father sought to have the benefits credited against the child support amounts which had accrued since his disability. The disability occurred after the divorce was final and the support amounts had been set. In granting the credit, the court stated: "It is clear that these payments directly resulted from Robert Jensen's accidental disability and in the context of this case were a substitute for his loss of earning power and his obligation to pay for the support of his dependents." *Id.* at 257, 214 N.W.2d at 594.

In *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985), *Schulze* was distinguished on the facts. In *Lainson* the mother was granted custody pursuant to a modification of the decree, and the father was ordered to pay child support. Before the modification was granted, the father had custody. At the time of the modification, both he and his son were receiving Social Security benefits due to the father's disability. At the modification hearing, the father proposed that any amount the court should order in monthly child support should be offset by the benefits the son was receiving from Social Security. The district court rejected this contention and expressly ordered child support in addition to the amounts received from Social

Security.

On appeal, this court held that that action of the trial court was within the discretion of the trial court and that *Schulze* did not mandate that the disability payments be offset. We stated:

> In *Schulze* the father was injured after child support amounts had been set by the court. The court there decided that "in the context of this case" the payments were a substitute for the father's support obligation. *Id.* at 257, 214 N.W.2d at 594. Here, Roger was injured prior to the court's determination of support obligation. The court was fully cognizant of Roger's disability and of the Social Security payments being made on the child's behalf. Knowing this, it ordered support in addition to the benefit payments. In so doing the trial court was considering the overall situation of both parents and the child.

Lainson, supra at 175-76, 362 N.W.2d at 57.

The fact situation in this case is different from those in both *Schulze* and *Lainson*. Unlike the situation in *Schulze*, the father in this case was disabled before the decree, and the court was cognizant that his children might receive benefits. Unlike in *Lainson*, no benefits had yet been received, and there was no certainty that they would be received or to what extent they might benefit the children.

Other jurisdictions have considered the question of crediting Social Security payments on a parent's court-ordered child support obligation. The majority rule, with which our *Schulze* decision comports, is that credit for such payments should be given, unless the allowance of such credit, in the particular case, would be inequitable. See, *Board v. Board*, 690 S.W.2d 380 (Ky. 1985); *Mooneyham v. Mooneyham*, 420 So. 2d 1072 (Miss. 1982); *Davis v. Davis*, 141 Vt. 398, 449 A.2d 947 (1982); *Mask v. Mask*, 95 N.M. 229, 620 P.2d 883 (1980); *Perteet v. Sumner*, 246 Ga. 182, 269 S.E.2d 453 (1980); *Griffin v. Avery*, 120 N.H. 783, 424 A.2d 175 (1980); *Cohen v. Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975); *Children & Youth Services v. Chorgo*, 341 Pa. Super. 512, 491 A.2d 1374 (1985).

In *Andler v. Andler*, 217 Kan. 538, 538 P.2d 649 (1975), the Kansas Supreme Court considered facts similar to those in this case. In *Andler*, the father suffered a disability in June 1969. He

subsequently applied for disability benefits with the Social Security Administration. In December 1969, his wife was granted a divorce, and he was ordered to pay $160 per month in child support. After the divorce, in January 1970, the father and his three children began receiving Social Security disability benefits because he had been adjudged totally disabled. After 3 years of receiving Social Security benefits but no direct child support, the mother sought a citation of contempt against the father for failure to pay child support.

Although the father's disability and the likelihood of disability benefits were known at the time of the decree, the Kansas Supreme Court held that in equity the father was entitled to credit. The court analogized the Social Security system to a system of private insurance in which the worker pays into the system with the understanding that the system will continue to fulfill the worker's moral and legal obligations to his dependents should he become unable to fulfill them due to disability.

We find the reasoning of *Schulze* and *Andler* applicable to the facts in this case. The father is unable to work because of his disability. Social Security benefits must necessarily serve as a substitute for the father's earning power. This is not a case such as *Lainson* where the trial judge was fully cognizant of the amount of benefits being received at the time of the modification and exercised discretion under the circumstances to order additional support.

We hold, therefore, that Social Security payments made to a parent's child on account of the parent's disability should be considered as credits toward the parent's court-ordered support obligation, in the absence of circumstances making the allowance of such a credit inequitable.

It should be noted that the relief granted appellee is an equitable credit for the disability benefits received by the children, which is by nature different from a retroactive modification of a vested and accrued obligation. See, *Griffin v. Avery, supra*; *Board v. Board, supra*; *Perteet v. Sumner, supra*; *Mask v. Mask, supra*.

Lastly, we must consider the argument that the application for credit must be refused under the doctrine of laches. The

defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary. *In re Estate of Widger*, 235 Neb. 179, 454 N.W.2d 493 (1990); *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 448 N.W.2d 123 (1989).

We have held that laches must be founded upon the inequity of permitting a claim to be enforced—an inequity which arises out of some change in the condition or relation of the parties. *Scheibel v. Scheibel*, 204 Neb. 653, 284 N.W.2d 572 (1979). Appellant does not satisfy either of these tests. The fact that disability benefits serve as a substitute for the father's earning power does not constitute an inequitable change in condition or relation of the parties. In fact, the dependent children are receiving a larger sum from the disability payments than they would have received from the child support payments.

There may have been differing expectations of the parties, but appellant was not unfairly prejudiced despite her belief that she was entitled to both disability benefits and direct support payments. Had she attempted to seek a modification of the support amounts to receive an amount greater than that of the disability payments, such a modification might not have been possible considering appellee's limited income. In any event, appellant could have attempted to secure more money for the children by instituting an action to collect at any time during a period of over 5 years. If additional funds were needed for the day-to-day expenses of the children, appellant should have made an effort to collect such needed funds.

Appellee's tardiness in applying for credit is not condoned. This is especially true in light of the fact that appellant refused to sign the proposed stipulation prepared by appellee's attorney. Each party apparently chose to gamble on the ultimate outcome resulting from the situation. On such conduct do many cases reach this court. Although appellee's tardiness is by no means commendable, neither is appellant's. The facts in this case do not establish laches as a bar to appellee's motion for credit.

The court's decree, in a handwritten addendum, states, " 'see docket entry - $200 per mo. commencing 4-3-83 &

through 7-3-88 plus accrued interest.' " The Social Security payments have been made monthly and operate as a satisfaction of the court-ordered monthly child support payments. Insofar as the record submitted to this court is concerned, there is no accrued interest. The Social Security payments satisfy appellee's court-ordered child support only on a month-to-month basis, however. Social Security payment in a particular month may not be carried over to satisfy court-ordered support amounts owing in future months. See *Andler v. Andler*, 217 Kan. 538, 538 P.2d 649 (1975). The trial court's order of July 21, 1988, and this court's affirmance of that order constitute a showing that the child support judgment against appellee is satisfied through July 21, 1988. Appellee has the burden of establishing that the child support judgment against him is satisfied after that date.

The order of the district court is affirmed.

AFFIRMED.

NEBRASKA STATE BANK, A CORPORATION, APPELLANT, V. BONNIE J. DOUGHERTY, APPELLEE.

460 N.W.2d 655

Filed September 28, 1990. No. 88-715.

Appeal from the District Court for Dakota County, ROBERT E. OTTE, Judge, upon the recommendation of the Appellate Division of the District Court, HAMILTON, KNAPP, and QUIST, District Judges. Reversed and remanded for further proceedings.

Daniel L. Hartnett, of Crary, Huff, Clem, Raby & Inkster, for appellant.

Patrick G. Rogers, of Rogers & Rogers, for appellee.

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

PER CURIAM.

On the bases of the briefs, the record, and the recommendation of the Appellate Division of the District Court, we find that questions of fact exist and therefore the trial court erred in awarding summary judgment to the defendant. Accordingly, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HILLCREST COUNTRY CLUB, APPELLANT AND CROSS-APPELLEE, V. N.D. JUDDS COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE AND CROSS-APPELLANT; GEORGIA-PACIFIC CORPORATION ET AL., THIRD-PARTY DEFENDANTS, APPELLEES AND CROSS-APPELLANTS.

HILLCREST COUNTRY CLUB, APPELLANT AND CROSS-APPELLEE, V. GEORGIA-PACIFIC CORPORATION ET AL., APPELLEES AND CROSS-APPELLANTS.

461 N.W.2d 55

Filed September 28, 1990. No. 88-738.

1. **Uniform Commercial Code: Warranty.** The existence and scope of an express warranty under the Uniform Commercial Code are ordinarily questions to be determined by the trier of fact.
2. **Uniform Commercial Code: Appeal and Error.** Factual findings of a court sitting as the trier of fact in a case arising under the Uniform Commercial Code will not be set aside unless clearly wrong.
3. **Uniform Commercial Code: Sales: Warranty.** According to Neb. U.C.C. § 2-313 (Reissue 1980), an express warranty is created by any description of the goods which is made part of the basis of the bargain, or by any affirmation of fact or promise relating to the goods that is made by the seller to the buyer and which becomes part of the basis of the bargain.
4. **Uniform Commercial Code: Sales: Warranty: Proof.** Since an express warranty must have been made part of the basis of the bargain, it is essential that the plaintiffs prove reliance upon the warranty.
5. **Uniform Commercial Code: Sales: Warranty.** Adoption of a manufacturer's warranty arises where a seller makes an affirmation about the manufacturer's warranty by means of a statement of fact, a promise, or some action which

would tend to induce the buyer to purchase the goods.

6. **Contracts.** The party formulating a contract will not be permitted to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance and then designedly burying elsewhere in the document, in fine print, provisions which purport to limit or take away the promise or preclude recovery for the failure to fulfill it.
7. **Appeal and Error.** On questions of law, the Supreme Court has an obligation to reach its conclusion independent of that reached by the trial court.
8. **Construction Contracts: Warranty: Words and Phrases.** In the context of construction contracts, the term "special warranty" refers to those warranties which are specific to the project under contract, as opposed to those warranties which are of general application in the construction industry.
9. **Uniform Commercial Code: Limitations of Actions: Sales.** The period of limitations contained in Neb. U.C.C. § 2-725 (Reissue 1980) does not apply to sales indemnity actions.
10. **Breach of Warranty: Proof.** The breach of an express warranty is established by showing that the goods to which it applies do not conform to the terms of the warranty.
11. **Trial: Pretrial Procedure.** Issues specified at a pretrial conference control the course of an action.
12. **Trial: Pretrial Procedure: Waiver: Appeal and Error.** Failure to object to the specifications in a pretrial order waives any right to claim error in that regard.
13. **Trial: Stipulations.** Parties have no right to stipulate as to matters of law, and such a stipulation, if made, is to be disregarded.
14. **Trial: Witnesses.** The trier of fact, being the judge of the credibility of the witnesses, may give greater weight to the testimony of one witness than to the testimony of the greater number of witnesses.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Rollin R. Bailey, of Bailey, Polsky, Cada, Todd & Cope, for appellant.

Dana V. Baker, of Barney, Carter, Johnson & Baker, P.C., for appellee N.D. Judds Co.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Georgia-Pacific Corp.

Robert L. Bals, of Nelson & Harding, for appellee David Bear, Inc.

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

CAPORALE, J.

I. INTRODUCTION

This appeal arises out of the consolidated bench trials of two suits filed by appellant, Hillcrest Country Club, because of the partial failure of its clubhouse roof.

In the first suit (district court for Lancaster County Docket 391, Page 21), Hillcrest alleges that the installer of the roof, appellee N.D. Judds Company, breached its contract with Hillcrest by failing to honor certain warranties. Judds in turn filed a third-party action against appellee David Bear, Inc., the distributor which supplied Judds with the roof; Roof Systems, Inc., the manufacturer of the roof; Pre-Finish Metals, Inc., which laminated the steel from which the roof was made with an acrylic film for Roof Systems; and appellee Georgia-Pacific Corporation, the manufacturer of the acrylic film. Bear cross-petitioned against Pre-Finish and Georgia-Pacific. By the time of trial, bankruptcy proceedings were pending against Roof Systems, and all matters against it were either stayed or dismissed without prejudice. After this court obtained jurisdiction, all issues involving Pre-Finish were dismissed by action of the parties.

So far as relevant to this appeal, Hillcrest avers in its second suit (district court for Lancaster County Docket 391, Page 22) that Bear and Georgia-Pacific each breached certain warranties, and Bear again cross-petitioned against Georgia-Pacific.

All parties have treated the transactions involved in this appeal as being for the sale of goods controlled by this state's Uniform Commercial Code. In the first suit, Hillcrest obtained a $33,043.20 judgment against Judds, and Judds was given a like judgment against Bear. Judds' third-party action and Bear's cross-petition against Pre-Finish and Georgia-Pacific were dismissed. Hillcrest's petition and Bear's cross-petition in the second suit were dismissed.

Hillcrest has appealed. Bear and Judds have cross-appealed, as has Georgia-Pacific, notwithstanding the fact that no judgment was entered against the latter. It is Georgia-Pacific's position on cross-appeal that the trial court erred in admitting the testimony of a Hillcrest witness and erred in failing to direct

a verdict in favor of Georgia-Pacific on the issues of liability, damages, indemnity, and contribution. We, however, do not concern ourselves with Georgia-Pacific's cross-appeal because, as explained in part III(4) below, the evidence in any event fails to impose any liability upon it.

The various remaining operative assignments of error asserted by the parties which are relevant to the dispositive issues question, in summary, whether the trial court erred in determining (1) the existence and scope of certain warranties; (2) that the contract provisions between Hillcrest and Judds do not shield Judds from liability to Hillcrest; (3) that Bear's liability to Judds is not time barred; (4) that Georgia-Pacific had no liability; and (5) that Hillcrest proved damages, and in assessing the amount thereof.

We affirm in part and in part reverse and remand for a new trial solely on the issue of damages.

II. FACTS

Under the terms of its lease, Hillcrest was required to replace the then-existing roof on its clubhouse with a new, high-quality and long-lasting one. In compliance with this lease provision, Hillcrest negotiated the replacement of the old roof with Judds, a contractor. During these negotiations, Judds supplied Hillcrest with a brochure describing a roof, called the RS-18, produced by Roof Systems. The RS-18 is made of galvanized steel laminated with an acrylic film, called Korad.

There is some dispute as to who gave Judds the brochure. Dennis O'Kelly, an employee of Judds, testified that Judds initially contacted Roof Systems after seeing an ad in a trade publication and that Roof Systems put Judds in contact with a distributor, Bear. O'Kelly testified that Judds had no further contacts with Roof Systems and that Judds received no materials from Roof Systems. Indeed, this was the first time Judds had ever dealt with the RS-18 roof. He further testified that although he did not recall how Judds received the Roof Systems brochure, it was not received until some time after Judds contacted Bear. John McKinney, another Judds employee, also testified that he believed the brochure came from Bear.

However, Rick Langill, the Bear employee who dealt with Judds, testified as to his "habit" of stamping any brochure he sent out with the Bear corporate name and logogram and that he would keep a copy of the cover letter he would send with the brochure in his files. There is no such stamp on the brochure, and Langill testified that there was no cover letter in his files which would indicate that he had sent the brochure to Judds. Langill also testified, however, that it was possible that such a cover letter could have been misfiled or the brochure sent without a stamp.

The brochure stated that the RS-18 was available in a Korad finish and that "all finishes carry a 20-year warranty." Below the statement about the warranty, there is an illustration of a "specimen warranty" measuring approximately 1¾ by 2½ inches.

Judds' president could not recall what role the brochure played in the formulation of Judds' bid. O'Kelly, however, recalled relying on the brochure's statements regarding the roof's design and the Korad finish.

Georgia-Pacific manufactured the Korad film and had prepared a "Spec-Data" sheet for use in its advertising. This specification sheet, which was attached to the brochure, reads in relevant part:

> KORAD® 2 Acrylic Film and KORAD® Acrylic Film (Standard)—maintenance-free, long-life coatings for exterior metal panels.
>
> . . . .
>
> . . . KORAD® acrylic films are thick, extremely weatherable, mar-resistant, pigmented acrylic plastic films . . . for use as a coating on exterior metal panels where virtual maintenance freedom is desired. KORAD films assure freedom from chalking, fading, chipping, peeling or other forms of coating deterioration. . . .
>
> . . . .
>
> Outdoor exposure—no noticeable chalking, fading, loss of adhesion or other coating deterioration after sixteen years (as of January 1979). . . .
>
> . . . .
>
> **Application:** KORAD is bonded to either metal coils or

sheets before forming. Bonding is performed by qualified coaters using recommended cleaners, pre-treatments, adhesives, heat and pressure (see diagram below). The KORAD surfaced metal is then post formed without fracture (see photos #3 and #4) by roll forming or break-forming techniques.

. . . .

Cost: Although warrantied for 20 years KORAD® 2 acrylic film is competitively priced to standard 10 year coatings. . . .

7. Guarantee/Warranty

A 20 year warranty for both KORAD® 2 and Standard KORAD® is available from panel and building component manufacturers. For warranty information, contact your panel supplier or KORAD Incorporated.

Judds submitted to Hillcrest a letter dated December 11, 1981, along with proposals for two types of roofs and a contract form. The letter recommended the RS-18 over the alternative roof, giving as one reason that "[t]he paint" on the recommended roof "will provide 20 years of wear." Hillcrest chose the roof Judds recommended and contracted with Judds to replace the existing roof with the RS-18. Hillcrest's president, Jack Herbert, testified that he relied on the brochure, Georgia-Pacific's specification sheet, and Judds' recommendation. Hillcrest board members W.B. Brown and Carl Glen testified that the board relied on the recommendations of board members Herbert and Merlin George, who were in charge of the reroofing project and were themselves in the construction business, as well as on the brochure and aforesaid specification sheet.

The contract between Hillcrest and Judds provides, in relevant part:

> 10.4 [Judds] warrants to [Hillcrest] . . . that all . . . Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these requirements may be considered defective.
>
> . . . .
>
> 15.5 The making of final payments shall constitute a

> waiver of all claims by [Hillcrest] except those arising from . . . (2) faulty or defective Work appearing after Substantial Completion, (3) failure of the Work to comply with the requirements of the Contract Documents, or (4) terms of any special warranties required by the Contract Documents. . . .
>
> . . . .
>
> 19.1 [Judds] shall promptly correct any Work . . . defective or . . . failing to conform to the Contract Documents whether observed before or after Substantial Completion . . . and shall correct any Work found to be defective or nonconforming within a period of one year from the Date of Substantial Completion . . . or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents. The provisions of this Article 19 apply to Work done by Subcontractors as well as to Work done by direct employees of [Judds].

Article 6 of the contract undertakes to list the "Contract Documents," but no such list is included. "Contract Documents" are defined in article 7 as "this Agreement with General Conditions, Supplementary and other Conditions, the Drawings, the Specifications, all Addenda issued prior to the execution of this Agreement, and all Modifications issued by the Architect after execution of the Contract . . . ." Article 21 states, in pertinent part, "[a]ll contract items per quatation [sic] dated 12-11-81," and bears the initials of Judds' president.

Bear sold the RS-18 roof panels to Judds, and the subcontract agreement between them recites that the materials Bear was to supply were to be in accordance with the "standards of the manufacturers." Bear had purchased the panels from Roof Systems, which had had Pre-Finish laminate them with the Korad acrylic film manufactured by Georgia-Pacific. Roof Systems supplied Pre-Finish both the Korad and the steel to which it was laminated.

Installation of the new roof was completed in July 1982. In November or December 1983, Hillcrest's employees noticed that the roof panels were flaking. Hillcrest orally notified Judds of the problem and then, on September 4, 1984, notified

the remaining parties.

A witness testified that in his opinion ultraviolet light from the sun caused the Korad to lose its elasticity, which in turn resulted in the failure of Korad's bonding with the steel panels.

James Stange, an architect and member of Hillcrest, whose "professional function" was to design roofs rather than to build or replace them, testified on his club's behalf that it would be necessary to replace the existing panels in order to correct the situation.

Henry Buis, a general contractor in the construction business since 1956, apparently gave Hillcrest a bid in the summer or fall of 1988 to replace the roof. He was not aware of anyone in the construction industry who recoats metal roofs, nor did he investigate to see whether recoating was feasible. His bid of $79,500 was for installing a new roof system onto the existing system. This new roof was made by a different company and coated with a different brand of film, but it would have had a similar, although not identical, 20-year warranty.

A second contractor called as a witness by Hillcrest, Walter Broer, testified that he obtained three bids for recoating the Hillcrest roof, that none of them carried a warranty for more than 3 years, and that it was his opinion that the only way to give Hillcrest a roof of "like value" to that warranted would be to replace the existing roof with a new one.

Georgia-Pacific called Larry Holmes to testify as to the cost of recoating the roof at Hillcrest with an acrylic. Holmes had several years' experience recoating metal roofs with acrylic, but had been an owner of his own business for only about a year and a half when he testified. On May 11, 1987, he submitted a bid to strip, clean, prepare, and recoat the roof with an acrylic finish for the amount of the judgment Hillcrest obtained against Judds and Judds obtained against Bear.

III. ANALYSIS

1. Nature and Extent of Warranties

The first summarized assignment of error questions the trial court's rulings concerning the extent and scope of warranties flowing from Judds to Hillcrest and from Bear to Judds.

(a) Judds' Warranties to Hillcrest

Judds challenges the trial court's finding that it gave an express warranty to Hillcrest and breached it, as well as the implied warranty of merchantability arising from the transaction.

The existence and scope of an express warranty under the Uniform Commercial Code ordinarily are questions to be determined by the trier of fact. *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984); Neb. U.C.C. § 2-313 (Reissue 1980). Inasmuch as the trial court was the finder of fact, its factual findings will not be set aside unless clearly wrong. *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (1990).

According to § 2-313, an express warranty is created by any description of the goods which is made part of the basis of the bargain, or by any affirmation of fact or promise relating to the goods that is made by the seller to the buyer and which becomes part of the basis of the bargain. Judds' statement that the paint (that is to say, acrylic finish) would provide 20 years of wear is an affirmation of fact relating to the RS-18 roof system, and it was made by Judds as the seller to Hillcrest as the buyer. The question therefore becomes whether there is sufficient evidence that Judds' statement became part of the basis of the bargain.

This court has held that "[s]ince an express warranty must have been 'made part of the basis of the bargain,' it is essential that the plaintiffs prove reliance upon the warranty." *Wendt v. Beardmore Suburban Chevrolet*, 219 Neb. 775, 780, 366 N.W.2d 424, 428 (1985). In the cases before us, the trial court expressly found that Hillcrest relied on the statement in Judds' letter.

Judds disagrees, arguing that rather than relying on its statement, the Hillcrest board relied instead on the Roof Systems brochure, the Georgia-Pacific specification sheet, and Herbert's and George's personal knowledge. Herbert believed that both he and George, who had died before these cases came to trial, relied on the various materials given to them by Judds, as well as upon their own experience.

Board member Brown testified that he and the rest of the board relied on the recommendations of Herbert and George.

Board member Glen also testified that he and the rest of the Hillcrest board relied on Herbert's and George's recommendations.

The testimony of Herbert, Brown, and Glen is sufficient to support the trial court's finding that the board, through its reliance on Herbert, relied on Judds' affirmation. That being so, the first summarized assignment of error fails as to Judds without our needing to determine whether the evidence also supports the trial court's finding that Judds breached its implied warranty of merchantability.

(b) Bear's Warranty to Judds

Bear questions the trial court's finding that Bear breached its express warranty to Judds that the finish on the RS-18 roof would wear for 20 years.

The trial court's determination in this regard is based on its findings that the Roof Systems brochure was given to Judds by Bear and that the statement in the Roof Systems brochure that "all finishes carry a 20-year warranty," together with the Bear-Judds subcontract provision that "[a]ll the above materials [are] to be in accordance with the standards of the manufacturers," constituted an express warranty running from Bear to Judds.

Bear essentially raises three objections: First, that there was no competent evidence that Bear supplied Judds with the materials the latter relied upon; second, that even if Bear did supply the materials, there is no evidence that Bear adopted Roof Systems' warranty as its own; and finally, that even if Bear did adopt Roof Systems' warranty, the terms of the "specimen warranty" contained in the brochure work to shield Bear from liability to Judds.

O'Kelly's testimony was such that the trial court could have deduced that since Bear and Roof Systems were the only entities with which Judds dealt in regard to the RS-18 roof, and since Roof Systems did not send Judds any materials, Bear supplied the brochure. The trial court as the trier of fact was free to disregard or to give little weight to Bear's evidence that it was Langill's "habit" to stamp all brochures he sent out with the corporate name and to file a copy of the cover letter

accompanying such brochures.

Bear's next argument is that the mere fact that Bear supplied the brochure to Judds, even when coupled with the subcontract provisions, is insufficient to establish that Bear adopted Roof Systems' warranty.

While it has been held that a seller does not adopt a manufacturer's express warranty merely by giving notice of that warranty, *State v. Patten*, 416 N.W.2d 168 (Minn. App. 1987), even when that notice was contained in the buyer's purchase agreement, *Gilliam v. Indiana Nat. Bank*, 337 So. 2d 352 (Ala. App. 1976), and *Cochran v. McDonald*, 23 Wash. 2d 348, 161 P.2d 305 (1945), adoption does arise where a seller makes an affirmation about the manufacturer's warranty by means of a statement of fact, a promise, or some action which would tend to induce the buyer to purchase the goods, *Richards v. Goerg Boat & Mtrs. Inc.*, 179 Ind. App. 102, 384 N.E.2d 1084 (1979), and *Scovil v. Chilcoat*, 424 P.2d 87 (Okla. 1967). We so ruled in *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *overruled on other grounds*, *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983). Therein, we stated that the lessor of a scaffold who stamped the manufacturer's brochure with the lessor's name and mailed it to potential users of such equipment adopted the manufacturer's warranty as the lessor's own.

Here, the evidence supports a finding not only that Bear sent Judds the Roof Systems brochure but that Bear covenanted in its subcontract with Judds that the roof would meet the manufacturer's standard, that is, that the finish carried a 20-year warranty. In view of those circumstances, it cannot be said that the trial court's finding that the interplay between the brochure and the Bear-Judds subcontract provisions was such that Bear made its own warranty to Judds is clearly wrong.

Bear's final argument centers on the trial court's alleged error in "totally ignoring" the "terms" contained in the "specimen warranty" reproduced in the Roof Systems brochure. This specimen, covering a $1^3/_4$- by $2^1/_2$-inch space as described in part II above, contains enough text to fill a standard $8^1/_2$- by 11-inch typewritten page and is unreadable by the naked eye. Text that small, particularly when compared to the surrounding

text touting the 20-year warranty, is ineffective to limit the express warranties made in the brochure. The party formulating a contract will not be permitted to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance and then designedly burying elsewhere in the document, in fine print, provisions which purport to limit or take away the promise or preclude recovery for the failure to fulfill it. *Seal v. Tayco, Inc.*, 16 Utah 2d 323, 400 P.2d 503 (1965).

Bear seems to think that consideration of these minute terms is necessary because "[i]t is meaningless to know that a warranty exists if one does not know what is being warranted." Brief for appellee Bear at 14. The short answer to this is that one knows what is warranted by the terms of the brochure and the specification sheet it contains, i.e., that the roof finish is warranted against, among other things, flaking.

Bear attempts to analogize its situation to that found in *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979), where this court rejected plaintiff's contention that a 20-year repair bond on a roof was an explicit, express warranty regarding the future performance of the roof. However, the only similarity between *Grand Island* and the cases under review is that all three involve a roof. We are not here being asked to convert a promise of future repairs into a warranty that the roof would last 20 years but, rather, to interpret the meaning of words which relate specifically to future performance.

Consequently, the first summarized assignment of error fails as to Bear as well.

2. Judds-Hillcrest Contract Provisions

In the second summarized assignment of error, Judds urges that several provisions in its contract with Hillcrest, when taken together, limit Judds' liability to defects discovered within 1 year of substantial completion of the contract and that Hillcrest's final payment acted as a waiver of Hillcrest's claims against Judds. Judds asserts that the terms of the contract are unambiguous, that as such their meaning presents a question of law, not fact, and that we must come to an independent

conclusion on matters of law. Judds is correct in its statement of the standard of review for unambiguous contracts. See *Central States Health & Life v. Miracle Hills Ltd.*, 235 Neb. 592, 456 N.W.2d 474 (1990). The question is whether this standard is applicable in these cases and, if so, whether it helps Judds.

Judds first argues that articles 10.4 and 19.1 of the contract limit its liability to defects found within 1 year of substantial completion. It asserts that the clause in article 19.1 allowing a longer period for special warranties is not applicable because the "20-year" language contained in its quotation to Hillcrest is not a part of the contract documents. The trial court, however, specifically found that Judds' letter of December 11, 1981, and the materials accompanying it constituted Judds' bid or quotation and that the quotation "was made a part of the contract . . . ." Does the evidence support the trial court's finding of incorporation?

The contract made reference to the "quatation [sic] dated 12-11-81." The quotations, bids, or proposals were sent under the same cover as the letter containing the affirmation, and all were written on the same stationery, although only the page with the recommendation and affirmation was dated or addressed. Herbert also testified that the letter was attached to the contract when it was signed, and the letter and proposals are still attached to the contract. These facts, when coupled with those which support the finding that Judds made an express warranty discussed in part III(1)(a) above, are sufficient to establish that the trial court did not commit clear error in finding that the 20-year language used in Judds' letter was incorporated into the contract documents.

The critical question, then, is whether the 20-year language constitutes a special warranty contemplated by article 19.1. Unfortunately, the contract does not define "special warranties," and there is a dearth of enlightening case law on the subject. The contract itself contains several warranties of general application to the construction industry, such as that all materials will be new unless otherwise specified, that the work will be of good quality and conform to the contract documents, and that it will be free of faults and defects. Under these circumstances, we conclude that the term "special warranty

required by the Contract Documents," found in article 19.1, refers to those warranties which are specific to the project under contract, as opposed to those warranties which are of general application in the construction industry. Thus, Judds' warranty fits into the "special warranties" exception of article 19.1, and its argument in this regard comes to naught.

Judds next argues that Hillcrest's final payment operated as a waiver of its claims against Judds under article 15.5 of the contract. However, this argument overlooks the fact that article 15.5, like article 19.1, contains an exception for special warranties. It seems fatuous indeed to suggest that article 15.5 waives warranties of future performance when that performance must necessarily occur after final payment.

Consequently, there is no merit to the second summarized assignment of error.

3. No Time Bar

In the third summarized assignment of error, Bear contends the trial court erred in failing to find that its express warranty to Judds was not barred by the 4-year limitation of Neb. U.C.C. § 2-725 (Reissue 1980).

That statute provides that an action for breach of contract must be brought within 4 years after the cause of action has accrued and that a cause of action accrues when the breach occurs. It further provides that a breach of warranty occurs when tender of delivery is made, except where the warranty extends to future performance of the goods and discovery must await the time of such performance, in which event the cause of action accrues when the breach is or should have been discovered.

In view of the trial court's finding that Bear's warranty extends to the future performance of the roof, the language of § 2-725 itself establishes that even if Judds' action against Bear were for the breach of Bear's express warranty, it is not time barred.

More specifically, however, Judds' action against Bear is, in reality, one for indemnity. This court recently, in *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989), determined that § 2-725 does not apply to a party

seeking indemnification on a contract of sale. The rationale behind this is simple: A party seeking indemnification has no injury to complain of until he or she suffers a loss. If the period of limitations were to start running when the underlying warranty is breached, a party could be foreclosed from indemnity through no fault of his or her own.

Accordingly, the third summarized assignment of error is without merit.

4. NONLIABILITY OF GEORGIA-PACIFIC

In this fourth summarized assignment of error, Hillcrest, Bear, and Judds all argue that the trial court's finding that Georgia-Pacific made express warranties with respect to the qualities of Korad film, when coupled with the fact that the film flaked off the roof, is sufficient to establish Georgia-Pacific's liability. They take issue with the trial court's conclusion that since no "defect" in the Korad was proved, there is no evidence that the Korad or Georgia-Pacific's instructions for laminating the Korad were the proximate cause of the flaking.

The parties questioning the trial court's resolution of this issue focus on that court's use of the term "defect," and contend that the only defect the product need have is its failure to meet the express warranty. We agree; indeed, contrary to Georgia-Pacific's view, we so held in *Delgado v. Inryco, Inc.*, 230 Neb. 662, 433 N.W.2d 179 (1988). Therein, plaintiff's fingers were amputated when a hydraulic jack the defendant had furnished allegedly slipped. Plaintiff claimed that the slippage constituted a breach of the defendant supplier's warranty that the jack was merchantable and fit for the activity for which it was to be used. In affirming the trial court's dismissal of plaintiff's action, we observed that if in fact the jack had slipped, there was no evidence as to what caused it to do so. We explained:

> In order for a plaintiff to recover on a breach of express warranty, he must show, among other things, that "the goods did not comply with the warranty, that is, that they were defective, and that his injury was caused by the defective nature of the goods."

Id. at 666-67, 433 N.W.2d at 183, citing *Durrett v. Baxter*

Chrysler-Plymouth, Inc., 198 Neb. 392, 253 N.W.2d 37 (1977). Thus, the only defect needed to establish a breach of express warranty is the failure of the goods to conform to the terms of the warranty. The parties' focus on the word "defect" in these cases is misleading; the trial court's use of the term must be read in context with its findings that there was "no evidence that the Korad film . . . would not wear for the length of time represented *if properly applied*" and that "the *defect in the bonding* of the Korad film was present when the panels left the control of Pre-Finish." (Emphasis supplied.) Thus, when the trial court wrote that there was no evidence of a defect in the Korad, it meant that there was no evidence that the delamination was attributable to the Korad itself. In other words, it was not the Korad itself which failed but, rather, the bonding or laminating process.

The real issue that is being argued is not whether a "defective product" needed to be shown but, rather, what exactly Georgia-Pacific warranted. If the warranty is only of the performance of the Korad itself, or properly laminated Korad, then Hillcrest, Judds, and Bear must show that the delamination was proximately caused by the Korad. If it was the performance of bonded Korad, or Korad-coated steel, that was warranted, then the bonding would be a part of the warranty, and the failure of the bond would be sufficient to establish a breach.

The trial court's factual finding that Georgia-Pacific warranted only the Korad film itself cannot be said to be clearly wrong, and, thus, the fourth summarized assignment of error is without merit.

5. Damages

In the fifth and final summarized assignment of error, Judds claims that Hillcrest failed in its effort to prove damages, since it presented no evidence of the difference in value between the roof actually provided and that warranted. Hillcrest claims that the proper measure of damages is the cost of replacing the roof, not the cost of repairing it. Judds further claims, as does Bear, that the damages must in any event be assessed as of the time and place of the breach, not as of some later date.

(a) Difference in Value

Neb. U.C.C. § 2-714(2) (Reissue 1980) provides:

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

Notwithstanding that the evidence provides no basis for varying from the usual measure of damages, all of the parties accepted the pretrial order specifying that Hillcrest's damages would be measured by the cost of repairing or replacing the roof. Hillcrest correctly reminds us that issues specified at a pretrial conference control the course of the action and that failure to object to the specifications in the pretrial order waives any right to claim error in that regard. *Misle Chevrolet Co. v. Kometscher*, 225 Neb. 804, 408 N.W.2d 713 (1987); *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987). See *Reyna Financial Corp. v. Lewis Serv. Ctr.*, 229 Neb. 878, 429 N.W.2d 380 (1988). While that is so, the parties have no right to stipulate as to matters of law, and such a stipulation, if made, is to be disregarded. *Staley v. City of Blair*, 206 Neb. 292, 292 N.W.2d 570 (1980).

With that last-stated rule in mind, the question is whether a pretrial order can control the measure of damages in this case. Bearing in mind that § 2-714(2) in special circumstances permits a measure other than the diminished value, the pretrial order in this case stipulates not as to a rule of law, but as to the existence of special circumstances warranting the use of a measure other than the ordinary one. We thus conclude that in this case the correct measure of damages is either the cost of repairing or of replacing the roof.

(b) Appropriateness of Amount

The essence of Hillcrest's argument as to the inadequacy of its recovery appears to be twofold: first, that it put forward three witnesses who testified that the roof needed to be replaced in order to remedy the flaw, while Georgia-Pacific put forward but one witness who testified that the roof could be recoated,

and that Hillcrest's witnesses had more experience in the construction field; and second, that a 15-year warranty from Holmes is not the same as a new 20-year warranty from Georgia-Pacific.

As to the first argument, it is clear that the trier of fact, being the judge of the credibility of the witnesses, may give greater weight to the testimony of one witness than to the testimony of the greater number of witnesses. *Linch v. Berggren*, 135 Neb. 530, 282 N.W. 528 (1938). Two of Hillcrest's witnesses admitted that they were either unaware of or did not consider the possibility of recoating the roof. The third considered recoating, but would only warrant the new finish for a short time.

Hillcrest's next argument is that a 15-year warranty from Holmes is not comparable to a new 20-year warranty from Georgia-Pacific, and, therefore, basing the measure of damages on Holmes' bid deprives Hillcrest of that for which it bargained, a warranty from an established firm. There are at least three problems with this argument.

First, it is Judds', not Georgia-Pacific's, warranty which entitles Hillcrest to recovery. Second, Hillcrest bargained for but one 20-year warranty. Although Hillcrest's cause of action accrued in November or December 1983 when it discovered the flaking, see § 2-725, the life of the warranty, by its terms, commenced when installation of the roof was completed, sometime in July 1982. Thus, the warranty extended through sometime in July 2002. Holmes' warranty could not begin to run until the recoating was done, and that, so far as the record shows, had not occurred by the time of trial in February 1988. Obviously then, Holmes' warranty would extend through at least February 2003 and thus cover the remaining life of Judds' 20-year warranty. Third, the amount of damages is a factual question which must be determined by the fact finder. Holmes' testimony supports the trial court's finding, and that evidence, the cost of recoating the roof with a product similar to Korad, is reasonably related to the damages proved. Therefore, were it not for the matter discussed below, the trial court's assessment of damages would stand.

(c) Date of Assessment

Judds and Bear question whether, even when a measure of damages other than the ordinary one set out in § 2-714(2) is appropriate, damages may be calculated as of a date several years after they accrued.

In a recent breach of contract action, *Hansen v. Lien Termite & Pest Control Co.*, 229 Neb. 596, 428 N.W.2d 195 (1988), we held that the cost of repairs necessitated by defendant's failure to discover an infestation of termites was to be assessed as of the time the latent damages were or, by the exercise of reasonable diligence, could have been discovered. In doing so, we rejected the defendant's claim that the damages should be assessed as of the date of its inspection. We also rejected plaintiffs' claim, based on *Rovetti v. City and County of San Francisco*, 131 Cal. App. 3d 973, 183 Cal. Rptr. 1 (1982), a negligence action, that the damages should be assessed as of the date of trial. In declining to follow the *Rovetti* approach, we reasoned that neither party would be unduly penalized by market forces if the damages were assessed as of the time the damages were or reasonably could have been discovered. In this case that date occurred in November or December 1983, when the roof began to flake. Hillcrest knew then that the roof was not performing as warranted and Hillcrest was, as of that time, in a position to explore the reason for and ultimate consequence of the failure and the methods and costs of achieving the warranted performance.

Thus, there is merit to this fifth and final assignment of error. Because Hillcrest succeeded in proving that it was damaged and failed only in establishing the amount of those damages as of the appropriate date, the first suit must be remanded for a new trial on the issue of damages alone. See, *Hansen, supra*; *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988).

IV. DECISION

For the foregoing reasons, the judgment of the trial court in the first suit is reversed and the cause remanded for a new trial solely on the issue of damages, in accordance with the rules set forth in this opinion. The trial court's judgment of dismissal in

the second suit is affirmed.

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

HASTINGS, C.J., and GRANT, J., not participating.

TODD WESTMORELAND AND GAYLE WESTMORELAND, APPELLANTS, V. TODD PERKINS, APPELLEE.

460 N.W.2d 655

Filed September 28, 1990. No. 88-848.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, DONALD R. GRANT, Judge, upon the recommendation of the Appellate Division of the District Court, HAMILTON, KNAPP, and QUIST, District Judges. Judgment of District Court reversed, and cause remanded with directions.

Alan L. Plessman for appellants.

Stephen L. Ahl, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellee.

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

PER CURIAM.

Upon consideration of the record, the briefs of the parties, and the recommendation of the Appellate Division of the District Court, it is ordered that the judgment of the district court be reversed. The cause is remanded to the district court with directions to affirm the judgment of the county court but modify it to provide for an attorney fee to the plaintiffs of $750 together with interest on the judgment originally entered by the county court at the rate of 6 percent per annum from and after September 30, 1987, until paid.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MARLIN E. MEYER, APPELLANT.

460 N.W.2d 656

Filed September 28, 1990. No. 89-1238.

1. **Criminal Law: Intent: Words and Phrases.** In the context of a criminal statute, that which is done willfully or purposefully rather than accidentally or involuntarily is done intentionally; being a state of mind, the intent operative at the time of an action may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct.
2. **Rules of Evidence: Jurors: Affidavits.** While under Nebraska law a juror's affidavit may be used to show that in reaching its verdict the jury considered prejudicial information emanating from a source other than the evidence presented at trial, such an affidavit may not be used to show a jury's misunderstanding of the law as such misunderstanding inheres in the verdict.
3. **Jury Instructions.** It is a trial court's duty to properly instruct a jury on the law applicable to the case.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Lance J. Johnson 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.

Defendant-appellant, Marlin E. Meyer, was, pursuant to verdict, adjudged guilty of failing to support his minor son, in violation of Neb. Rev. Stat. § 28-706(1) (Reissue 1989), which provides, in relevant part, that one "who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a . . . minor child . . . commits criminal nonsupport." In seeking to overturn his conviction Meyer asserts, in summary, that the district court erred in (1) excluding certain evidence, (2) finding the evidence sufficient to support the verdict, and (3) failing to instruct the jury as he requested. The summarized errors being without merit, we affirm.

Meyer's marriage to the mother of the child in question was dissolved on June 12, 1985. The dissolution decree orders, in

accordance with the parties' settlement agreement, that Meyer pay the mother $222 per month for the support of the subject child until sale of the former family home and sets Meyer's child support obligation thereafter at $200 per month. The agreement, which is incorporated into the decree, specifically notes that the amount of the child support initially ordered was equal to the monthly payment due the holder of the mortgage on the home and that it was set at that amount to enable the mother to make the mortgage payments. The agreement also permits the mother to occupy the property until June 1, 1988, gives each party 30 days thereafter within which to purchase the property by paying the other party one-half of the assessed value of the property, and provides that if neither party purchases the other's interest, the property be otherwise sold by the end of 1988 and the proceeds divided equally between the parties. The agreement requires the mother to make the mortgage payments, pay all taxes and insurance premiums relating to the property, and hold Meyer harmless on those obligations.

Meyer admits that he is in arrears in his child support obligation. The records of the clerk of the district court reveal that Meyer made regular payments through that office until May 1986, when he made no payment. He thereafter made a payment of $100 in both June and July 1986 and has since made no payment through that office.

The mother testified that she made the mortgage payments until shortly before she left the property in September 1986. No further payments having been made, the mortgage became delinquent, and sometime during the last quarter of 1986 Meyer and the mother, without the exchange of money, conveyed the property to the mortgage holder.

Regarding the first summarized assignment of error, Meyer urges that by refusing to receive evidence concerning the "circumstances surrounding the condition of or sale of the . . . former residence; the treatment of [the child] by [the mother] and her [three] sons [by a former marriage]; or the circumstances surrounding [a certain] juvenile court proceeding," brief for appellant at 5, the district court deprived Meyer of the opportunity to establish that his failure to support

his son was not intentional. In fact, however, the district court did receive some evidence on those matters.

Meyer and the mother both testified as to the delinquency of the mortgage payments and the voluntary conveyance of the property to the mortgagee, and Meyer testified both that the property had been damaged during the mother's occupancy and that the mortgage holder acquired the property for the amount remaining due on the mortgage, which was less than the value of the property. Although the child denied it, Meyer testified that his son was mistreated by the mother and her three other sons. The record also establishes that juvenile court proceedings were instituted because the child had run away from his mother's home and that, as a consequence, he was placed in foster care. In addition, Meyer testified that he chose not to make the ordered child support payments because the money was not being used to care for his son or to make the mortgage payments and because after the child was placed in foster care, the mother no longer had possession of him, and that Meyer made one $222 payment to one of the foster care givers.

In any event, the evidence with which Meyer is here concerned does not bear on whether he intended to not make the ordered support payments. In the context of a criminal statute, that which is done willfully or purposefully rather than accidentally or involuntarily is done intentionally; being a state of mind, the intent operative at the time of an action may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct. *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). Meyer does not claim that he accidentally or involuntarily neglected to make the payments; rather, he professes to have had good reasons for willfully and purposefully refraining from so doing. Thus, in this summarized assignment of error he is concerned not with his intent, but with his motives for knowingly refraining from doing that which he was ordered to do. The evidence with which he is concerned may, in Meyer's own mind, explain why he chose to act as he did, but it does not negate his intent to so act.

Contrary to the claim made in the second summarized assignment of error, the evidence adduced by the

plaintiff-appellee State is sufficient to support the verdict. It is clear from the State's evidence that the child in question is a minor. It may also be inferred that Meyer knew what the dissolution decree required of him in regard to child support. Not only did he sign the agreement which the decree incorporates, but he fulfilled his child support obligation in accordance with the terms of the decree for almost a year. Indeed, he testified that he stopped making the required payments because the mother stopped making the mortgage payments and because the child had been placed in foster care, not that he did not know what his obligation was. What he did not do was ask the court for relief because of the mother's failure to make the mortgage payments or the child's placement in foster care. The State also adduced evidence from which the jury could conclude that during at least part of the relevant time, Meyer had assets from which to make the ordered payments and has always had the ability to earn sufficient income as would enable him to fulfill his obligation.

We thus reach the third summarized assignment of error, regarding which Meyer asserts the district court should have instructed the jury that its verdict would not affect "any existing financial obligation for child support" he owed. Meyer urges that without such an instruction the jury could conclude that a not guilty verdict would erase his child support obligation. In an effort to support that argument, Meyer states that in connection with his new trial motion the affidavit of a juror was introduced in evidence which states that this very concern was a factor in the jury's determination.

There are at least three difficulties with this argument. The first is that notwithstanding Meyer's direction that the bill of exceptions contain "any and all evidence offered at trial or at any hearing in this matter," the bill of exceptions presented to us neither indexes any hearing on the motion for new trial the transcript shows Meyer filed nor contains any evidence which may have been received at any such hearing. (In fairness, it must also be noted that if Meyer had complied with requirements of Neb. Ct. R. of Prac. 9C(3) and 9D(1)f (rev. 1989) in the preparation of his brief and attempted to tell us where in the bill of exceptions the affidavit could be found, he

would have discovered that he was seeking consideration of a document not before us.)

The second difficulty is that while under our law a juror's affidavit may be used to show that in reaching its verdict the jury considered prejudicial information emanating from a source other than the evidence presented at trial, such an affidavit may not be used to show a jury's misunderstanding of the law as such misunderstanding inheres in the verdict. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). See, also, *State v. Trevino,* 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988); *State v. Roberts*, 227 Neb. 489, 418 N.W.2d 246 (1988); *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979); Neb. Rev. Stat. § 27-606(2) (Reissue 1989).

The third difficulty is that the requested instruction had nothing to do with the issues presented by the charge and thus had nothing to do with the law of the case. While it is a trial court's duty to properly instruct a jury on the law applicable to the case, *State v. Gorman*, 232 Neb. 738, 441 N.W.2d 896 (1989), it cannot be expected to instruct as to all matters jurors might wonder about at some point in their deliberations.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANGEL SILVA CORTES, APPELLANT.

460 N.W.2d 659

Filed September 28, 1990. No. 89-1247.

1. **Convictions: Appeal and Error.** A conviction will not be reversed on appeal unless, after the court views the evidence most favorably for the State, it can be said that the evidence is so lacking in probative value that it is insufficient as a matter of law to support a verdict of guilty beyond a reasonable doubt.
2. **Sentences: Appeal and Error.** A sentence that is within the statutory guidelines will not be reduced absent a showing of abuse of discretion by the trial court.
3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of

explanations, or weigh the evidence; such matters are for the finder of fact.

4. **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.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, 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.

The defendant, Angel Silva Cortes, appeals his conviction of first degree sexual assault and his sentence for a term of 5 to 15 years' imprisonment. He assigns as error the insufficiency of the evidence to support the conviction and the excessiveness of the sentence.

A conviction will not be reversed on appeal unless, after the court views the evidence most favorably for the State, it can be said that the evidence is so lacking in probative value that it is insufficient as a matter of law to support a verdict of guilty beyond a reasonable doubt. *State v. Frazier*, 234 Neb. 107, 449 N.W.2d 230 (1989).

A sentence that is within the statutory guidelines will not be reduced absent a showing of abuse of discretion by the trial court. See *State v. Johnson*, 234 Neb. 110, 449 N.W.2d 232 (1989).

Cortes is a 43-year-old Mexican national. Although Cortes has been in the United States for approximately 26 years, he claims that he is unable to speak or understand English.

The victim is 37 years old and slightly mentally retarded. Her IQ is 75. According to her father, she has the mental capacity of a 10-year-old child. However, expert testimony indicated that the victim is mentally capable of making decisions with regard to sexual relations.

According to the victim's testimony, she was returning soda

to the store on August 25, 1988, when Cortes grabbed her arm and led her to his home. Cortes took her to his room.

The victim testified that while she was in Cortes' bedroom he anally, vaginally, and orally sexually assaulted her. Cortes alleges that she consented to his actions. However, the testimony at trial indicates that immediately after the incident the victim was extremely upset. Furthermore, her brassiere was ripped and her neck was bruised.

Cortes alleges that after the victim left his house she was grabbed by another man, who then dragged her down an alley. Cortes believes that since this "second man" lived on Fourth Street and Cortes lived on West Third Street, the victim was confused as to which house she was in. Therefore, she accused the wrong man. Furthermore, Cortes testified that he was unable to come to the aid of the victim because he did not speak English.

Cortes also contends that the victim has substantially changed her version of the sexual assault by indicating that Cortes used a knife to force her to have sex with him. However, the State contends that she testified as to her belief that Cortes would use a knife if she did not submit to him.

The information charged that the defendant subjected another person to sexual penetration and overcame such person by force or, in the alternative, did subject another person to sexual penetration knowing that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct. At the close of all the evidence the court sustained defendant's motion for a directed verdict as to the second section of the information relating to mental or physical incapability, but submitted to the jury the charge as to penetration by force. Following argument and instructions, the jury returned a verdict of guilty.

"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." *State v. Frazier, supra* at 109, 449 N.W.2d at 231.

Although the evidence adduced by the State was disputed by

the defendant, a jury question was properly presented, and the jury chose to believe the State's witnesses. There is no merit to defendant's first assignment of error.

The sentence imposed by the court was well within the statutory guidelines, which permit imprisonment of from 1 to 50 years for this offense. The remaining question is whether the trial court abused its discretion. "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. Schall*, 234 Neb. 101, 106, 449 N.W.2d 225, 229 (1989).

Although the defendant apparently had no prior criminal record and had difficulty communicating in English, the fact remains that he attacked a woman and subjected her to numerous and various acts of sexual abuse. The court stated that imprisonment was necessary for the protection of society and a lesser sentence would depreciate the seriousness of the crime and promote disrespect for the law. We find no abuse of discretion in the action of the trial court in imposing sentence.

The judgment of the district court is affirmed.

AFFIRMED.

KEALYE POURNAZARI, APPELLEE, V. MOHSEN M. POURNAZARI, APPELLANT.

460 N.W.2d 661

Filed September 28, 1990. No. 89-1263.

Appeal from the District Court for Nemaha County: HERBERT A. RONIN, Judge. Affirmed.

Louie M. Ligouri for appellant.

Charles D. Hahn for appellee.

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

PER CURIAM.

Respondent father appeals from the judgment of the trial court, which modified a previous judgment of the district court for Nemaha County, Kansas, under the authority of the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 et seq. (Reissue 1988). In these proceedings the district court for Nemaha County, Nebraska, modified the previous decree by terminating joint custody of the parties' minor son and placing permanent custody with the petitioner mother, awarded the respondent restricted and supervised visitation of the child within the boundaries of Nemaha County, Nebraska, and denied the petitioner's request for a restraining order against the respondent or for a requirement that the respondent post a bond.

The ultimate test in determining the appropriateness of an award involving custody of a minor child is reasonableness, as determined by the facts in each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. *Emme v. Emme*, 235 Neb. 505, 455 N.W.2d 808 (1990).

We have reviewed the record de novo, as we are required to do, and have determined that the trial court did not abuse its discretion. *Emme v. Emme, supra*. The judgment of the district court is affirmed. No attorney fees are awarded.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH M. BAKER, APPELLANT.

461 N.W.2d 251

Filed September 28, 1990. No. 89-1311.

1. **Drunk Driving: Words and Phrases.** "Operate," as used in Neb. Rev. Stat. § 39-669.07 (Reissue 1988), refers to the actual physical handling of the controls of the vehicle while under the influence of intoxicating liquor.
2. **Drunk Driving.** Under the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1988), it is unlawful for any person to actually physically handle the controls of any motor vehicle while under the influence of alcohol or while having the prohibited amount of alcohol in one's breath.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed.

Brian R. Watkins for appellant.

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

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

CAPORALE, J.

Following a bench trial, the county court adjudged defendant-appellant, Joseph M. Baker, guilty of second-offense driving while intoxicated, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). That conviction was affirmed by the district court; defendant now urges that the latter court erred in failing to find that the former court erred on the record by finding the evidence sufficient to support the charge. We affirm.

At approximately 3:10 a.m. on October 23, 1988, Deputy David Pekarek of the Lancaster County sheriff's office was dispatched to investigate an accident at the intersection of 56th Street and Rokeby Road, south of Lincoln, Lancaster County, Nebraska. As he arrived at the scene, he noticed a pickup truck on the road attempting to pull a suburban vehicle from a ditch with a chain. The suburban's rear tires were spinning and throwing grass and dirt. Pekarek thereupon parked his vehicle and approached the scene on foot. By the time he arrived, the suburban had reached the roadway. In Pekarek's opinion, the suburban could not have gotten out of the ditch without the aid of the pickup.

Pekarek testified that when he arrived, the suburban's engine was running and its reverse lights were lit. After the pickup had stopped pulling, the suburban continued to move backward under its own power toward the pickup, to give more slack in the chain. The pickup also backed up to release tension in the chain. The suburban was traveling under 5 miles per hour and moved less than 5 feet under its own power. Pekarek identified

defendant, the sole occupant of the vehicle, as the person sitting behind the wheel of the suburban. When Pekarek reached the suburban, the gearshift indicator was in the reverse position, and the vehicle was held in position by defendant's application of the brakes.

Pekarek then instructed defendant to put the suburban into park, shut off the engine, and exit the vehicle. Pekarek noted that defendant smelled of alcohol and that his eyes were bloodshot and watery. As a result, Pekarek required defendant to undergo a number of field sobriety tests, all of which defendant performed poorly. Pekarek concluded defendant was under the influence of alcohol and placed him under arrest for driving while intoxicated. Defendant was then transported to Lincoln, where Pekarek administered a breath test, which showed the presence of 0.175 grams of alcohol per 210 liters of breath.

Jeffrey Rosenlof, a passenger in the pickup which pulled the suburban out of the ditch and the person who hooked the two vehicles together with the chain, watched the pulling operation from outside the pickup. Rosenlof testified that the suburban's engine was running while it was being pulled from the ditch and that the vehicle was in reverse gear. According to Rosenlof, the suburban rolled "under its own power" to release the tension in the chain once it had been extricated from the ditch. Rosenlof estimated that the suburban had backed up approximately 5 feet.

Defendant testified that he fell asleep in the suburban after eating dinner and having a "couple of beers" at a tavern. He claimed to be tired, having arisen at 4 o'clock the previous morning and having worked all day. However, on cross-examination, defendant admitted that he had been drinking during the day while working and also that he had been drinking prior to going to the tavern that evening. Defendant's first memory after falling asleep was of being awakened by a jerk on the ditchbound suburban. According to defendant, the suburban's engine was already running at this point, and he slid behind the wheel as the vehicle was being pulled. He put the suburban into reverse gear and gave the vehicle "a little gas" while it was being pulled. He claims to have

applied the brakes as soon as the suburban reached the roadway and denied having steered the vehicle. Defendant also denied having moved the suburban once it reached the roadway. Defendant said he put the suburban into parking gear and accompanied Pekarek. According to defendant, the pull chain was not disconnected from the two vehicles until he was sitting in Pekarek's vehicle.

Kenneth Kobza, a passenger in the suburban when it went into the ditch, testified that the backward movement of the suburban on the roadway as it exited the ditch was the result of the pickup's pulling the suburban and not defendant's independent operation of it.

Initially, there was some confusion about who drove the suburban into the ditch. Defendant claimed to have been the driver when first questioned about it, but a comment made by his wife, who was standing nearby at the time, prompted Pekarek to question her as well as defendant. Following that discussion, Pekarek concluded that defendant's wife had been driving when the suburban went into the ditch.

So far as is relevant to this case, § 39-669.07 provides that it shall be unlawful for one "to operate or be in the actual physical control of any motor vehicle" while "under the influence of alcoholic liquor" or while having "a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath." Defendant does not claim that he was not under the influence of alcoholic liquor or that he did not have more than the permitted amount of alcohol in his breath; rather, he claims the evidence fails to establish that he was either operating or in actual physical control of the suburban.

In *Uldrich v. State*, 162 Neb. 746, 750-51, 77 N.W.2d 305, 308 (1956), citing *Commonwealth v. Jordan*, 310 Mass. 85, 37 N.E.2d 123 (1941), this court held "operate," as that term was used in a predecessor statute, referred to the "actual physical handling of the controls of the vehicle while under the influence of intoxicating liquor." This definition has survived through the years. See, e.g., *Waite v. State*, 169 Neb. 113, 98 N.W.2d 688 (1959); *State v. Nielsen*, 199 Neb. 597, 260 N.W.2d 321 (1977), *overruled on other grounds, State v. Gerber*, 206 Neb. 75, 291

N.W.2d 403 (1980). Thus, under the provisions of § 39-669.07, it is unlawful, so far as relevant in this case, for any person to actually physically handle the controls of any motor vehicle while under the influence of alcohol or while having the prohibited amount of alcohol in one's breath.

Defendant admitted to putting the suburban into reverse and applying the gas while it was being pulled out of the ditch. There was evidence that he continued to back the vehicle under its own power after reaching the roadway, and there was evidence that defendant so backed the suburban over a distance of as much as 5 feet.

While it is true that the presence of the chain may have limited the direction and speed with which defendant could have moved the suburban, it cannot, under the circumstances, be said, as defendant suggests, that the presence of the chain somehow converted the suburban into the equivalent of a "broken down vehicle in a junkyard." Brief for appellant at 8. The evidence that defendant backed the suburban under its own power to loosen the chain is sufficient to permit a finding that the vehicle was not so converted.

The evidence supporting a finding that defendant did in fact operate the suburban while he was in a prohibited alcoholic state renders the district court judgment correct without any need to consider what is meant by the phrase "to be in the actual physical control," as used in § 39-669.07. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

JANICE K. CAUDILL, APPELLANT, V. SURGICAL CONCEPTS, INC., ET AL., APPELLEES.

460 N.W.2d 662

Filed September 28, 1990. No. 89-1333.

1. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 84-918 (Cum. Supp. 1990), appeals to this court from the district court under the Administrative Procedure Act are reviewed de novo on the record if the district court proceeding was commenced prior to July 1, 1989.
2. **Employment Security.** Neb. Rev. Stat. § 48-628(b) (Reissue 1988) authorizes a disqualification from unemployment compensation benefits for discharge due to misconduct of the employee.
3. **Employment Security: Words and Phrases.** Misconduct is defined as behavior that evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Robert Kohorst, of Kohorst Law Firm, and Michael J. Lehan, of Kelley, Kelley & Lehan, P.C., for appellant.

Michael S. Mostek, of McGill, Parsonage & Lanphier, P.C., for appellee Surgical Concepts.

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

WHITE, J.

This is an appeal from the district court for Douglas County, Nebraska. Plaintiff-appellant, Janice K. Caudill, claims unemployment compensation benefits under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-671 (Reissue 1988). After being discharged from her employment with Surgical Concepts, Inc., she sought unemployment compensation. The Nebraska Department of Labor claims deputy found that Caudill was discharged for misconduct and assessed a 7-week disqualification of benefits. She appealed to the Nebraska Appeal Tribunal, which affirmed the decision of the claims deputy. Caudill then appealed, on May 4, 1989, to the Douglas County District Court, which affirmed the decision of

the appeal tribunal. This appeal followed.

Caudill was employed as an outside sales representative for Surgical Concepts from September 1, 1988, until January 21, 1989. She was hired away from her previous job by Thomas Roberson, the president and owner of Surgical Concepts. She was hired to sell surgical supplies throughout Nebraska and western Iowa and was supervised by Roberson directly.

Her job duties included making sales calls to customers in Kearney, Grand Island, Hastings, and Scottsbluff, as well as calling on local customers. She was informed that she would have to travel approximately three nights per month. She agreed to travel when she accepted the job.

Roberson claimed that she failed to make any trips to her assigned territory in western Nebraska. He testified that when he questioned her about traveling, she expressed concern about being a single woman traveling alone and indicated that she did not understand how to read a map. He also stated that she told him she was now attending school three nights per week. He believed that this was the reason she was not traveling. He also testified that she would not sell the company's entire product line despite being requested to do so.

Caudill testified that Roberson told her she would have to travel to western Nebraska two to four times per year and she planned to do so sometime before the end of February. She also stated that she was attending school the same number of nights as when she began her employment with Roberson and he was aware of her school schedule. She stated that her school schedule would not interfere with traveling for her job. She testified that she concentrated her sales efforts on the "big ticket items" rather than the smaller products, but tried to sell all company products. Caudill also testified that Roberson had complimented her on her job performance 3 weeks before she was discharged.

In late 1988, Caudill submitted a false expense receipt for $14.90. She indicated on the receipt that the expense was for lunch at Julio's with a nurse on November 1, 1988. Roberson noticed that she had higher lunch expenses than he had ever incurred while working in the local territory, and he checked with the nurse. The nurse informed him that she had not had

lunch with Caudill on that day or any other day.

Caudill testified that she had taken the staff of a doctors' office out to lunch and had spent $65. She stated that she knew Roberson would be angry because he was concerned about large expenses for entertaining, so she extended the $65 lunch out over time by fabricating $65 of other expenses. The $14.90 expense for lunch was one of these fabricated expenses.

Roberson testified that he had a conversation with Caudill in mid-January concerning her job performance. At that time he expressed his dissatisfaction with her lack of travel and failure to sell the entire product line. He also testified that he discussed the issue of lack of trust in her. It is unclear from the testimony whether Roberson specifically mentioned the falsified Julio's receipt to her. He gave her the opportunity to resign, and she refused. He then discharged her and sent her a letter detailing the reasons for discharge, including the falsified expense incident.

Pursuant to Neb. Rev. Stat. § 84-918 (Cum. Supp. 1990), appeals from the district court under the Administrative Procedure Act to the Supreme Court are reviewed de novo on the record if the district court proceeding was commenced prior to July 1, 1989.

Section 48-628(b) authorizes a disqualification from benefits for discharge due to misconduct of the employee. This court, in *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983), has defined misconduct to include behavior that evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

Caudill claims that the cited reason for discharge, the falsified expense report, was not the real reason for termination. Rather, she claims Roberson wanted to terminate her because he was upset about the amount of salary and commission he had agreed to pay her. This may be true; however, Caudill admitted she falsified the Julio's expense

receipt. Falsifying expense reports, regardless of the reason, is dishonest and is certainly a violation of acceptable standards of employee conduct and employer rules under *Stuart, supra.* Caudill's conduct in falsifying the records alone was enough to constitute "misconduct." The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. COLE, APPELLANT.

460 N.W.2d 665

Filed September 28, 1990. No. 89-1343.

1. **Criminal Law: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must perform the additional procedural step of objecting at trial to admission of the evidence which was the subject of the suppression motion in order to preserve the question of admissibility for appeal.
2. **Trial: Evidence: Waiver: Appeal and Error.** If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection.
3. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.

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

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

James L. Cole, pro se.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

FAHRNBRUCH, J.

James L. Cole appeals his Douglas County jury convictions for knowingly or intentionally and unlawfully delivering controlled substances. Cole was found to be a habitual criminal and was sentenced to concurrent terms of not less than 10 nor more than 12 years' imprisonment. We affirm.

Through his lawyer, Cole assigns as error that the trial court erred in admitting, over objection, evidence of controlled substances found inside Cole's house, the possession of which substances the defendant was not charged.

About 9:45 p.m. on June 5, 1989, Officer Kevan Barbour of the Omaha Police Division, in an undercover capacity, went to 3210 North 16th Street in Omaha to attempt the purchase of Ritalin and Talwin, both controlled substances. Ritalin and Talwin are used as a "set" and when combined and melted may be injected into the body to produce a heroinlike effect. Barbour approached Cole's house on foot. He passed through a fenced area and walked up to a screened-in front porch. Seated inside the porch was Monte Gary, of whom Barbour asked, "[I]s anything happening[?]" (drug jargon for inquiring whether there are any drugs for sale). Gary replied, "[Y]es," and yelled into the house. The defendant appeared in the doorway. After the defendant had a short conversation with Gary, Cole said, "[T]ell him to come in." Barbour entered the porch and asked Cole for a "set." Cole nodded affirmatively, walked to the south side of the porch, sat down, and handed Barbour one Ritalin and one Talwin tablet ("direct-buy set") in exchange for $20. Barbour then asked if Cole had "rock" (crack cocaine) for sale. Barbour was wearing a body transmitter and "rock" was the code word used to let backup police officers know a sale had been completed. Cole said he did not have any rock, but that he would refer Barbour to someone. At that point, six police officers wearing jackets bearing the words "Omaha Police" ran toward the house. Cole immediately ran into the house and into the basement. Since Barbour had no weapon or flashlight, he waited at the top of the stairs approximately 45 seconds for backup officers to arrive. As the officers descended into the basement, Cole was observed coming out of the basement laundry room and was

arrested. Entering the laundry room, Barbour found one Ritalin and one Talwin tablet ("basement set") lying on the floor. The $20 paid by Barbour to Cole for the direct-buy set was never found by the police.

A second amended information filed August 28, 1989, charged Cole with the Class III felony of unlawfully knowingly or intentionally distributing, delivering, or dispensing methylphenidate (Ritalin), a controlled substance. See Neb. Rev. Stat. § 28-416(1)(a) and (2)(b) (Cum. Supp. 1988). Another count charged Cole with the Class IV felony of unlawfully knowingly or intentionally distributing, delivering, or dispensing pentazocine (Talwin), a controlled substance. See § 28-416(2)(c). Both charges were based on the direct-buy set. Cole was also charged with transportation or possession of a short shotgun, see Neb. Rev. Stat. § 28-1203(1) (Reissue 1989), and the possession by a felon of a firearm with a barrel less than 18 inches, see Neb. Rev. Stat. § 28-1206(1) (Reissue 1989), both Class IV felonies. A Class III felony carries a penalty of not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. A Class IV felony carries a penalty of not more than 5 years' imprisonment, up to a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). Finally, Cole was charged with being a habitual criminal. When a defendant is found to be a habitual criminal, the penalty for a felony of which he is convicted is enhanced to not less than 10 nor more than 60 years' imprisonment. Neb. Rev. Stat. § 29-2221 (Reissue 1989).

At a pretrial hearing, the trial court dismissed the two weapons charges on the prosecution's motion, which conceded that Omaha police had no authority to search where the weapons were found. The trial judge overruled Cole's motion to suppress any of the Ritalin and Talwin tablets seized by police. The court held that although there was no search warrant, the direct-buy set was purchased outside the defendant's house and that exigent circumstances justified entry into the house, where the basement set was found.

Following a September 1989 trial, the jury found the defendant guilty on the two controlled substance charges.

First to be considered is the assignment of error raised by Cole's lawyer that "[t]he trial court erred in admitting, over

objection, evidence as to controlled substances found inside [Cole's] house, the possession of which the Defendant was not accused." It relates only to the Ritalin and Talwin tablets found in the laundry room in the basement of Cole's residence. They were the only controlled substances seized by the police officers and offered into evidence with whose possession or delivery Cole was not charged. As previously stated, the trial court refused to suppress the basement set of Ritalin and Talwin after a suppression hearing.

Although Cole claims that at trial he objected to the basement set, the record reflects that when the basement set was offered in evidence at trial, there was no objection. Instead, Cole objected on relevancy grounds to a foundational question to the State's expert concerning the direct-buy set. That objection was properly overruled. There was no objection when each set of controlled substances was offered and received into evidence.

In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must perform the additional procedural step of objecting at trial to admission of the evidence which was the subject of the suppression motion in order to preserve the question of admissibility for appeal. *State v. DiBaise*, 232 Neb. 217, 440 N.W.2d 223 (1989) (citing *State v. Davis*, 231 Neb. 878, 438 N.W.2d 772 (1989), and *State v. Brockman*, 231 Neb. 982, 439 N.W.2d 84 (1989)); *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988).

The issue of alleged improper admission into evidence of the basement set of controlled substances at trial was not preserved for appeal and, therefore, the assignment of error in that regard is meritless.

In a pro se supplemental brief, Cole claims, in a single assignment of error, that law enforcement officers violated his "fourth amendment rights as protected by the constitutions [sic] of the State of Nebraska and the U.S. Constitution" when the officers, without a warrant, (1) entered upon defendant's premises, (2) purchased alleged controlled substances, (3) arrested the defendant, and (4) made a search and seizure of evidence within the defendant's home.

After the State had dismissed the weapons charges against Cole, the parties, at the pretrial suppression hearing, then agreed that Cole's suppression motion pertained only to the controlled substances, Ritalin and Talwin, which were involved in the case. As previously noted, when the physical evidence of each set of controlled substances was offered in evidence, Cole made no objection to the offer, and each exhibit was received in evidence without objection. Under such circumstances any objection to the exhibits was waived. See *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988). If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989); *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). See, also, *State v. Vann*, 230 Neb. 601, 432 N.W.2d 810 (1988).

In regard to the other issues raised by Cole's pro se assignment of error, " ' "[e]xcept in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived." ' " *State v. Moore*, 235 Neb. 955, 956-57, 458 N.W.2d 232, 234 (1990) (quoting *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987), quoting *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985)); *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988); *State v. Ledingham*, 217 Neb. 135, 347 N.W.2d 865 (1984). The fourth amendment issues were not submitted for disposition or preserved for appeal at the trial level. In reviewing the record of this case, we have found no plain error. Therefore, Cole's pro se assignment of error is meritless.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VICTOR G. TRUE, JR., APPELLANT.

460 N.W.2d 668

Filed September 28, 1990. No. 89-1392.

1. **Criminal Law: Sentences: Effectiveness of Counsel.** Sentencing is a critical stage of a criminal proceeding at which the defendant is entitled to the effective assistance of counsel.
2. **Presentence Reports.** Rather than allowing an attorney access to a presentence report only in the probation office or judge's chambers, the better policy is to allow the defendant to examine the presentence report with his or her attorney, subject to the court's supervision. Prior to such examination, the court may review the document in camera and redact any information deemed to be confidential or privileged.
3. **Sentences.** In determining a sentence, the trial judge should consider factors such as the defendant's age, mentality, education, experience, social and cultural background, past criminal record, and motivation for the offense and the nature of the offense.

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

Richard L. Kuhlman for appellant.

Robert M. Spire, Attorney General, and Donald A. Kohtz for appellee.

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

WHITE, J.

Victor G. True, Jr., the appellant, pled guilty in the district court for Dodge County to second degree murder. His plea was entered following an agreement to reduce one charge from first degree murder and dismiss the other charge, use of a firearm to commit a felony. The trial court sentenced him to life imprisonment for the Class IB felony. On appeal, True asserts that his attorney should have been allowed to make copies of any portion of the presentence investigation report and that his sentence is excessive. We affirm.

The incidents which led to True's plea began on April 26, 1989, when the victim, Troy Williams, poured a beer down the back of True's brother-in-law, Peter Saeger. An altercation followed in which Williams allegedly jumped up and kicked

Saeger in the face. Saeger then talked to True, who lived in a basement apartment of Saeger's home. The two decided to find Williams to talk to him about the fight. True is approximately 5 feet 3 inches tall and weighs about 140 pounds, and Williams was approximately 6 feet tall and weighed about 200 pounds.

Upon arrival at a friend's home, True showed the friend the shotgun he had in his car and told him it was intended to scare someone. Another car was outside the friend's home, and True went to see who was in it. As True approached the car, Williams got out of the back seat and confronted True, who then walked toward his own car, reached through an open window, and pulled out the gun. As True pulled the gun up to his shoulder, it discharged, killing Williams.

True told Saeger to leave the area, and True walked to a friend's apartment, where he placed the gun in the trunk of that friend's car. Upon returning to the scene of the shooting to determine the extent of Williams' injuries, True was arrested.

True was initially charged with first degree murder and use of a firearm to commit a felony. On September 27, 1989, the court found beyond a reasonable doubt that the defendant freely, voluntarily, knowingly, and intelligently desired to withdraw his plea of not guilty and granted leave to amend the charge. True then entered a plea of guilty to a charge of second degree murder, and the firearm charge was dismissed.

Prior to accepting the plea, the court advised True that a guilty plea would waive any technical defects or defenses. He was also informed that he was presumed innocent and that he had the right to a speedy trial, to a jury trial, to confront witnesses and his accusers, to present witnesses, to remain silent, and against self-incrimination. After explaining the range of penalties for the crime, the court found that the defendant fully understood his rights; that he waived them freely, voluntarily, knowingly, and intelligently; and that he understood the consequences of waiving his rights.

True contended at the initial hearing that the shooting of Williams was accidental, and the court informed him that he could be found guilty of a lesser offense such as manslaughter. True stated that, because of the possibility that he could be convicted of first degree murder, he was willing to enter a guilty

plea to second degree murder. The court found beyond a reasonable doubt that True did purposely, but without deliberate and premeditated malice, kill Williams and that True was acting voluntarily, freely, and knowingly in entering his plea.

When True and his attorney appeared for sentencing on November 6, 1989, he again contended that the shooting was an accident. The State then offered evidence to demonstrate that the shotgun could not have discharged accidentally.

The request by True's attorney to mark the presentence investigation report as an exhibit was denied by the court, which noted that the presentence investigation is available to the Supreme Court for its consideration on appeal, whether it is marked as an exhibit or not. See Neb. Ct. R. of Prac. 16B (rev. 1989). True's attorney then requested copies of transcriptions of taped statements from the report. The court noted that counsel would not be allowed to photocopy the presentence report, but was granted access to the report at the probation office at any time.

The court found that the killing was a senseless act which was unnecessary and intentional, and sentenced True to life in prison.

A presentence investigation report is provided for by statute. Neb. Rev. Stat. § 29-2261 (Reissue 1989). Subsection (6) of that section governs access to the presentence report:

> Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such information. The court *may permit inspection* of the report or *examination of parts* thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration.

(Emphasis supplied.)

We have previously held that this statute "makes the

inspection of a presentence report by the defendant's attorney discretionary with the trial court. However, this is a discretion which may be reviewed in this court." *State v. Keller*, 195 Neb. 209, 211, 237 N.W.2d 410, 412 (1976).

In a U.S. Supreme Court case in which parts of a presentence report were not disclosed to the defendant or his counsel, the Court held:

> [T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.

Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

We are cognizant of the critical nature of the information provided in the presentence report and of its importance in the sentencing process. The report has traditionally been held to be confidential for the protection of the public and the defendant. Identification of or statements of confidential informants may be included. We are also aware that an attorney may seek to review the contents of the report with the defendant in order to determine the validity of the information contained in it. By allowing the attorney to have access to the presentence report only in the probation office or in the judge's chambers at a time when the defendant is incarcerated, the burden is on the attorney to discuss the report with his or her client based only on notes or memory.

We hold that the better policy would be to allow the defendant to examine the presentence report with his or her attorney, subject to the court's supervision. Prior to such examination, the court may review the document in camera and redact any information deemed to be confidential or privileged.

In the present case, however, True has not demonstrated that he was prejudiced in any way by the refusal to provide copies of the presentence report. At oral argument True's counsel conceded that his primary goal was to obtain copies of the statements made to police immediately following the shooting,

which were made a part of the presentence report. True's counsel could have requested discovery of the police reports from the prosecution. While this court, in *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984), has held that there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work in the case, certainly the information would have been discoverable under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), if it was exculpatory or material to his defense. Apparently, counsel believed that the pursuit of such discovery would delay the case and irritate the judge.

True asserted at the time he entered his plea and at the sentencing hearing that the shooting was accidental. Yet he still voluntarily entered a plea of guilty to second degree murder, an element of which is intent. ("A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-304(1) (Reissue 1989).) True now asks this court to find that the shooting was accidental, a defense which could have led to a charge of manslaughter rather than second degree murder. See Neb. Rev. Stat. § 305(1) (Reissue 1989). True waived any defenses when he entered his plea. This court does not resolve conflicts in evidence, pass on credibility of witnesses, determine plausibility of explanations, or weigh evidence. *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988); *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988).

Since the trial court twice heard the defendant's contention that the shooting was accidental and had before it the very reports which counsel suggests sustained that contention, no prejudice resulted. If some other harm resulted, True has an obligation to explain to this court what would have been done differently in his case had he and his attorney had access to copies of the presentence report. He has not met that duty. His first assignment of error is without merit.

True's second assignment of error claims that the sentence of life imprisonment is excessive and an abuse of discretion. Second degree murder, a Class IB felony, is punishable by a minimum of 10 years' imprisonment and a maximum of life

imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 1985). We have repeatedly held that a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion by the sentencing judge. *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988). See, *State v. Zaritz*, 235 Neb. 599, 456 N.W.2d 479 (1990); *State v. Beins*, 235 Neb. 648, 456 N.W.2d 759 (1990). In determining a sentence, the trial judge should consider factors such as the defendant's age, mentality, education, experience, social and cultural background, past criminal record, and motivation for the offense and the nature of the offense. *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988).

The trial court here found that the shooting was a senseless, unnecessary act. True seems to argue that his sentence is excessive because his victim had a reputation as a fighter and had prior convictions. That argument is frivolous. Also, True has previous convictions as a juvenile for breaking and entering and burglary, and convictions as an adult for burglary and possession of a controlled substance. No abuse of discretion is evident in the life sentence. The second assignment of error is also meritless.

The judgment of the district court is affirmed.

AFFIRMED.

RICHARD H. BEHRENS, APPELLANT AND CROSS-APPELLEE, V. AMERICAN STORES PACKING CO. ET AL., APPELLEES AND CROSS-APPELLANTS.

460 N.W.2d 671

Filed September 28, 1990. No. 89-1449.

1. **Standing.** Before a party is entitled to invoke the jurisdiction of a court, he or she must have standing to sue, which involves having some real interest in the cause of action; in other words, in order to have standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the 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. **Workers' Compensation.** An employee's right to recover the cost of medical services under the Workers' Compensation Act depends upon his or her having paid for the services or having incurred a liability to pay for them.
4. **Workers' Compensation: Court Rules.** Amendments to rules of procedure are immediately binding upon the Workers' Compensation Court.
5. **Workers' Compensation: Appeal and Error.** Findings of fact by the Workers' Compensation Court have the effect of a verdict in a civil case, and its judgment may not be set aside on appeal where there is evidence sufficient to support it; however, findings made by the compensation court which are not supported by credible evidence and are clearly wrong will be set aside.
6. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
7. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
8. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824(2) (Reissue 1989), connotes an improper motive or a legal position so wholly without merit as to be ridiculous.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

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.

PER CURIAM.

In this third appearance before us, see *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988) (*Behrens I*), and *Behrens v. American Stores Packing Co.*, 234 Neb. 25, 449 N.W.2d 197 (1989), plaintiff-appellant employee, Richard H. Behrens, challenges the Workers' Compensation Court's dismissal of his petition seeking additional recoveries from defendant-appellee employer, American Stores Packing Co., and its insurer, defendant-appellee Kemper Insurance Company. Behrens' assignments of error combine to attack the compensation court's (1) adherence to its Schedule of Medical

Fees in determining the physical therapy charges for which defendants are liable, (2) failure to order defendants to pay for a "Colpac" he purchased, and (3) failure to assess a waiting penalty and attorney fee in his favor. Defendants question Behrens' standing to raise any issues concerning the additional charges his physical therapy provider wishes to assess and, by cross-appeal, assign error to the compensation court's failure to award them an attorney fee. We affirm.

As the result of an accident arising out of and in the course of his employment with American Stores, Behrens, on February 15, 1979, sustained serious injuries to his left knee. *Behrens I.* The parties agree that Behrens requires physical therapy treatments, and further agree that defendants have paid the provider of those services, Lincoln Physical Therapy Associates, the maximum fee which the Workers' Compensation Court Schedule of Medical Fees, effective June 1, 1988, allows for the treatments involved. What is at issue in this regard are those charges the provider wishes to assess which exceed the maximum fee allowed by the schedule. These excess charges amount to $4,064.10.

Neb. Rev. Stat. § 48-120 (Reissue 1988) authorizes the compensation court to establish a schedule of maximum medical fees in the following language:

> The employer shall be liable for all reasonable medical, surgical, and hospital services, including . . . supplies . . . and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . subject to the approval of and regulation by the Nebraska Workers' Compensation Court, not to exceed the regular charge made for such service in similar cases. The compensation court may establish and publish schedules of maximum fees for such services. If the compensation court establishes such a schedule, it shall review such schedule annually and adopt appropriate changes when necessary. The compensation court may contract with any person, firm, corporation, organization, or government agency to secure adequate data to establish such fees. The provider or supplier of

> such services shall not collect or attempt to collect from any employer, insurer, government, or injured employee or dependent or the estate of any injured or deceased employee any amount in excess of the maximum fee established by the compensation court for any such service.

Prior to 1986, the compensation court's rule IV provided in part:

> The Nebraska Medical Association 1975 Relative Value Study when used in conjunction with a conversion factor of $19 per unit hereby is adopted as a fee schedule to be used as a guide in setting maximum fees for physician's services in Workmen's Compensation Cases.

The compensation court amended the foregoing rule, effective November 18, 1986, to except use of the schedule in determining the reasonableness of physical therapy charges:

> The Nebraska Medical Association 1975 Relative Value Study when used in conjunction with a conversion factor of $19 per unit hereby is adopted as a fee schedule to be used as a guide in setting maximum fees for medical services in Workers' Compensation cases except for charges for physical therapy . . . however, such charges shall not exceed the usual and customary charges for such services in the community.

The rule was again amended, effective June 1, 1988, to provide in part:

> The Nebraska Workers' Compensation Court Schedule of Medical Fees when used in conjunction with the Instructions, Definitions, Ground Rules and conversion factors set out in such Schedule hereby is adopted as a fee schedule to be used in setting maximum charges for medical services in Workers' Compensation cases; however, such charges shall not exceed the provider's usual and customary charges for such services if the provider's usual and customary charges are less than what the use of the conversion factors would be.

By the time of the decision under review, the compensation court had adopted the 1989 rules which became effective September 1, 1989, but rule IV and the portion of the schedule

involved in this case remained the same.

The various schedules assign unit values to medical procedures and services, dependent on their nature and difficulty, which unit values are then multiplied by a dollar conversion factor to determine the maximum fee allowed for a procedure or service. *Behrens I.* Under both the 1988 and 1989 schedules, the conversion factor for physical therapy is $5.75. The physical therapy sections of each schedule assign unit values to "modalities," which involve the use of "some machine" on the patient, and to "procedure[s]," which involve "hands-on" treatment from the therapist. However, a separate unit value is assigned for each office visit during which both procedures and modalities are undertaken. Code 97200 assigns a unit value of 6.2 to the initial 30 minutes of an "[o]ffice visit, including [the] combination of any modality(ies) and procedure(s)," and code 97201 assigns a unit value of 2.2 as the maximum for any additional time spent during the office visit. The parties agree that because Behrens received in each office visit a combination of modalities and procedures, Behrens fits within both codes. Accordingly, the maximum fee for an office visit lasting between 2 and 2½ hours, the length of Behrens' average visit, is $48.30; that is, 6.2 multiplied by $5.75, or $35.65, plus 2.2 multiplied by $5.75, or $12.65.

The president of Lincoln Physical Therapy Associates, Tom Harmon, testified that the fees charged by his firm are fair, reasonable, usual, and customary within the community. Harmon stated that because of the manner in which the 1988 fee schedule compensates when several physical therapy procedures or modalities are undertaken in 1 day, when his firm must provide extensive services, as is required in treating Behrens, it sustains a loss. Harmon stated that if his firm provided Behrens only such treatments as would be completely compensated under the schedule, the firm would be "withholding good quality care for" Behrens and would not be "giving good treatment."

On another topic, Behrens testified that in January 1988 his therapist recommended that he purchase a coldpack (the Colpac). Behrens stated that he purchased the item at a cost of $13.75 and used it on his knee, but that he was not reimbursed

by defendants. He introduced into evidence an undated receipt for the item. Defendants' representative testified that Behrens submitted the receipt, but, as it was undated, he was not reimbursed for the purchase.

The compensation court determined that defendants had paid the maximum fee allowed by the 1988 schedule for the physical therapy expenses, that Behrens had failed to prove that "said maximum allowance should not apply here," and that, therefore, defendants were not required to pay the amounts charged which exceeded the maximum fee allowed. The court further found that there was no evidence as to when the Colpac was purchased, and, therefore, defendants were not required to reimburse Behrens for that purchase.

Prior to reaching Behrens' concerns, we must consider defendants' preliminary claim that Behrens lacks standing to seek payment for the amounts Lincoln Physical Therapy Associates wishes to charge in excess of the maximum fee allowable under the relevant schedule. In support of this position, defendants refer us to the language in § 48-120 which provides:

> The provider or supplier of such services shall not collect or attempt to collect from any employer, insurer, government, or injured employee or dependent or the estate of any injured or deceased employee any amount in excess of the maximum fee established by the compensation court for any such service.

No question of constitutionality having been raised, defendants argue: "Since the maximum fee has been paid in this case, [Behrens] has no liability to the provider and cannot be required (or even requested, for that matter) to pay any further amount." Brief for appellees at 5-6.

We thus begin by recalling that before a party is entitled to invoke the jurisdiction of a court, he or she must have standing to sue, which involves having some real interest in the cause of action; in other words, in order to have standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy. *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986). Additionally, 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. *H.H.N.H., Inc. v. Department of Soc. Servs.*, 234 Neb. 363, 451 N.W.2d 374 (1990). See, also, *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986) (in order to maintain a cause of action, a party must have a legal interest in the outcome of litigation).

An employee's right to recover the cost of medical services depends upon his or her having paid for the services or having incurred a liability to pay for them. *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978). Although Behrens agrees that the provider has been paid the maximum fee allowed by the 1988 schedule, he argues that the 1986 version of rule IV (which, as noted earlier, excepted charges for physical therapy from its ambit) applies to the charges made by the provider while that version of the rule was in effect. If Behrens' argument has merit, the provider might be entitled to more than the maximum fee allowed by the 1988 schedule for the services it rendered while the 1986 language of rule IV was in effect and could therefore seek reimbursement from Behrens without violating the proscription in § 48-120. Thus, Behrens has a legal interest in the outcome of this litigation concerning the additional charges Lincoln Physical Therapy Associates wishes to assess for services rendered prior to June 1, 1988, the effective date of the amendments to rule IV and of the 1988 schedule.

Behrens, however, also seeks payment for additional excess amounts the provider wishes to exact for services it rendered after June 1, 1988. Because he alleges that defendants' "refusal to pay said medical expense has resulted in considerable harassment of [him] by credit agencies and creditors," we presume Behrens seeks such payments in order that he may in turn pay the sums over to the provider. However, as defendants argue, § 48-120 prevents the provider from collecting or attempting to collect from Behrens any amount in excess of the maximum established by the compensation court for the services provided to him. Therefore, Behrens has no legal interest in the outcome of this litigation concerning charges in excess of the maximum allowable under the relevant schedule for services the provider rendered after June 1, 1988.

Consequently, he lacks standing to challenge the reasonableness of the fees awarded under the relevant schedule or the reasonableness of the schedule itself.

Having determined that defendants are only partially correct in challenging Behrens' standing with respect to their liability for physical therapy charges, we turn to Behrens' contention that as to the physical therapy treatments he received prior to June 1, 1988, the compensation court should have applied the version of rule IV then in effect. He, however, successfully argued to the contrary in *Behrens I*.

There, the compensation court applied the pre-November 18, 1986, version of rule IV and the pre-1986 schedule to determine the reasonableness of certain medical expenses incurred by Behrens. Behrens appealed that determination, positing that the November 18, 1986, amendment to rule IV, which, as stated earlier, excepted the use of the schedule to determine the reasonableness of physical therapy expenses, was binding on the compensation court at the time of its decision on January 12, 1987. We agreed, reasoning:

> In *Allen* [*v. IBP, Inc.*, 219 Neb. 424, 363 N.W.2d 520 (1985)], we said that where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it was binding upon a tribunal, and the date of the tribunal's judgment or award was the critical time, not the date of its hearing.
>
> From an examination of rule IV and its purposes, we determine that the [relative value study] chart was nothing more than a tool, guide, method, or aid for the court in evaluating all of the evidence in arriving at the reasonableness of the claimed medical expenses, an existing right. Rule IV originally and as amended was procedural only, not substantive. Rule IV as amended November 16, 1986 . . . excepting charges for physical therapy, was binding on the panel upon adoption, and it was obligated to disregard the [relative value study] chart at the time the court made and filed its order on January 12, 1987. It was error for the court to either consider or apply rule IV and the [relative value study] chart when

> assessing the reasonableness of the physical therapy expenses.

Behrens I at 25, 421 N.W.2d at 17.

Thus, in *Behrens I* we held that rule IV is one of procedure only and that any amendments are immediately binding upon the compensation court. Under the holding in *Behrens I*, the compensation court, which, on November 17, 1989, issued the order presently before us, was bound by the version of rule IV in effect as of September 1, 1989, which version, as relevant here, is identical to the 1988 version which the compensation court applied. Therefore, the compensation court erred in applying the 1988 version of rule IV rather than the 1989 version, but because the two versions, to the extent they are relevant to this case, are identical, Behrens was not prejudiced. Consequently, Behrens' first summarized assignment of error fails.

The next summarized assignment of error challenges the compensation court's failure to order defendants to reimburse him the cost of the Colpac. Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1988), findings of fact by the Workers' Compensation Court have the effect of a verdict in a civil case, and its judgment may not be set aside on appeal where there is evidence sufficient to support it; however, findings made by the compensation court which are not supported by credible evidence and are clearly wrong will be set aside. *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990). 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. *Canas v. Maryland Cas. Co., ante* p. 164, 459 N.W.2d 533 (1990). As the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Canas v. Maryland Cas. Co., supra*.

While it is true Behrens testified he purchased the Colpac in January 1988 upon the recommendation of his physical therapist, the compensation court was not obligated, particularly in the face of an undated receipt, to find the sequence of events in fact occurred in the order Behrens recalled it. Accordingly, it cannot be said the compensation court's

finding in this regard is clearly wrong. The second summarized assignment of error is therefore without merit.

In view of the resolution of the first and second summarized assignments of error, the waiting penalty and attorney fee issues presented in the third summarized assignment of error, under the provisions of Neb. Rev. Stat. § 48-125(1) (Reissue 1988), do not arise.

Left for consideration is defendants' cross-appeal for an attorney fee, the resolution of which is controlled by Neb. Rev. Stat. § 25-824 (Reissue 1989). That statute provides, in pertinent part:

> (2) Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.
>
> . . . .
>
> (4) The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment.

The term "frivolous," as used in § 25-824(2), connotes an improper motive or a legal position so wholly without merit as to be ridiculous. See, *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990); *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988). There is no evidence of improper motive, nor can we say that Behrens' legal position was so lacking in merit as to be ridiculous.

Accordingly, the judgment of the compensation court is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

CAPORALE, J., dissenting in part.

While I agree with the majority's disposition of Behrens' appeal, I disagree with its adjudication of defendants' cross-appeal.

The minor dispute concerning the Colpac presents a credibility issue, a matter which this court does not review. The remaining dispute concerning the physical therapy treatments separates into two parts. Behrens has no standing to complain as to one part and as to the remaining part seeks to overturn the very interpretation he, through his attorney, established in *Behrens I*. I fail to understand how under those circumstances it can be said that the legal positions asserted are not so lacking in merit as to be ridiculous and that this litigation is not frivolous. Neither do I understand how Behrens' attorney could reasonably have concluded otherwise.

Accordingly, I would award defendants an attorney fee in the sum of $500 against Behrens' attorney to apply toward the services of their attorneys in this court and remand the cause to the compensation court for the assessment of an attorney fee against Behrens' attorney to apply toward the services of defendants' attorneys in that court.

CAROL J. MONZON, APPELLANT, V. RICHARD J. MONZON, APPELLEE.

460 N.W.2d 678

Filed September 28, 1990. No. 90-091.

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

Michelle J. Oldham, of Mousel Law Firm, P.C., for appellant.

Paul M. Wood, of Colfer, Lyons, Wood, Malcom & Goodwin, for appellee.

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

PER CURIAM.

This is an appeal from an order modifying a decree of dissolution. The wife appeals, alleging that the district court abused its discretion in finding that a material change in circumstances affecting the best interests of the children required a change in child custody previously granted to the wife.

> "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, ante p. 101, 104, 459 N.W.2d 215, 219 (1990); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

From our review de novo on the record in these proceedings, we find no abuse of discretion by the district court. We decline to award an attorney fee in this appeal.

AFFIRMED.

TIMOTHY D. KRACL AND LAURIE A. KRACL, HUSBAND AND WIFE, APPELLEES, V. NORMAN L. LOSEKE AND MARIE LOSEKE, HUSBAND AND WIFE, APPELLANTS.

461 N.W.2d 67

Filed October 5, 1990. No. 88-532.

1. **Actions: Equity: Contracts: Rescission.** An action to rescind a written instrument is an equity action.
2. **Fraud: Equity: Proof: Evidence.** In an equity case, fraud must be proven by clear and convincing evidence.
3. **Fraud: Proof: Circumstantial Evidence.** Fraud may be proved by circumstantial evidence.

4. **Fraud: Contracts: Rescission: Real Estate.** A seller's fraud provides a basis for a purchaser's right to rescind a contract for the sale of real estate.
5. **Actions: Equity: Contracts: Conveyances: Rescission: Restitution.** A plaintiff's restitution or tender of property is unnecessary before commencement of an action in equity to rescind a contract or conveyance.
6. **Laches: Time.** Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
7. **Contracts: Rescission: Ratification: Estoppel.** A purchaser's conduct which constitutes acquiescence, ratification, or estoppel precludes rescission of a contract.
8. **Contracts: Rescission: Parties.** The purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract; hence, rescission may be unavailable unless the parties can be placed substantially in the status quo.
9. _____: _____: _____. The remedy of rescission involves more than cancellation of a contract, and includes a judicial effort to place the contractual parties in, as nearly as possible, substantially the same condition which existed when the contract was entered.
10. **Contracts: Rescission: Equity: Real Estate.** In equitable rescission of a real estate contract, a plaintiff purchaser is entitled to be returned to the status quo and recover payments on the contract rescinded less the fair rental value of the premises for the time that the plaintiff held possession of the premises under the contract.
11. **Actions: Contracts: Rescission: Equity: Real Estate: Evidence.** Before a seller, as a party to a contract rescinded in an equity action, may receive credit for fair rental value of the premises involved in the rescission action and thereby reduce the amount recoverable by the plaintiff purchaser as a result of the rescission, a court must be presented with relevant evidence which establishes the fair rental value of the premises.

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

Stephen C. Hansen, of Luckey, Sipple, Hansen, Emerson & Schumacher, and Francis O'Brien for appellants.

Larry J. Karel, of Karel & Seckman, for appellees.

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

SHANAHAN, J.

In their petition filed on February 27, 1987, in the district court for Colfax County, Nebraska, Timothy D. and Laurie A. Kracl sought rescission of their written contract with Norman

L. and Marie Loseke for the purchase of Losekes' house and "for such other and further relief as is just and equitable . . . ." Kracls based their action on Losekes' concealment of termite damage in the residence sold to Kracls. The court entered judgment whereby the contract of sale was rescinded, Kracls recovered the payments made under the contract, and the premises were restored to Losekes, who appeal.

STANDARD OF REVIEW

An action to rescind a written instrument is an equity action. *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986) (rescission of farm lease); *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985) (rescission of contract for sale of residence).

> "In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another."

Gottsch v. Bank of Stapleton, 235 Neb. 816, 818, 458 N.W.2d 443, 446-47 (1990); *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989); Neb. Rev. Stat. § 25-1925 (Reissue 1989) (appellate review in equity cases).

SALE OF LOSEKES' RESIDENCE

In December 1983, Losekes decided to sell their residence in Schuyler, Nebraska. Subsequently, in February 1984, Norman Loseke observed "tunnels on the south wall" of the residence's basement, but never actually saw termites in that area. Before putting their house on the market, Losekes had their basement ceiling "Sheetrocked" to cover floor joists which supported the first floor of their home. Most of the Sheetrock work, except for an area near the basement's north wall, was performed by Leo McNally in March 1984. The ceiling near the north wall was already Sheetrocked when McNally commenced his work. Prior to McNally's work for Losekes, a contractor had built a small room in the Loseke basement. The basement room was approximately 4 by 6 feet, with a fully Sheetrocked ceiling

which left no exposed wood. The walls for this basement addition also provided support for weakened joists covered by the Sheetrock at the north side of the basement. The additional support for the floor joists was necessary because, as later expressed by Norman Loseke at trial, "the floor joists were showing some deterioration, wood rot, termites . . . ."

The Kracls first viewed the Loseke residence in early April 1984 and were informed by Losekes that "the sheetrocking had been put up to help sell the property, spruce it up a little bit." Also, Norman Loseke told Kracls that the house was in "good condition." There was no discussion concerning termites. Norman Loseke never mentioned the "tunnels," since, as he later maintained, he did not realize that termites had made the tunnels at the basement's south side. Norman Loseke characterized the basement room as a "canning room" and did not indicate that the room supplied support for the floor joists and basement ceiling.

After an additional visit to the Loseke house, Kracls decided to purchase the residence and met with the Losekes on April 14, 1984, to review a "Contract for Sale of Real Estate" which Losekes provided. Paragraphs 7 and 8 of the contract state:

> 7. The buyer has examined the above described premises, and relies upon their own inspection of said premises, and not upon any representations made by the seller or agent of the seller. No warranty is implied or expressed by the seller.
>
> 8. Termite inspection of the above described premises shall be the responsibility of the buyers with regard to the making of arrangements for the inspection and for the payment of the costs of the inspection. If termites are found on the premises as a result of the inspection prior to the final settlement, costs incurred in the treatment for termites shall be the responsibility of the seller.

Kracls and Losekes signed the contract on April 14 and scheduled a closing for July 1. Under the contract, Losekes were allowed to remain in possession of the house until February 1, 1985, since they were in the process of building a new home. After the July closing, Losekes remained in the house until January 3, 1985. For that period, Losekes paid

Kracls rent in the amount of $1,000.

Although the Kracl-Loseke contract provided that Kracls were responsible for any termite inspection, Losekes took it upon themselves to obtain a termite inspection by Orkin Exterminating Company on October 17, 1984. That inspection revealed termites in the garage and beneath the basement steps of the house sold to Kracls. After Losekes paid for Orkin's treatment of the house, Norman Loseke told Kracls that Orkin "had found a trace [of termite activity] in the garage but there was nothing to worry about, they just went ahead and treated the house anyway."

KRACLS' POSSESSION OF THE RESIDENCE

On January 3, 1985, Kracls moved into the former Loseke residence and, in October, replaced the old furnace in the north part of the basement, which required removing a section of the Sheetrock ceiling. When the Sheetrock was removed above the furnace, Kracls saw termite damage to the wooden floor joists. Kracls removed the remaining Sheetrock from the ceiling and found additional termite damage in the south and west ends of the basement. The bulk of the damage, however, was located in the north end of the basement. Orkin was summoned for the termite problem, treated the house in 1985, and applied an additional treatment in October 1986 to prevent further termite damage. Although the exact date is undisclosed, Kracls employed Joe Scheppers, a contractor, to inspect the house and evaluate the damage to their home. On January 12, 1987, Kracls received a written estimate from Scheppers Construction which stated that the cost to repair termite damage was $24,000. Kracls were also informed that it would cost an additional $1,000 for a moving company to raise the house so that Scheppers could replace the floor joists. To replace the floor joists, it would be necessary to remove and later replace the house's chimney at a cost of $1,700.

On January 30, 1987, Kracls, by a letter from their lawyer, first informed Losekes about Kracls' discovery of termite damage in the house. Kracls filed their rescission action on February 27 and alleged that Losekes had concealed the existence of termites in the house sold to Kracls, who would not

have purchased the house if the presence of termites had been known by Kracls.

In their answer of March 27, 1987, Losekes denied any fraudulent concealment and, on January 25, 1988, 2 days before trial, filed an amended answer, which contained:

> By way of further answer to Plaintiffs Petition Defendants allege[:] That the first time that either of Defendants were advised by Plaintiffs that they should be liable for any damage to the house they sold to Plaintiffs was during January of 1987, which was more than two years after Plaintiffs first occupied the house; consequently, Plaintiffs should be estopped from claiming any alleged misrepresentation by Defendants and from seeking recovery thereon.

Richard Kolarik, the Orkin employee who treated the house in response to Kracls' call, testified that the damage to the floor joists had "all been done by termites" and, regarding the north end of the basement, the damage was "very severe," especially since termites usually "don't eat a whole chunk" out of wood as the termites had done in Kracls' home. Kolarik estimated that it had taken termites at least 3 years to cause the damage to the floor joists that he viewed in October 1985. Kolarik also testified, without objection, that at the time the Sheetrock was installed in 1984, termite damage to the joists would have been visible. According to Robert Stratman, one of the Orkin employees who inspected the house for Losekes, covering the basement ceiling with Sheetrock rendered the termite damage undetectable. When questioned whether he had known about any termite damage in 1984 near the north basement wall, Norman Loseke testified that he had never looked at the area of the north wall, despite the fact that he had lived in the house for 30 years and twice a year had changed the filter for the furnace, which was located 1 foot from the north wall. McNally, who had done the Sheetrock work in the basement of the Loseke residence, testified that he never actually saw any termites when he installed the Sheetrock, but there "might have been a little tunnel or something on the south side" of the basement.

The court found generally in favor of Kracls, entered judgment that the Kracl-Loseke contract was rescinded, and

ordered Losekes to repay Kracls $56,358.05 which had been paid under the contract of sale.

LOSEKES' ASSIGNED ERRORS

Losekes contend that (1) Kracls did not prove fraud in the form of Losekes' concealment of a material fact concerning the sale, (2) Kracls' failure to promptly rescind the contract prevents rescission, and (3) Losekes were entitled to rent from Kracls as a result of Kracls' possession of the premises before the rescission.

FRAUD BY CONCEALMENT

In an equity case, fraud must be proven by clear and convincing evidence. *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989). Fraud may be proved by circumstantial evidence. *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). A seller's fraud provides a basis for a purchaser's right to rescind a contract for the sale of real estate. See *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985).

> [I]n order to maintain an action for damages for fraudulent concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.

Nelson v. Cheney, 224 Neb. 756, 762, 401 N.W.2d 472, 476-77 (1987).

In *Christopher v. Evans, supra* at 55, 361 N.W.2d at 196, which was a rescission action involving a contract for the sale of a residence, we stated:

> *Conceal* means "To hide, secrete, or withhold from the

knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of." Black's Law Dictionary 261 (5th ed. 1979).

Also, in *Christopher, supra* at 54-55, 361 N.W.2d at 196, we recognized that fraud by concealment and fraud by misrepresentation are quite similar and acknowledged:

> " 'If, with the intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party. . . .' "

(Quoting *Linton v. Sheldon*, 98 Neb. 834, 154 N.W. 724 (1915).)

In view of the severity and longevity of the termite damage in the basement of the Loseke residence, the reasonable conclusion is that Losekes knew about the presence of termites in the basement. Uncontradicted testimony established that the termite damage began some 3 years before the Orkin inspection in 1985, and, therefore, was visible well in advance of Losekes' sale to Kracls. Also undisputed is the fact that the termite damage was observable in 1984 when the Losekes placed Sheetrock on the basement ceiling, covering the floor joists, to help "spruce up" the house for a prospective sale. Although Norman Loseke claims that he never looked at the joists near the north basement wall, where he would have seen the termite problem, Loseke on several occasions was in the immediate vicinity of the termite damage when he changed the furnace filters. We also take into consideration the fact that the district court observed the various witnesses during their testimony and had a personal opportunity to evaluate the credibility of the witnesses. Losekes' activity in covering the joists with Sheetrock to mask the termite damage certainly comes within the definition of "concealment" in reference to fraud. See *Christopher v. Evans, supra*. After our de novo review of the

record, we reach the same conclusion as that of the district court, namely, Kracls proved their case of fraud by Losekes' concealment of the termite problem.

LOSEKES' DEFENSES TO RESCISSION

Losekes contend that rescission is unavailable to Kracls because Kracls did not declare a rescission and tender the premises before commencement of the rescission action and did not timely elect to rescind the contract after discovery of the termite problem.

Failure to Tender Property.

To support their argument that a declaration of rescission and tender of property are necessary to maintain a rescission action, Losekes rely on *Rasmussen v. Hungerford Potato Growers Ass'n*, 111 Neb. 58, 62, 195 N.W. 469, 471 (1923), in which this court stated that

> he who rescinds must act promptly. Immediately upon learning the facts he should announce to his adversary that he does not intend to be bound by the terms of the agreement made, and tender back what he has received under it. *To maintain rescission at law*, he must do this at or prior to the time of the commencement of his action. Due allegation of his acts of rescission should be made in the petition.

(Emphasis supplied.) Losekes have confused rescission at law, which was involved in *Rasmussen*, and equitable rescission, which is the subject of the present appeal.

The difference between rescission at law and rescission in equity was explained by this court in *Haumont v. Security State Bank*, 220 Neb. 809, 815-16, 374 N.W.2d 2, 7 (1985):

> "Strictly speaking, in a law case, the rescission is by act of the party and is a condition precedent to bringing an action to recover money or thing owing to him by any other party to the contract as a consequence of the rescission, and by his rescission or repudiation of a contract a party merely gives notice to the other party that he does not propose to be bound by the contract. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for

> the recovery of land, or for the recovery of damages, and although nothing is said concerning it either in the pleading or in the judgment, a contract or conveyance, as the case may be, is virtually rescinded; the recovery is based on the fact of such rescission and could not have been granted unless the rescission had taken place.
>
> "In equity, on the other hand, the rescission is effected by the decree of the equity court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument, and renders it as though it does not exist."

(Quoting 12A C.J.S. *Cancellation of Inst.* § 4 (1980).)

Thus, a plaintiff's restitution or tender of property is unnecessary before commencement of an action in equity to rescind a contract or conveyance. *Haumont v. Security State Bank, supra*; *Geise v. Yarter*, 112 Neb. 44, 198 N.W. 359 (1924). As further observed in D. Dobbs, Handbook on the Law of Remedies, *Principles of Restitution* § 4.8 at 294 (1973):

> In equity the suit is not *on* rescission, but *for* rescission; it is not a suit based upon the rescission already accomplished by the plaintiff, but a suit to have the court decree a rescission. . . . Since rescission is not accomplished "in equity" until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money he received from the defendant. . . .
>
> This does not mean that the plaintiff is entitled to get back what he gave and keep what he got, too. It means only that he need not make formal tender before suit.

See, also, *Knaebel v. Heiner*, 663 P.2d 551 (Alaska 1983) (because plaintiff sought equitable rescission rather than legal rescission, neither restoration nor tender was required prior to suit by plaintiff); *Lightner v. Karnatz*, 258 Mich. 74, 77, 241 N.W. 841, 842 (1932): "Restoration or tender before suit is a necessary element in legal rescission, but is wholly superfluous as a prerequisite to the commencement of a suit in equity for rescission or cancellation."

Because Kracls' case involves equitable rescission, that is, an

action to obtain a decree of rescission, Kracls' tender of the premises before filing their petition was unnecessary to preserve their cause of action for rescission of the contract with Losekes.

Delay or Waiver by Kracls.

Losekes further contend that the remedy of rescission is barred by the lapse of time in the present case or that the right to a rescission was waived because Kracls made improvements to the house after their discovery of the termite problem. Kracls discovered the termite damage in October 1985, received estimates of repair in January 1987, and filed suit in February 1987.

> "If the purchaser has knowledge of the grounds upon which he is entitled to rescind, an unreasonable delay upon his part, especially if accompanied by such change of circumstances as makes it impracticable for him to place the vendor in statu quo, or by such acts or conduct on the part of the purchaser as constitutes waiver, prevents him from exercising his right to rescind. Even where time is not of the essence of the contract, a purchaser may still lose his right to rescind by delaying action to a time, which, under the circumstances, is unreasonable." . . .
>
> "The question whether laches exists in a particular case depends upon its own peculiar circumstances . . . ."

Russo v. Williams, 160 Neb. 564, 582, 71 N.W.2d 131, 143-44 (1955).

In determining whether a purchaser's delay in seeking rescission is unreasonable, we must keep in mind that "the defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary." *In re Estate of Widger*, 235 Neb. 179, 181, 454 N.W.2d 493, 496 (1990). Similarly, we have stated that "laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another." *Van Pelt v. Greathouse*, 219 Neb. 478, 484, 364 N.W.2d 14, 19 (1985).

Losekes direct our attention to *Russo v. Williams, supra*,

where Russos were denied rescission even though their delay in seeking rescission was much shorter than the time element in Kracls' case. In *Russo*, Russos purchased a motel, consisting of several units, and took possession on April 22, 1952. Around June 26, Russos discovered termites on the premises and sued for rescission in early September 1952 after discovery of additional termites. In concluding that Russos' delay in seeking rescission was unreasonable, this court pointed out that after the discovery of termites in June, Russos "made no effort to eradicate or control them, although the evidence shows that can be done." *Id.* at 583, 71 N.W.2d at 144. This court also noted that Russos continued to operate the motel after the initial discovery of termites and that

> [i]t was only after [Russos] discovered additional evidence of termites in several of the cabins in the early part of September 1952 that they took action. This was after the tourist season of 1952 was practically over. It is apparent the business had not been as profitable as appellants had anticipated and so, when they found this additional evidence of termites, they decided it was a good time to give the motel back to [Williams].

Id. The *Russo* court concluded: "Under these circumstances we do not think appellants are entitled to rescind. They should have acted when they first discovered the place had termites and therefore [was] not as represented. By waiting until September we find they affirmed the contract and that rescission should be denied." *Id.* Thus, in *Russo*, the court did not determine that the length of delay or the time element, from June to September, in and of itself was unreasonable; rather, Russos' actions during that period "affirmed" the contract and, thus, barred Russos from rescission. Furthermore, in *Russo*, the defendant seller suffered prejudice from Russos' failure to take any steps to prevent additional termite damage after the initial discovery of the termite problem.

In the present appeal, although Kracls did not file suit until approximately 16 months after their discovery of the termite problem, nothing indicates that Losekes sustained any prejudice during the interval between Kracls' discovery and commencement of the suit. In efforts to ascertain the extent of

termite damage, Kracls enlisted the services of a contractor to examine the house and provide information about the magnitude of the termite damage as a factor in intelligently determining the course of action to be taken. The premises did not suffer any additional termite damage during the postdiscovery period before suit was filed. In fact, Kracls reasonably took the precaution of additional termite treatment to prevent further damage. Also, Richard Kolarik testified that, in terms of termite damage, the condition of the floor joists at the time of trial was identical to the joists' condition at the time Kracls discovered the termite problem, which indicates that the termite problem was ostensibly stabilized as the result of Kracls' discovery and intervention. We conclude that any delay by Kracls did not constitute "inexcusable neglect," see *In re Estate of Widger, supra*, to bar Kracls' rescission of their contract with Losekes.

Losekes also argue that the right to rescission was waived by Kracls because Kracls made improvements on the house.

A purchaser's conduct which constitutes acquiescence, ratification, or estoppel precludes rescission of a contract. *Wolin v. Zenith Homes, Inc.*, 219 Md. 242, 146 A.2d 197 (1959). Cf. *Wegner v. West*, 169 Neb. 546, 552, 100 N.W.2d 542, 547 (1960): " 'The assertion of the rescission of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been rescinded.' "

The "improvements" by Kracls after discovery of the termite problem consist of roof repair, $56.89; repair of a water pipe, $3.50; pump repair, $11.89; and repair to a door, $21.60, a total of $93.88 in repairs. These minor repairs can hardly be considered acts which indicate Kracls' intent to ratify the contract with Losekes or acquiesce in the termite damage. The repairs by Kracls show nothing more than a wish to preserve the status of the property or to protect the property from further deterioration. Thus, we conclude that Kracls' right to a rescission is not barred by the equitable defenses asserted by Losekes.

LOSEKES' RECOVERY OF RENT

Losekes argue that the trial court erred in not deducting from

Kracls' recovery the reasonable rental value of the premises while Kracls occupied the house. Losekes did not plead fair rental value as a setoff or counterclaim in the action commenced by Kracls.

In *Boris v. Heyd*, 220 Neb. 569, 371 N.W.2d 268 (1985), Boris commenced an action for strict foreclosure of a land contract with Heyds, who counterclaimed based on the seller's fraud. Boris generally denied the alleged fraud. Heyds obtained a rescission of the contract, subject to a setoff in Boris' favor for rent while Heyds occupied the premises under the contract. In *Boris*, we reversed the setoff for rent and stated:

> The fact question as to what would be the reasonable rental value of the property was neither pled nor proved. Since no evidence as to fair rental value appears in the record at any point, a setoff for fair rental value could be based only on conjecture or speculation. . . . Furthermore, plaintiff was required by Neb. Rev. Stat. §§ 25-811 and 25-812 (Reissue 1979) to plead the setoff in her response to the Heyds' counterclaim. No such pleading was filed. The setoff . . . must be disallowed.

220 Neb. at 572-73, 371 N.W.2d at 270-71.

Notwithstanding *Boris*, we have recognized that the purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract; hence, rescission may be unavailable unless the parties can be placed substantially in the status quo. See, *Anson v. Grace*, 174 Neb. 258, 117 N.W.2d 529 (1962); *Wegner v. West, supra*; *Caruso v. Moy*, 164 Neb. 68, 81 N.W.2d 826 (1957); *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). See, also, *Perry v. Meyer*, 110 Neb. 347, 350-51, 193 N.W. 717, 718 (1923): "The principal relief effected by rescission is to place the parties in the same condition as they were in before the making of the contract sought to be rescinded"; *Collison v. Ream*, 95 Neb. 29, 38, 144 N.W. 1050, 1053 (1914): "When a contract is rescinded, parties should be placed in *statu quo* as nearly as possible."

Thus, the remedy of rescission involves more than cancellation of a contract, and includes a judicial effort to place the contractual parties in, as nearly as possible, substantially

the same condition which existed when the contract was entered. The equitable objective of a return to the status quo as the result of a rescission is consistent with the equitable maxim "[One] who seeks equity must do equity." *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 674, 74 N.W.2d 546, 559 (1956); *Hadley v. Platte Valley Cattle Co.*, 143 Neb. 482, 10 N.W.2d 249 (1943). The meaning of the foregoing maxim is that

> "whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy."

Kerr v. McCreary, 84 Neb. 315, 320, 120 N.W. 1117, 1119-20 (1909).

The equitable objective in a return to the status quo as a result of rescission and the reasonable rental value for property involved in the rescission have been considered by numerous courts. For example, in *Smeekens v. Bertrand*, 262 Ind. 50, 311 N.E.2d 431 (1974), the Supreme Court of Indiana recognized:

> It is hornbook law that a rescinding party must restore any and all benefits received under the contract. The parties must be returned to the status quo. . . . "Therefore, when a party elects to rescind the contract, he is only entitled to a return to the status quo. This usually requires a plaintiff to restore *any benefit* he received under the contract, *including a return in specie of any property received and a reasonable rental value for the use of the property*, plus damages for waste, if any. Likewise, *the defendant must restore any money paid by the plaintiff under the contract plus interest* . . . ."

(Emphasis in original.) *Id.* at 58, 311 N.E.2d at 436 (quoting *Grissom v. Moran*, 154 Ind. App. 432, 292 N.E.2d 627 (1973)). See, also, *Renner v. Kehl*, 150 Ariz. 94, 98, 722 P.2d 262, 266 (1986): " '[I]t is of course essential to justify the rescinding of a contract that the rescinding party offer to place the other in

status quo, and this includes the offer to credit the vendors with a reasonable rental value for the time during which the land was occupied' "; *Walter v. Moore*, 700 P.2d 1219 (Wyo. 1985) (defendant vendor entitled to reasonable rental value of home, since plaintiff successfully obtained rescission of contract for sale of home); *Isaacs v. Bokor*, 566 S.W.2d 532, 540 (Tenn. 1978): "[I]n attempting to restore the parties to their former status, courts may require the vendee to account to the vendor for the use or rental value of the property"; *Farmer v. Groves*, 276 Or. 563, 568, 555 P.2d 1252, 1255 (1976): "In the case of a rescission plaintiffs are entitled to be returned to the status quo and to recover the payments made on the contract less the fair rental value of the premises for the time they had possession thereof"; *Nelson v. Hoff*, 70 Idaho 354, 360, 218 P.2d 345, 349 (1950): "It is true that respondents did not raise the question of rental value by cross-complaint. However, it was the duty of appellants to account for the reasonable rental value, if any, of the property in the event they were entitled to recover." We, therefore, hold that in equitable rescission of a real estate contract, a plaintiff purchaser is entitled to be returned to the status quo and recover payments on the contract rescinded, less the fair rental value of the premises for the time that the plaintiff held possession of the premises under the contract. For that reason, we now disapprove of the holding in *Boris v. Heyd*, 220 Neb. 569, 371 N.W.2d 268 (1985), which requires that a defendant vendor plead a setoff for rent on the premises before the vendor is entitled to a credit against contract payments recovered by the plaintiff purchaser in an equity action for rescission of a contract for the sale of real estate.

In the appeal before us, Kracls sought the equitable remedy of rescission concerning their contract with Losekes. By seeking an equitable remedy, Kracls rendered themselves amenable to doing equity in accordance with the maxim "One who seeks equity must do equity." Consequently, in Kracls' action, the district court was obliged to provide equitable relief and direct whatever was reasonably necessary to return Kracls and Losekes to their respective positions, the status quo, which existed immediately before the parties entered their contract for sale and purchase of the Loseke house. After the contract,

Kracls had possession of the house until they elected to seek rescission of the contract by which they held possession. Since Kracls could not accomplish the impossible by turning back the calendar and restoring the time which had elapsed during their possession of the property, an equitable solution includes consideration of reasonable rent for the period while Kracls were in possession of the premises. Thus, although Losekes did not plead a setoff for reasonable or fair rental value of the property while Kracls were in possession of the premises, equitable relief through rescission, as an effort to reestablish the status quo which existed when the parties entered the contract, may necessitate that Kracls pay Losekes the fair rental value during Kracls' possession of the premises.

However, before a seller, as a party to a contract rescinded in an equity action, may receive credit for fair rental value of the premises involved in the rescission action and thereby reduce the amount recoverable by the plaintiff purchaser as a result of the rescission, a court must be presented with relevant evidence which establishes the fair rental value of the premises. We find, as the district court obviously found, that the payments by Losekes while they were in possession of the house after execution of the Kracl contract occurred as special circumstances in the sale and, therefore, lack probative value to establish the fair rental value for the premises. Thus, there is no relevant evidence which warrants an adjustment of the amount awarded to Kracls, namely, $56,358.05 paid under the contract, as equitable relief under the circumstances.

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., concurring in the result.

I agree not only with the result reached in the majority opinion, but also with the holding that in an equitable action for rescission of the sale of the property, a purchaser seeking the rescission is liable for the fair rental value of the property during the purchaser's possession. I would, however, require the vendor not only to plead, but also to assume the burden of proving, the fair rental value of the property while it was in the purchaser's possession.

Nebraska adheres to the doctrine of code pleading. Under

that doctrine, the purpose of pleadings is to frame issues upon which a cause is to be tried, and issues in a given case are limited to those which are pleaded. *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985). One of the purposes of a pleading is to advise an adversary as to what issue the adversary must meet. *Bashus v. Turner*, 218 Neb. 17, 352 N.W.2d 161 (1984).

If the vendor in an equitable action for rescission fails to either plead or prove the fair rental value of the property during the purchaser's possession, the issue of fair rental value should not be considered by the court.

WHITE and GRANT, JJ., join in this concurrence.

CITIZENS STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. JENNINGS STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLEE.

461 N.W.2d 78

Filed October 5, 1990. No. 88-750.

1. **Equity: Appeal and Error.** In an equity action, this court reviews the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Debtors and Creditors: Conveyances: Fraud: Consideration.** Under the Uniform Fraudulent Conveyance Act, any conveyance made by a person thereby rendered insolvent is fraudulent as to creditors if the conveyance is made without fair consideration. Neb. Rev. Stat. § 36-604 (Reissue 1988).
3. **Conveyances: Consideration: Words and Phrases.** Neb. Rev. Stat. § 36-603 (Reissue 1988) defines fair consideration as property conveyed or an antecedent debt satisfied in a good faith exchange for a fair equivalent of the property or debt.
4. **Debtors and Creditors: Conveyances: Fraud: Intent.** Under Neb. Rev. Stat. § 36-607 (Reissue 1988), any conveyance made with the actual intent to hinder, delay, or defraud either present or future creditors is fraudulent as to both present and future creditors.

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

Scott J. Norby, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

John R. Brownell, of Lauritsen, Brownell, Brostrom & Stehlik, for appellee.

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

WHITE, J.

This is an action brought under the Nebraska Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. §§ 36-601 et seq. (Reissue 1988). The plaintiff-appellant, Citizens State Bank, seeks to set aside a conveyance of a building made to the defendant-appellee, Jennings State Bank, from the Jennings Agency, Inc. (Agency). Citizens State requested that the district court enter an order under § 36-609 disregarding the conveyance so as to permit its judgment lien to attach.

On August 24, 1988, the district court filed its order that held that Citizens State failed to show by convincing evidence that fraud against it existed in the transfer of $300,000 from Jennings State to the Agency on December 31, 1981, or that fraud existed in the delivery of the deed on March 11, 1986. The court entered judgment in favor of Jennings State. Citizens State appeals that judgment to this court.

Citizens State claims that the district court erred in failing to find that the conveyance made by the Agency to Jennings State was made with the intent to hinder, delay, or defraud Citizens State as a creditor of the Agency. Citizens State also claims that the district court erred in failing to find that the transferee, Jennings State, knew or should have known that the conveyance by the Agency to it was made with the intent to hinder, delay, or defraud Citizens State as a creditor of the Agency.

In 1975, Melvin Douglas Jennings inherited a controlling interest in Jennings State and the Agency. Jennings was the president and director of both of these entities. The Agency and Jennings State are located in the same building in Davenport, Nebraska. At the time Jennings inherited his interest, the Agency owned the building, and Jennings State paid the Agency $300-per-month rent for the space it occupied.

Jennings State and the Agency have historically shared numerous officers, directors, and shareholders, most of whom

are related by blood or marriage. At one time or another most of these people served as officers and/or directors of Jennings State and/or the Agency.

Within 2 or 3 years after acquiring his interest in Jennings State and the Agency, Jennings acquired a 50-percent interest in a business known as Broadcast Management, which held the license for a radio station in Durango, Colorado. At about the same time Jennings also acquired a 100-percent interest in a corporation known as Great Plains Broadcasting, which was the licensee of a radio station in Fairbury, Nebraska. Jennings was the president and director of both of these companies.

In 1977, Citizens State began a lending relationship with Jennings personally, the Agency, Broadcast Management, and Great Plains Broadcasting. The Agency executed approximately 20 promissory notes to Citizens State beginning in July 1977. At no time did Citizens State request security for the loans, either in the form of a mortgage on the bank building or in the form of Agency stock.

Lloyd E. Van Cleef, president of Citizens State, began the lending relationship with Jennings and his related business interests. Van Cleef was a longtime friend of Jennings'. Van Cleef was also personally indebted to Jennings State in the amount of $190,000 to $220,000 from 1976 through 1986, and was unable to service this debt in 1986. Van Cleef negotiated a settlement with Jennings of this debt for about $200,000, in February and March 1986.

In 1980, Jennings desired to make improvements to the bank building. Because the building was owned by the Agency, the Agency needed to get financing to make the improvements. Jennings wanted the Agency to borrow the money from Jennings State. By resolution of the board of directors of Jennings State, the Agency was extended a $200,000 line of credit. Because Jennings was the president and director of both entities, there was concern that this loan would be termed an "insider loan" under the rules of the Federal Deposit Insurance Corporation and the Nebraska banking laws. Because of this problem, the board of directors also resolved that if the loan violated state or federal law, the loan would immediately be called in by Jennings State and paid back by the Agency.

Jennings obtained a verbal commitment from his brother-in-law, Dan Fisher, president of the Crawford State Bank, for the improvement loan in the event the Jennings State loan was disapproved. However, Jennings State proceeded with the transaction before getting any approval from the FDIC or the Nebraska banking department.

Nearly 1 month later, Frank Landis, Jr., secretary of the board of directors of Jennings State and a cousin of Jennings', sought verbal and written approval from the Nebraska banking department. The department answered in writing that the loan was legal within the limits of Neb. Rev. Stat. § 8-149 (Reissue 1987). In 1981, during the regular course of examination of Jennings State by the FDIC, the FDIC discovered the loan and disapproved it. The FDIC directed Jennings State to call in the line of credit. The Agency loan was paid in full on August 26, 1981, by debit to the First National Bank of Fairbury in Fairbury, Nebraska, in the amount of $201,798.74. The Agency also acquired other building improvement funds through Fisher at Crawford State.

After the FDIC instructed Jennings State to call in the loan, the Agency and Jennings State decided to sell the bank building to Jennings State. Prior to this time, the ongoing lease arrangement between Jennings State and the Agency was reapproved by the board of directors of Jennings State. At an October 30, 1981, special shareholders' meeting, the shareholders unanimously approved the purchase of the building by Jennings State for the cost of the improvements plus a price for the original facility.

After approval by the board, Jennings asked Daniel L. Werner, an attorney, to prepare a contract for the sale of the building. Werner prepared the document, but the contract was never signed. Werner also stated that he never prepared a deed for the sale. It is Werner's testimony that Landis felt that there was no need for a formal written contract for the transaction, but Jennings wanted the sale formalized in writing. Ultimately, the contract was never signed, nor was a deed prepared. On December 3, 1981, Jennings State deposited $300,000, the agreed-upon sale price for the building plus improvements, to the Agency's account at Jennings State. At the time of transfer

of these funds, the Agency, Jennings personally, Great Plains Broadcasting, Broadcast Management, and Jim Heller, a Jennings State employee, all had outstanding notes at Citizens State. The money was used to pay off the loan at the Fairbury bank, a loan at Crawford State, and a small loan of approximately $5,500 at Citizens State.

In 1982, Fisher resigned his position and sold his interest at Crawford State. As part of the negotiations associated with Fisher's leaving Crawford State, Fisher was to personally assume loans previously made to Jennings and to the Agency. At the time, Jennings' loans totaled $127,000, and the Agency's loans $140,000. Fisher required Jennings and his wife to personally guarantee the Agency's notes. At that time the Agency had a note with Citizens State for $70,098, Great Plains Broadcasting owed Citizens State $71,000, and Broadcast Management owed $26,000. By January 1983, Jennings had personally guaranteed all these debts. Additionally, Alice Fisher, Jennings' sister, had loaned Jennings over $100,000 for a home improvement loan.

By early 1984, neither Jennings personally, the Agency, nor any of his other related business interests were able to service the notes at Citizens State or pay any amounts to the Fishers. In order to satisfy some of these debts, Jennings sold Great Plains Broadcasting. An assignment of the proceeds, prepared by Werner for the benefit of Citizens State, was drawn up between Van Cleef and Jennings for application of the proceeds of the sale to the outstanding debts at Citizens State of Jennings, the Agency, and his other related business interests. Citizens State received approximately $192,000, which was applied to service the debts of Great Plains Broadcasting and Broadcast Management but was insufficient to satisfy the Agency's debt and Jennings' personal debt. Van Cleef testified that he did not apply the proceeds to the Agency debt because he believed the Agency had assets enough to service its debt.

In 1985, Jennings and Fisher entered into negotiations for the sale of Jennings' stock in Jennings State to Fisher. The purpose of the sale was to satisfy Jennings' debt to the Fishers. The actual sale of the stock was never consummated because Fisher decided he did not want to go through with it. The

Fishers and Jennings made other arrangements for satisfaction of the debt. Jennings deeded Alice Fisher his interest in a section of land in Nuckolls County, Nebraska, to satisfy his personal debt to her, and he also pledged the stock of Broadcast Management and some stock of the Agency to Dan Fisher.

By October 1985, Jennings State was in serious financial trouble. To continue operating, the FDIC required Jennings State to inject $800,000 in capital. Because Jennings was not able to provide the necessary capital, he surrendered his stock to Jennings State, moved to Texas, and filed personal bankruptcy. Citizens State was a claimant in the bankruptcy action and, at the time of this litigation, had yet to receive any funds from the proceedings. Jennings State was recapitalized through efforts of Fisher and other investors.

At about the same time, Fisher approached Jennings and proposed that Fisher purchase the insurance portion of the Agency. The insurance business was located in the bank building. Jennings "sold" the insurance portion of the Agency to Fisher in satisfaction of the Agency's debt to Fisher. The board of directors, in a special meeting on December 28, 1985, authorized the sale of the insurance business. Additionally, Jennings transferred a post office building owned by the Agency to Fisher. It is unclear from Jennings' testimony whether this was in satisfaction of an Agency debt or a personal debt of Jennings'. There are no minutes authorizing this sale.

Following these transactions with the Fishers, the only remaining record asset of the Agency was the bank building. Jennings contends in his testimony that the Agency had no remaining assets because the building belonged to Jennings State. Jennings had no further contact with Jennings State after he surrendered his stock until Fisher contacted him in January 1986 regarding execution of a deed on behalf of the Agency for the alleged sale of the bank building in 1981.

After Jennings moved to Texas, Fisher acted as a consultant to Jennings State. He testified that he was trying to reorganize Jennings State and obtain the necessary capital required by the FDIC to keep the bank in operation. All the remaining shareholders assigned their stock back to Jennings State and then bought back their shares. Fisher assigned his interest in the

insurance portion of the Agency to Jennings State in exchange for stock. Fisher counted the value of the bank building as an asset of Jennings State for recapitalization purposes. Presumably, had the building not been included, the investors would have had to come up with $300,000 more in capital.

By the end of March 1986, Fisher had acquired all of the Agency's assets except the building, a controlling interest in and the offices of president and director of Jennings State by turning the insurance business in for stock, and a security interest in Jennings' Agency and Broadcast Management stock.

In January 1986, the Agency's note remained in default. Citizens State began to make other efforts to collect on the Agency's note. Van Cleef testified that Citizens State attached the Agency's checking account and had Citizens State's attorney, Don Sass, check the land records to determine the Agency's assets. The records indicated that the Agency was the owner of the bank building.

In February 1986, Van Cleef had a meeting with Fisher and Landis at the offices of Jennings State. Fisher informed Van Cleef at that time that he was now president of Jennings State. Van Cleef testified that he was unaware that Fisher had also acquired the majority of the Agency's assets. Fisher did not tell Van Cleef about the transfer of assets at this meeting. Van Cleef was also not aware of the alleged sale of the bank building in 1981.

The meeting was held to discuss the status of the Agency's debt with Citizens State and Van Cleef's debt with Jennings State. At the meeting Van Cleef told Fisher and Landis that he believed the Agency had assets to satisfy the debt. Fisher and Landis inquired as to what assets he was talking about, since they believed there were no assets left in the Agency. Van Cleef stated that he believed if he told them, they would try to remove the assets. Fisher and Landis told him they would not do that. When questioned about the bank building, Fisher requested that another bank employee, Dean Wight, look for the deed. Wight returned with some tax statements, but no deed. Van Cleef testified that both Fisher and Landis were surprised that no deed was found. Van Cleef also informed them at that time that he would instigate proceedings to attach the building in

satisfaction of the debt.

Van Cleef attended a second meeting with Fisher and Landis on March 6, 1986. The purpose of this meeting was further discussion of the debts of both parties. Werner was present as attorney for Jennings State, and Sass was present as attorney for Citizens State. Van Cleef informed Fisher and Landis that he had checked the records and that the Agency was the record owner of the building. Then Fisher told him about the alleged sale of the building and that the deed was missing. Van Cleef claims that there was never any discussion of trying to acquire a deed at that time. Van Cleef's debt with the Bank was settled during the meeting. That day Citizens State filed its petition asking for judgment on the Agency note. Van Cleef asserts that he became aware that Jennings State had secured and recorded a deed from Jennings when he read it in the newspaper.

Approximately 2 days before the March 6 meeting with Van Cleef, sometime after that meeting had been scheduled, Fisher contacted Werner and asked him to prepare a deed for the building, send it to Jennings for his signature, and cause it to be filed. Werner prepared a deed dated December 31, 1981. At the same time, he was representing Jennings State in the attachment proceedings by Citizens State. Jennings signed the deed on March 11, 1986. The deed was recorded in Thayer County on June 10. On July 15, judgment was entered in the district court for Thayer County in favor of Citizens State on the Agency's promissory note in default.

Testimony concerning who knew that no deed ever existed for the transfer of the building and at what time this was discovered is in conflict. Jennings testified in a confusing manner that he thought there had always been a deed, but he had never actually seen it. He could not explain why the deed was not recorded at the time of the transfer of the $300,000 purchase price to the Agency. He testified that the Agency reported the sale of the building on its 1981 tax return; that Jennings State had paid all taxes, insurance, and utilities on the building since 1981; and that Jennings State had paid no rent to the Agency since 1981.

Fisher testified that he first discovered that the building was still held in the Agency's name when he was organizing the

recapitalization of Jennings State in the fall of 1985. He testified that he discovered that the tax assessment statements for the building were still being sent to the Agency, but the taxes themselves were being paid by Jennings State. Fisher also testified that he began to search for the deed at that time. He stated that he contacted Jennings in Texas to inquire as to the whereabouts of the deed. He also instructed Jennings State's employees to "be on the look out" for the deed. However, he did not contact Werner until March 1986 to obtain a deed. This was after the first meeting with Van Cleef was held. He testified that his reason for the delay in obtaining and recording a deed for so long was that he was hoping "we would stumble across the deed."

Landis testified that he had no explanation as to why no deed was prepared for the sale in 1981. He testified that he always believed a deed had been recorded. Landis testified that he was first informed by Fisher in the fall of 1985 that no deed could be found and that Landis took no steps himself to locate the deed. He stated that the hunt for the deed was just one of many activities that were going on during the recapitalization of Jennings State, and therefore no one rushed to get a deed recorded at the time. He did not have an explanation as to why the sale contract was not signed.

In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider 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. *Federal Land Bank of Omaha v. Swanson*, 231 Neb. 868, 438 N.W.2d 765 (1989). See, *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988); *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

Under the Uniform Fraudulent Conveyance Act, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his or her actual intent if the conveyance is made or the obligation is incurred without a fair

consideration." § 36-604.

Section 36-603 defines fair consideration as:

> (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
>
> (b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

There is no disagreement among the parties that $300,000 was a fair price for the bank building plus the cost of the improvements. The consideration given for the building, whether viewed in the form of a valid sale in 1981 or as an antecedent debt later satisfied by the actual transfer of the building in 1986, was adequate. Therefore, Citizens State does not satisfy the requirements of §§ 36-603 and 36-604.

Under § 36-607, "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

In this case, the district court found that Citizens State failed to show by convincing evidence that Jennings State intended to defraud Citizens State in the delivery of the deed. We agree. The actual transfer of the money to the Agency and the facts that Jennings State stopped paying rent to the Agency and paid taxes and insurance on the building and that the Agency reported the sale of the building on its tax returns, all lend credence to Jennings State's claim that the late recording of the deed was merely the completion of an earlier transaction. The district court's judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS M. PLANT, APPELLANT.

461 N.W.2d 253

Filed October 5, 1990. No. 89-094.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate 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, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Search and Seizure: Search Warrants: Police Officers and Sheriffs.** A police officer who has not obtained either an arrest or a search warrant cannot make a nonconsensual and warrantless entry into a suspect's home in the absence of exigent circumstances.
3. **Criminal Law: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the suppression motion in order to preserve the question for appeal.
4. **Search and Seizure: Words and Phrases.** Exigent circumstances may be found to exist in an emergency situation.
5. **Search and Seizure: Search Warrants: Police Officers and Sheriffs: Words and Phrases.** The emergency doctrine allows police officers to enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance.
6. **Search and Seizure: Search Warrants: Proof.** In the absence of a warrant, the State has the burden to prove that a search was conducted under circumstances substantiating the reasonableness of the search or seizure.
7. **Motions to Suppress: Appeal and Error.** In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong.
8. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude relevant evidence which is otherwise admissible, and such ruling will be upheld on appeal absent an abuse of discretion.
9. **Trial: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
10. **Rules of Evidence: Hearsay.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not excluded by the hearsay rule. Neb. Rev. Stat. § 27-803(1) (Reissue 1989).
11. **Trial: Evidence: Hearsay.** To qualify as an excited utterance, a statement must meet the following criteria: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the event.

12. **Assault: Evidence: Hearsay: Time.** The time lapse between an assault and the statements is not dispositive; rather, the crucial consideration is whether there has been time for conscious reflection.
13. **Evidence: Hearsay.** The fact that there was some questioning preceding the out-of-court declarations does not per se destroy their character as excited utterances.
14. _____: _____. While it is not necessary to show that the declarant was visibly excited in order to qualify under the excited utterance exception, a declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event.
15. **Rules of Evidence: Trial: Evidence: Hearsay.** A hearsay statement not specifically covered by other statutory hearsay exceptions but having equivalent circumstantial guarantees of trustworthiness is admissible if the court determines that (1) the statement is offered as evidence of a material fact, (2) 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 (3) the general purposes of the evidence rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under exception of Neb. Rev. Stat. § 27-803(22) (Reissue 1989) unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.
16. **Rules of Evidence: Hearsay.** The residual hearsay exception is to be used rarely and only in exceptional circumstances.
17. **Trial: Evidence: Hearsay.** Particularized guarantees of trustworthiness must be shown from the totality of the circumstances, which circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. Hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.
18. **Rules of Evidence: Hearsay: Witnesses.** The second residual hearsay exception, set forth in Neb. Rev. Stat. § 27-804 (Reissue 1989), is identical to that in Neb. Rev. Stat. § 27-803(22) (Reissue 1989) except that unavailability of the declarant must be shown.
19. _____: _____: _____. Unavailability as a witness includes situations in which the declarant is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.
20. **Rules of Evidence: Hearsay: Minors.** Child victims of abuse may be unavailable for purposes of the residual hearsay exception due to the trauma resulting from the abuse.
21. **Constitutional Law.** Whether considering the right to confrontation under the U.S. Constitution's sixth amendment or article I, § 11, of the Nebraska Constitution, the analysis is the same.
22. **Constitutional Law: States.** The 6th amendment's confrontation clause is made applicable to the states through the 14th amendment.

23. **Constitutional Law: Criminal Law: Trial: Witnesses.** The primary interest secured by the confrontation clause is the right of cross-examination. The right to confront and cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.
24. **Constitutional Law.** The right to confrontation is not absolute.
25. **Constitutional Law: Trial: Evidence: Hearsay.** Two requirements must be met when a hearsay declarant is not available at trial. First, the confrontation clause *normally* requires a showing that the declarant is unavailable. Second, the statement is admissible only if it bears adequate indicia of reliability.
26. **Evidence: Hearsay.** Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.
27. **Constitutional Law: Trial: Expert Witnesses: Minors: Hearsay.** A psychologist's testimony that a child victim of abuse would be unable to testify and be psychologically harmed is sufficient to show unavailability for purposes of confrontation clause analysis.
28. **Constitutional Law: Rules of Evidence: Hearsay.** The excited utterance hearsay exception is a firmly rooted hearsay exception for which reliability may be inferred under the confrontation clause.
29. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
30. **Trial: Juries: Appeal and Error: Words and Phrases.** When there is some incorrect conduct by a trial court which, on review of the record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant, the error is harmless.
31. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted or admitted without objection, supports the finding by the trier of fact.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Thomas P. McKenney for appellant.

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

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

FAHRNBRUCH, J.

The defendant, Thomas M. Plant, appeals his Douglas County jury convictions for the second degree murder of his

18-month-old stepson and for the first degree assault and child abuse of his 4-year-old stepson. We affirm.

Plant received a life sentence for the second degree murder of 18-month-old Christopher Bartlett, his stepson; not less than 6²/₃ nor more than 20 years for first degree assault; and not less than 1 nor more than 3 years for child abuse. The assault and abuse sentences were concurrent with each other and consecutive to the murder sentence.

In his appeal, the defendant claims, in substance, that the trial court erred (1) in failing to suppress evidence obtained as a result of a warrantless entry into his home; (2) in receiving allegedly inadmissible hearsay evidence, i.e., out-of-court statements of Plant's 4-year-old stepson and of the defendant's own 4-year-old daughter relating to the death of the one stepson and the infliction of injuries to the second stepson; and (3) in failing to find that the admission of his daughter's and stepson's hearsay statements denied the defendant his constitutional right of confrontation.

In reviewing a criminal conviction, it is not the province of an appellate 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, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Bohan*, 233 Neb. 679, 447 N.W.2d 485 (1989); *State v. Wokoma*, 233 Neb. 351, 445 N.W.2d 608 (1989); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

Taking the view most favorable to the State, the record reflects the following operational facts. Around 7 p.m. on May 20, 1988, Sgt. William Muldoon of the Omaha Police Division was directed to Childrens Memorial Hospital in Omaha to await the arrival by rescue squad of Christopher Bartlett, a critically injured 18-month-old child, and to conduct an investigation into the child's injuries.

Upon arriving at Childrens Memorial Hospital, Muldoon was informed that the child's stepfather, the defendant Thomas Plant, had originally taken the child by automobile to Bergan Mercy Hospital and the child was then transferred to Childrens Memorial Hospital. Between 7 and 8 p.m. on May 20, Dr. Gary

S. Lerner examined Christopher Bartlett at Childrens Memorial Hospital. At that time, there was considerable swelling on the child's forehead, accompanied by some bruising. There was a massive amount of swelling inside Christopher's head which had occurred within 5 or 6 hours of the examination. In addition to the head injury, Dr. Lerner testified, Christopher had a number of bruises; an abrasion on his chin; a number of rib fractures; a small corner fracture of the distal femur, the largest bone in the leg; and a shattered pubic bone.

Muldoon was told by physicians at the hospital that Christopher had suffered a severe brain hemorrhage and was not expected to live. The doctors said that Christopher's injuries were inconsistent with the explanation given by his parents. Christopher's mother, Gloria Plant, was present at the hospital and informed Muldoon that Christopher had fallen off a sofa while reaching for potato chips and struck his head when he fell to the floor. It was later determined that the floor in question was carpeted.

A cruiser officer told Sergeant Muldoon that he had made contact with Thomas Plant at Bergan Mercy Hospital. Plant informed the officer that he was going to his home to check on the well-being of three other children who were at the Plants' residence, that he had to arrange for a babysitter for the children, and that he would then go to Childrens Memorial Hospital. The three children were 4-year-old Cindy Plant, 4-year-old James Bartlett, and 2-week-old April Plant. Thomas Plant's mother and sister, who were at the hospital, told Muldoon that the children were at the Plants' residence. Gloria Plant stated that the children were either at home or with Thomas Plant.

The defendant called Childrens Memorial Hospital and spoke with Sergeant Muldoon at approximately 7:30 p.m. The defendant informed Muldoon that he was on his way to the hospital and that he had taken the children to a babysitter in Carter Lake, Iowa. Plant's wife, mother, and sister told Muldoon that they were unaware of any babysitter in Carter Lake. Muldoon was also advised that the Plants' home did not have a telephone.

At about the same time as Muldoon spoke with Plant, Sgt. William Connelly of the Omaha Police Division and two other police officers were dispatched to the Plants' residence to locate the three children. The officers knocked on the front and back doors of the Plants' home and announced their presence, but received no response. Connelly testified at a suppression hearing that no one appeared to be home, the lights were out, and the blinds were drawn. This information was conveyed to Sergeant Muldoon and to police headquarters. Connelly observed a car matching the description of Plant's vehicle in a parking lot across the street from the Plants' residence. However, the car was driven away before Connelly could determine the identity of the driver. Connelly remained at the Plants' home for approximately 30 to 45 minutes after the vehicle left and waited for its return.

Plant again spoke by telephone with Sergeant Muldoon between 8 and 8:15 p.m. He informed Muldoon that his car had broken down at approximately 73rd and Cedar Streets in Omaha. Muldoon advised Plant that an officer would pick him up there. Approximately 5 minutes later, when a police cruiser arrived at 73rd and Cedar Streets, neither Plant nor his car could be located.

At that time, Sergeant Muldoon, concerned about the missing children, contacted his superiors and requested that someone be sent to the Plants' residence to check on the condition of the children.

Sergeant Muldoon received word from the intensive care unit at the hospital where Christopher was being cared for that Plant had been directly calling doctors there and requesting that his relatives speak with him on the telephone.

About 9:45 p.m., Sergeant Connelly was informed by Omaha Police Lieutenant Venditte that the location of the Plant children was still unknown, that conflicting accounts of their location had been given to Sergeant Muldoon, and that Connelly should proceed to the Plants' home to again determine if the children were there. Connelly also spoke with Officer Christopher Toledo of the youth services unit. Toledo told Connelly of a recent report alleging that James Bartlett had suffered continual abuse by Thomas Plant.

Sergeant Connelly and Officer Toledo proceeded to the Plants' house, arriving there at approximately 9:55 p.m. Officer Jepsen met them at the home. The officers again received no response after knocking and announcing their presence. A next-door neighbor told Connelly that she had not seen anyone since the afternoon, when the children and their parents left in a vehicle. Connelly noted a tear in a shade in one of the windows of the Plants' home that was not present during his first visit. The officer shined his flashlight through the window and saw no evidence that anyone was home. Upon receiving a request for further instructions, Lieutenant Venditte, considering the circumstances, authorized forced entry into the Plants' home. Connelly testified that his intent in entering the home was to find the children and check on their well-being. Connelly further testified that it was not his design to make any arrests or to conduct an evidentiary search. He did state, however, that if Plant was found, he would be arrested.

About 10:20 p.m., the officers made a forced entry through the front door of the Plants' home. In a bedroom, Connelly and Toledo discovered the three children asleep on a bed and a babysitter crouching between two beds. Approximately 10 seconds later, during a standard security sweep to ensure that no one else was present, Plant was discovered fully clothed, hiding in the bathroom shower. Plant was then placed under arrest. Police did not search the home or seize any physical evidence, but photographs of the premises were taken. Early Saturday morning on May 21, 1988, all three children were taken to the University of Nebraska Medical Center for physical examination. Dr. Lyle Woerth examined James and Cindy at the emergency room of the hospital in the early morning hours of May 21. There was no evidence in the record of injuries to Cindy or April Plant.

Dr. Woerth testified that his examination of James Bartlett during the early morning hours of May 21 revealed multiple areas of swelling about the head; large bumps on the top of the skull; evidence of hair's being yanked out; swelling and bruising along the right shoulder to the neck; a 3-centimeter cut behind the right ear; multiple areas of swelling and bruising on the chest and abdomen; numerous cuts and bruises on the back;

areas of excoriation around the base of the scrotum; a swollen and tender left lower leg; a fracture of the right middle finger; a fracture of the tibia, the biggest bone in the lower leg; a shattering of the distal phalanx, the bone farthest out in the great toe, on the left foot; a fracture of the clavicle, which is the bone leading from the breastbone to the shoulder; a fracture in two places in the jaw; and three rib fractures. Dr. Woerth testified that due to the length of time over which the injuries occurred and the nature and extent of the injuries, he concluded the injuries sustained by James Bartlett were intentionally inflicted.

During their examinations, James Bartlett and Cindy Plant made a number of statements to Dr. Woerth incriminating Thomas Plant. The two children were interviewed by Sergeant Muldoon on May 22, at which time the children made further statements reflecting that the defendant was responsible for the injuries to James and the fatal injury to Christopher Bartlett.

Christopher Bartlett died 4 days after being taken to the hospital. Dr. Blaine Roffman, a pathologist who performed an autopsy on Christopher, testified that the cause of Christopher's death was a traumatic head injury. In Dr. Roffman's opinion, Christopher's injuries were not consistent with a fall from a couch onto a carpeted floor but were consistent with Christopher's being thrown headfirst against a hard surface. There was evidence from which a jury could find beyond a reasonable doubt that Christopher's fatal injuries occurred when Christopher struck his head on the floor after being thrown across a room by the defendant.

In one information, Plant was charged with the second degree murder of Christopher, and in a second information, the defendant was charged with one count of first degree assault on James and one count of child abuse involving James. The cases were consolidated for trial. Following a trial, the jury found Plant guilty of all three charges.

ENTRY INTO THE HOME

In his first assignment of error, Plant impliedly recognizes that a police officer who has not obtained either an arrest or a search warrant cannot make a nonconsensual and warrantless

entry into a suspect's home in the absence of exigent circumstances. See *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981). Plant argues that exigent circumstances were lacking when Omaha police officers entered his home because they did not have a reasonable belief from a present factual basis that anyone was in the Plants' home. Plant argues that since his fourth amendment right against unreasonable searches was violated, Cindy Plant's and James Bartlett's statements made to Dr. Woerth and to Sergeant Muldoon and photographs of the home should have been suppressed as fruits of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Following a pretrial hearing, the trial court overruled Plant's motion to suppress the photographs taken in the Plants' residence and the children's statements. The defendant made no objection at trial to the admission of the photographs. Therefore, Plant may not raise as error in this appeal the admission of the photographs into evidence. In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the suppression motion in order to preserve the question for appeal. *State v. Sock*, 227 Neb. 646, 419 N.W.2d 525 (1988); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987). Thus, we concern ourselves with only the out-of-court statements of the children.

This court has recognized that exigent circumstances may be found to exist in an emergency situation. *State v. Resler, supra*. In the context of this case, the rationale for the emergency doctrine is to allow " 'police officers [to] enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance. . . .' " *Id.* at 254-55, 306 N.W.2d at 922 (quoting *Root v. Gauper*, 438 F.2d 361 (8th Cir. 1971)). The elements of the doctrine may be summarized as follows: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) the search must not be primarily motivated by intent to arrest and seize evidence; and

(3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. *State v. Resler, supra.* In the absence of a warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of the search or seizure. *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

Before forcing entry into the Plants' home, the entering police officers had information from which they could reasonably conclude that two 4-year-old children and a 2-week-old infant were unaccounted for and had been left unattended for several hours. The entering officers had attempted unsuccessfully to verify reports of Plant's wife, mother, and sister that the children were at the Plants' residence. The officers were also aware that the information Plant had given other officers as to his and the children's whereabouts and activities was misleading. One of the officers had observed an automobile matching that of the defendant in a lot across the street from the Plants' residence. It left the area without the driver's contacting the police or the residence. The entering officers were also familiar with a report to police that 4-year-old James Bartlett had suffered continual abuse by the defendant and that Christopher Bartlett was in critical condition because of his injuries.

All of this information was gathered by police from reliable sources and demonstrates that the officers entering the Plants' home had reasonable grounds to believe that an emergency was at hand and that there was an immediate need for police assistance for the protection of the three small unaccounted-for children. The information also demonstrates that there was a reasonable basis approximating probable cause for associating the emergency with the place to be searched, i.e., the Plants' home. Under the totality of the circumstances, had the police officers failed to enter the home to determine the well-being of the children, they may well have been derelict in their duty in light of all the knowledge they possessed at that time. The police officers who participated in the forced entry into the house testified that their motivation in entering the Plants' dwelling was to ensure the safety of the children, not to arrest Plant or

conduct an evidentiary search.

The trial court determined that the warrantless entry into the Plants' home was proper under the emergency doctrine. In determining the correctness of a ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Marcotte*, 233 Neb. 533, 446 N.W.2d 228 (1989).

The district court was not clearly wrong in finding that the warrantless, nonconsensual entry into the Plants' house by police officers did not violate Plant's fourth amendment constitutional right against unreasonable search and seizure. Therefore, the defendant was not entitled to have the statements of Cindy Plant and James Bartlett suppressed on the basis of an unreasonable search and seizure. Plant's first assignment of error is without merit.

CINDY PLANT'S STATEMENTS

SECOND DEGREE MURDER

Early Sunday evening on May 22, Cindy Plant was interviewed by Sergeant Muldoon. He spoke to the child in a foster home where she had been placed by authorities. The record discloses that Cindy's interview was tape-recorded. Over Plant's objection, the tape recording of Cindy's interview was received in evidence and played before the jury. The jury could find beyond a reasonable doubt from Muldoon's testimony of the interview and from the taped interview that Cindy observed her father throw Christopher at James. Cindy also said that Christopher suffered head injuries when the defendant threw him on the floor. Plant objected to Cindy's statements on the grounds of hearsay and violation of his right to confrontation.

Plant in this appeal claims that the trial court erroneously admitted into evidence the statements Cindy Plant made to Sergeant Muldoon. The State offered the statements under three statutory provisions: the excited utterance hearsay exception and the two residual hearsay exceptions.

It is within the trial court's discretion to admit or exclude relevant evidence which is otherwise admissible, and such ruling will be upheld on appeal absent an abuse of discretion. See, *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990);

McCune v. Neitzel, 235 Neb. 754, 457 N.W.2d 803 (1990). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989).

"A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. Neb. Rev. Stat. § 27-803(1) (Reissue 1989). The underlying theory of the exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987). To qualify as an excited utterance, a statement must meet the following criteria: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the event. *Id.* The crucial question in this case is whether Cindy Plant's statements were made while she was still under stress from the startling event.

Under the common-law res gestae exception upon which the excited utterance exception is based, courts traditionally imposed a contemporaneous requirement, meaning that the statement was made while the event was still in progress, and a spontaneity element, requiring that the statement was made while the declarant was still under the influence of the exciting event. *Id.* However, it has been recognized that special circumstances exist with regard to the statements of very small children, and their statements are admitted for the reason that it is unlikely a small child would fabricate stories of abuse. *Id.* As a result, numerous jurisdictions have relaxed the requirements that a statement be contemporaneous and spontaneous. *Id.* This court relaxed the contemporaneous requirement in *State v. Red Feather*, 205 Neb. 734, 289 N.W.2d 768 (1980). There, we held that the time lapse between the assault and the statements is not dispositive; rather, the crucial consideration is whether there has been time for conscious reflection. Because the stress of an assault is present for some time in children after the

assault has occurred, this court, in *In re Interest of R.A. and V.A., supra,* likewise loosened the spontaneity requirement. The key requirement is that the statement be made without time for conscious reflection. *Id.*

Plant argues that a child's statements made after questioning as to events which occurred 2 days previously do not qualify as excited utterances. Regarding the temporal element of Plant's argument, we reiterate our holding in *Red Feather, supra*, that the time lapse is not dispositive. Furthermore, this court, as well as other jurisdictions, has held that hearsay elicited under similar circumstances constitutes an excited utterance. See, *In re Interest of R.A. and V.A., supra* (statements made after returning from a weekend visit with a noncustodial parent during which a sexual assault occurred); *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983); *In re Marriage of Theis*, 121 Ill. App. 3d 1092, 460 N.E.2d 912 (1984) (utterance made 2 months after the incident); *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (1982) (hearsay declaration made 3 days after the final incident); *State v. Galvan*, 297 N.W.2d 344 (Iowa 1980) (2 days between time of offense and statement). See, also, *People in Interest of O.E.P.*, 654 P.2d 312, 318 (Colo. 1982) (asserting that "[t]he element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in the 'lack of capacity to fabricate rather than the lack of time to fabricate' ").

The fact that Muldoon's questioning preceded Cindy Plant's declarations does not per se destroy their character as excited utterances. See, e.g., *Roy, supra*; *Red Feather, supra*; *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied* 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981); *People in Interest of O.E.P., supra*; *People v. Woodward*, 21 Mich. App. 549, 175 N.W.2d 842 (1970).

While it is not necessary to show that the declarant was visibly excited in order to qualify under the excited utterance exception, see *In re Interest of R.A. and V.A., supra*, a declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event. Muldoon testified that at the time he interviewed Cindy Plant, she was extremely shy and apprehensive. Cindy

Plant sucked on a finger, clung to her foster mother, and buried her head into her foster mother. The child was not very verbal, and Muldoon spoke to her for 20 minutes before she would respond. Having observed the brutal nature of the incident, a young child would remain in a stressed condition for some period of time. Cindy Plant's age and her condition at the time of the interview further demonstrate Muldoon's need to ask leading questions. Furthermore, a child of 4 years is hardly adept at the type of conscious reflection necessary to fabricate a story of infanticide. See *People in Interest of O.E.P., supra* (a child of 3 years lacks the reasoned reflection to concoct a story of sexual abuse implicating the child's mother). The principles in regard to admission into evidence of excited utterances by small children related in *State v. Roy, supra*, are equally applicable here. Based on the foregoing case law and the circumstances of this case, it cannot be said that the trial court's determination that Cindy Plant's statements in the taped interview constituted excited utterances was clearly untenable, unfairly depriving the defendant of a substantial right and denying just results in matters submitted for disposition.

The residual hearsay exceptions are delineated in § 27-803(22) and Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1989). Section 27-803(22) provides that the following is not excluded by the hearsay rule:

> A statement not specifically covered by any of the foregoing exceptions 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 best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and

address of the declarant.

Clearly, the evidence was offered as evidence of a material fact, i.e., how Christopher was fatally injured. Besides the defendant, the only other alleged witnesses to the murder were the defendant's mother, his wife, and Cindy Plant. There was evidence from which the trial court could find that because of her age and lack of interest, Cindy Plant's statements were more probative on how Christopher received his fatal injuries than the testimony of Gloria Plant or the defendant's mother or than any other evidence the State could procure through reasonable efforts. Thus, the child's statements to Muldoon constitute "statement[s] [which are] more probative on the point for which [they are] offered than any other evidence." The notice requirement of the statute was complied with in this case. Defense counsel acknowledged that he was aware that Sergeant Muldoon would testify regarding the out-of-court statements made to him. Plant focuses solely on the element of trustworthiness, arguing the statements made to Sergeant Muldoon on May 22 were not trustworthy.

It is important to keep in mind that the residual hearsay exception is to be used rarely and only in exceptional circumstances. *U.S. v. Shaw*, 824 F.2d 601 (8th Cir. 1987), *cert. denied* 484 U.S. 1068, 108 S. Ct. 1033, 98 L. Ed. 2d 997 (1988). In *Idaho v. Wright*, ____ U.S. ____, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), the U.S. Supreme Court assessed the factors necessary to demonstrate "equivalent circumstantial guarantees of trustworthiness" under the residual hearsay exception when a criminal case is involved. " '[P]articularized guarantees of trustworthiness' must be shown from the totality of the circumstances [which] include only those that surround the making of the statement and that render the declarant particularly worthy of belief." 110 S. Ct. at 3148. In other words, "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." 110 S. Ct. at 3150. By way of illustration, the Court outlined some of the factors that may properly relate to whether hearsay statements are reliable: spontaneity of the statement, consistent repetition, mental state of the declarant, use of terminology

unexpected of a child of a similar age, and lack of motive to fabricate.

The spontaneity factor is present in this case, as Cindy Plant volunteered a number of statements without prompting from Muldoon. The child was nervous and excited, which demonstrates that she was still under the stress of the event, ensuring reliability of her statements. Given Cindy's tender age, it is unlikely that her statements recounting such horrendous events are unreliable. There is not a scintilla of evidence from which it could be concluded that Cindy had any motive to provide false information. Moreover, her statements incriminated her natural father as opposed to her stepmother. Cindy's statements were made to a police officer, an authority figure commanding truthfulness. Related to this, the interview was conducted by one professionally trained in eliciting the truth from an interviewee. Cindy's statements over the course of her interview with Muldoon were substantially consistent. In view of all the facts that support the finding of the trial court that Cindy's statements were trustworthy, Plant's argument that the leading nature of some of Muldoon's questions detracts from the trustworthiness of the statements is not persuasive. See *Wright, supra* (use of leading questions with children, when appropriate, does not necessarily render responses untrustworthy). The trial court did not abuse its discretion in admitting Cindy Plant's statements under the residual hearsay exception prescribed in § 27-803(22).

The second residual hearsay exception, set forth in § 27-804, is identical to that in § 27-803(22) except that unavailability of the declarant must be shown. Section 27-804(1) provides in relevant part: "Unavailability as a witness includes situations in which the declarant . . . [i]s unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity . . . ."

To support the State's contention that Cindy Plant was unavailable to testify, a letter from the child's psychologist that Cindy was unable to testify was received into evidence without objection. In the letter, Cindy's psychologist, who had been treating the child on an outpatient basis for several months, concluded:

> I believe that Cindy's appearance in court would be most traumatic for her and would precipitate a combination of emotional and behavioral problems, most notably extreme withdrawal and regression. If Cindy were required to testify, I expect that she would immediately become withdrawn by putting her head down, placing her hands over her face, and saying absolutely nothing.

Other courts have concluded that child victims of abuse may be unavailable for purposes of this residual hearsay exception due to the trauma resulting from the abuse. See *State v. J.C.E.*, 235 Mont. 264, 767 P.2d 309 (1988); *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987). In view of this evidence that Cindy Plant would be traumatized and unable to testify, the trial court did not abuse its discretion in determining that the declarant was unavailable to testify. See *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984) (stating that it is within the sound discretion of the trial court to determine whether the unavailability of a witness has been shown).

We conclude that the trial court did not abuse its discretion in admitting Cindy Plant's statements into evidence under any or all of the three theories proposed by the State. Having resolved this issue, we turn to Plant's assertion that admission of Cindy Plant's tape-recorded statements denied him his constitutional right to confrontation.

Plant does not state whether he bases his right to confrontation on the U.S. Constitution's sixth amendment or on article I, § 11, of the Nebraska Constitution. It is of no import, since the analysis is the same under either provision. See *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983) (addressing the defendant's federal and state confrontation clause claims under a single analysis).

The sixth amendment's confrontation clause, which is made applicable to the states through the 14th amendment, see *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The primary interest secured by the confrontation clause is the right of cross-examination. *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

"The right to confront and cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986).

If the confrontation clause were interpreted literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. *Roberts, supra*. The right to confrontation is not absolute.

> This is so because the question of admissibility of hearsay evidence against a criminal defendant who has no opportunity for confrontation involves two very important but competing interests: the protection of the defendant's fundamental right to confront the witnesses against him, and the pursuit of the public's interest in the disclosure of reliable information that can lead to effective law enforcement.

U.S. v. Chapman, 866 F.2d 1326, 1330 (11th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 321, 107 L. Ed. 2d 312 (citing *Roberts, supra*, and *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). In balancing these competing interests, the Supreme Court has required that two requirements must be met when a hearsay declarant is not available at trial. First, "the Confrontation Clause *normally* requires a showing that [the declarant] is unavailable." (Emphasis supplied.) *Roberts, supra* at 448 U.S. at 66. The uncontroverted evidence overwhelmingly demonstrates that Cindy Plant was unavailable to testify. Therefore, in this case, it is irrelevant whether the confrontation clause permits a hearsay statement to be introduced into evidence without a showing that the declarant is unavailable. Second, the "statement is admissible only if it bears adequate 'indicia of reliability.' " *Id.* The *Roberts* Court explained that reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (holding that in a case involving the coconspirator hearsay exception, indicia of reliability need not be shown since the coconspirator exception is a firmly rooted hearsay exception). The principles announced in *Roberts, supra*, were reaffirmed in *Idaho v.*

Wright, ____ U.S. ____, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

The U.S. Court of Appeals for the Seventh Circuit held that a psychologist's testimony that a child victim of abuse would be unable to testify and be psychologically harmed is sufficient to show unavailability for purposes of confrontation clause analysis. See *Nelson v. Farrey*, 874 F.2d 1222 (7th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 835, 107 L. Ed. 2d 831 (1990). See, also, *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987) (upholding a trial judge who based his finding of unavailability on expert testimony indicating that a child abuse victim would be uncommunicative if asked about the assault and could be further traumatized by courtroom proceedings).

As the preceding discussion concerning § 27-804(2)(e) demonstrates, the trial court correctly determined that Cindy Plant was unavailable.

The trial court did not abuse its discretion in admitting into evidence Cindy Plant's excited utterances because they bore adequate indicia of reliability. See *State v. Roy, supra*. A number of courts have held that the excited utterance exception is a firmly rooted hearsay exception for which reliability may be inferred. See, e.g., *Stidum v. Trickey*, 881 F.2d 582 (8th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 1151, 107 L. Ed. 2d 1055 (1990); *Martinez v. Sullivan*, 881 F.2d 921 (10th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 740, 107 L. Ed. 2d 758 (1990).

Likewise, the district court did not abuse its discretion in admitting into evidence Cindy Plant's statements because they bore adequate indicia of reliability under either residual hearsay exception. See *State v. Roy, supra*. As has been stated, the child's statements satisfied the circumstantial guarantees of trustworthiness required by each of the residual hearsay exceptions. In this case, that conclusion is dispositive of the indicia of reliability prong. See, *Wright, supra*; *United States v. Dorian*, 803 F.2d 1439 (8th Cir. 1986). Indeed, in analyzing the admissibility of Cindy Plant's statements under the residual hearsay exceptions, we have equated the trustworthiness requirement under the residual hearsay exceptions with the reliability element of the confrontation clause.

It is unclear from the record whether Plant's hearsay and lack of confrontation objection related to Cindy's statements to Dr. Woerth concerning both James and Christopher or only to her statements concerning James. For purposes of this opinion, we shall assume the objection was to Cindy's statements concerning both James and Christopher.

Dr. Woerth testified that at the time Cindy made her statements to him at the medical center, she appeared "very excited and anxious" and very nervous and that her increased heart rate was consistent with her nervousness and excitement. Among other things, Cindy told the doctor that "James had pulled Christopher's hair," after which Plant started hitting and kicking both boys; that "Daddy choked Christopher"; and that "Christopher didn't wake up."

Cindy's out-of-court statements to Dr. Woerth constituted excited utterances. As the excited utterance exception is a firmly rooted hearsay exception, see, *Stidum, supra*; *Martinez, supra*, reliability may be inferred. See *Idaho v. Wright, supra*. Thus, her statements were admissible in evidence over Plant's hearsay and lack of confrontation objection. We recognize that the statements that Cindy made to Dr. Woerth were not as lengthy or as inclusive as those made in her taped interview and in some respects varied somewhat from those made to Muldoon. However, by admitting Cindy's statements into evidence, the trial court impliedly held that any differences in the statements did not affect their trustworthiness, and that they could be considered by the jury in determining the weight and credibility to be given to the statements.

It cannot be said that the trial court abused its discretion in admitting into evidence any of Cindy's out-of-court statements relating to the charge of second degree murder against her father.

FIRST DEGREE ASSAULT AND CHILD ABUSE

In her tape-recorded interview with Muldoon, Cindy said, "My daddy stepped on James' foot" and "My daddy hit James . . . with his fist." She also said that her father hit James in the stomach with his fist and had hit the boy in the face. When asked if her father hit James' leg, Cindy responded, "Yeah, he

broke his—James broke—my daddy hit James' leg and James falled on the porch." Cindy also said that "my daddy kicked him [James] with his feet when—'cause James won't walk to my daddy." She also said that because James would not walk, he was beaten "hard on his foot." As previously stated, Plant objected to this evidence on hearsay and lack of confrontation grounds.

Because we conclude that the trial court did not abuse its discretion in determining that Cindy's statements regarding James' injuries satisfied the requirements of either residual hearsay exception, we need not decide whether the trial court abused its discretion in finding the statements also qualified as excited utterances.

As previously discussed, the trial court did not abuse its discretion in finding that Cindy Plant was unavailable to testify. Therefore, either residual hearsay exception is applicable here. The only argument raised by Plant in this regard is whether Cindy Plant's statements about the assault and abuse perpetrated on James satisfy the trustworthiness element of the residual hearsay exceptions. Again, as our prior discussion illustrates, the requirement of trustworthiness, as well as the remaining elements of the residual hearsay exceptions, has been satisfied here.

As we stated in our prior discussion in regard to the murder charge against Plant, the trial court's finding under the residual hearsay exceptions that Cindy Plant was unavailable as a witness and that her statements were trustworthy disposed of the confrontation clause argument. The same is true with respect to her statements regarding Plant's abuse of James Bartlett. Moreover, as will be set out later, in most respects, Cindy's out-of-court statements in regard to how James received his injuries, including those to Dr. Woerth, were generally cumulative to evidence given by other witnesses. Thus, the admission into evidence of Cindy's out-of-court statements regarding James' injuries did not result in any prejudice to Plant. The trial court did not abuse its discretion in admitting these statements of Cindy Plant's under either residual hearsay exception, nor did it abuse its discretion in determining that their admission did not violate Plant's right to confrontation.

JAMES BARTLETT'S STATEMENTS

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. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). When there is some incorrect conduct by a trial court which, on review of the record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant, the error is harmless. *Id.* "Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact." *Id.* at 504, 437 N.W.2d at 140. See, also, *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988).

Plant claims that the trial court erred when it permitted Sergeant Muldoon to testify, over an objection on the grounds of hearsay and lack of confrontation, that the injured 4-year-old James Bartlett told him that the defendant hit Christopher and that "Daddy hates me" and "Daddy hits me."

We first address James' statement that the defendant hit Christopher. The statement does not establish a nexus between the striking of Christopher and the infliction of the fatal injury. However, in light of Cindy's and Gloria Plant's testimony that the defendant hit Christopher, the evidence is cumulative, and any error in admitting the statement was harmless beyond a reasonable doubt.

Next to be considered is whether the admission of James' statements to Sergeant Muldoon that the defendant hated him and had hit the boy constituted error. Dr. Woerth testified that during his medical examination of James Bartlett on May 21, the child made no response when asked if his mother was responsible for his injuries. Without objection, Dr. Woerth also testified that when he asked James if his father caused the injuries, James nodded his head affirmatively.

Gloria Plant testified that the defendant broke James' toe with a hammer; that he beat James with his fists, a boot, and a two-by-four; that she observed the defendant kick James in the

jaw; and that Plant's mother said that if Plant did not stop abusing the children, she would do something about it.

Plant told a neighbor that he kicked James Bartlett off the porch. The defendant told his cellmate, while both were in the Omaha jail, that he, Plant, had broken James' leg when he was "correcting" the child. Gloria Plant testified that James' leg was hurt when the defendant twisted it. The Plants' babysitter testified she had observed the defendant kick James with such force that the child was airborne. An employee of a neighborhood restaurant observed Plant slam the front seat of a two-door car into James as the child was entering the back seat. The defendant testified that he had kicked James with sufficient force to knock the boy forward on his face, that he had on occasion beaten James, and that he was not particularly fond of the boy because the child "would go . . . to the bathroom right in his pants right in front of you just for the fun of it."

Thus, there was other properly admitted overwhelming evidence upon which the jury could find beyond a reasonable doubt that Thomas Plant was guilty of child abuse and first degree assault of James Bartlett. As a review of the evidence recited above demonstrates, each purported hearsay statement was independently proven by properly admitted evidence. Because any alleged error was harmless beyond a reasonable doubt, Plant's assignment of error that admission into evidence of either Cindy's or James' statements to Muldoon was erroneous is without merit.

The defendant's convictions are affirmed.

AFFIRMED.

SHANAHAN, J., concurring in the result.

The "excited utterance" exception to the rule against admission of hearsay is found in the Nebraska Evidence Rules, namely, Neb. Evid. R. 803:

> Subject to the provisions of [Neb. Evid. R. 403], the following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition . . . .

Yet, this court tilts with temporal windmills en route to the boundary between an "excited utterance" and hearsay. The majority concludes that 2 days between the witnessed assault, as an "exciting" occurrence, and Cindy Plant's statements do not disqualify her statements as excited utterances and shores up its conclusion with random references to decisions involving various time intervals, for example, 2 days or 2 months, which did not render some statements inadmissible as hearsay. For all the cases mentioned to support the majority's position that particular time intervals did not adversely affect admissibility, there are just as many decisions rejecting admissibility based on those same intervals. See J. Myers, Child Witness Law and Practice § 5.33 (1987 and Cum. Supp. 1990). Absent from the majority's opinion is any analysis of why different time intervals permit or prevent admissibility of a statement under stress of excitement as an exception to the rule against hearsay. If "time is fleeting," the value of a decision determining admissibility under Neb. Evid. R. 803(1) on the basis of time is equally ephemeral.

Although the majority believes that the "crucial question in this case is whether Cindy Plant's statements were made while she was still under stress from the startling event," the issue is whether Cindy's stress, resulting from the excitement of her witnessing the brutal assault on her stepbrother, caused her statements to Sergeant Muldoon. A corresponding question is whether Sergeant Muldoon utilized impermissible persuasion and suggestion or coaxing to effect Cindy's statements. See, *Com. v. McEachin*, 371 Pa. Super. 188, 537 A.2d 883 (1988) (the statement, as an excited utterance, must clearly be the product of stress caused by a traumatic experience); *People v Straight*, 430 Mich. 418, 424 N.W.2d 257 (1988) (the statement, as an exception to the hearsay rule, must be caused by the stress of excitement from an event or condition rather than the result of a combination of physical stress and repeated questioning).

Some 2 days after the child victim was assaulted and that assault had been extensively investigated by police, Sergeant Muldoon, who, according to the majority's characterization, is "professionally trained in eliciting the truth" from young children, contacted 4-year-old Cindy Plant for an investigative

interview concerning the assault. *Elicit* means "to draw or bring out." Webster's Third New International Dictionary, Unabridged 736 (1981). Muldoon commenced the interview around 7:30 p.m., but did not start his tape recorder for the interview until at least "[t]wenty minutes, a good 20 minutes" after the interview was underway. What communication occurred between Cindy Plant and Sergeant Muldoon during the 20-minute interval before activation of the tape recorder is undisclosed and, consequently, is relegated to the realm of complete conjecture or absolute speculation. What is contained in the recorded 34-minute interview is a series of Muldoon's leading questions with Cindy Plant's responses to those questions.

It is not Muldoon's leading questions by themselves that cast suspicion on the reliability of Cindy Plant's responses during the recorded interview, for, as observed by Professor Myers: "[C]ourts are in agreement that questioning itself need not destroy the spontaneity required by the exception. When questioning is leading, however, or when the adult drags the statement out of the child, the requirement of spontaneity may be missing." J. Myers, *supra*, § 5.33 at 342-43. Also, as Professor Myers notes, very young children are susceptible to suggestion from authority figures, such as police officers. See J. Myers, *supra*, § 4.6.

Since the record fails to identify the content of the communication between Cindy Plant and Muldoon during the 20-minute period preceding the tape-recorded interview, we are left with several unanswered questions on account of the unrecorded interview and the silent record, namely: Did Sergeant Muldoon provide Cindy with the facts or other crucial information about the assault? Did he direct that Cindy repeat his statements for recording? Was the recording nothing more than the officer speaking through the child? Was prospective and imminent disapproval from an authority figure brought to bear on Cindy? Or did Muldoon merely get acquainted with Cindy to establish a comfortable atmosphere for the interview?

The State should have been required to present a foundation that Cindy's trauma from observation of the assault caused or produced the account of the incident related by Cindy Plant to

Sergeant Muldoon. That foundational information would have allowed the trial court to determine whether Cindy's statements were produced by the stress of excitement caused by her observation of the assault, a prerequisite for admissibility of Cindy's statements as an exception to the hearsay rule. See Neb. Evid. R. 104(1) (preliminary questions of admissibility of evidence). As the case now stands, there is a valid question whether Cindy Plant's statements were the product of excitement caused by her observing the assault or whether her statements were produced by investigative information and leading questions from Muldoon. Absence of a factual basis concerning causality undermines the trial court's evidential reception of Cindy's statements and precludes a realistic review of that ruling on admissibility of evidence.

Consequently, although the majority suggests that the requirements for admissibility of a child's statement as an excited utterance have been relaxed, the requirements of the excited utterance exception have been so "relaxed" that the requirements no longer stand up and have actually collapsed.

Also, the State should have been required to present evidence negating impermissible influence by Muldoon regarding Cindy's statements. Without such evidence, the trial court was not in a position to determine whether there were equivalent circumstantial guarantees of trustworthiness required for admissibility under Neb. Evid. R. 803(22). See Neb. Evid. R. 104(1). Without that determination, Cindy's statements did not qualify for admission under the residual exception.

Since Cindy's statements failed to qualify under any exception to the hearsay rule, the trial court erred in admitting Cindy's statements.

This brings us to still another point, the majority's expression "It is within the trial court's discretion to admit or exclude evidence . . . and such ruling will be upheld on appeal absent an abuse of discretion." In essence, the foregoing rule allows a court the choice whether to comply with the Nebraska Evidence Rules in ruling on an evidential question at trial. A trial court must adhere to any of the Nebraska Evidence Rules in which discretion has no role; adherence is not optional. Hence, a court may not discretionarily admit evidence which is hearsay or

otherwise inadmissible under the Nebraska Evidence Rules.

Nevertheless, in view of all the other evidence which was properly admitted in Plant's trial, the erroneous admission of Cindy Plant's statements is harmless beyond a reasonable doubt. See *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988): "Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." See, also, *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989): "Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact." For that reason, and notwithstanding the majority's misperception regarding Neb. Evid. R. 803(1), Plant's conviction must be affirmed.

GRANT, J., concurring.

I agree with the court's decision affirming defendant's convictions. I cannot agree with the court's holding that the statements of 4-year-old Cindy Plant made to Officer Muldoon 2 days after the injuries inflicted by defendant on Christopher Bartlett, and concerning defendant's conduct at the time of those injuries, were "excited utterances" and therefore admissible in evidence. I concur because I believe the statements were admissible under Nebraska's residual hearsay exceptions in Neb. Rev. Stat. §§ 27-803(22) and 27-804(2)(e) (Reissue 1989) for the reasons set out in the majority opinion. I believe, however, that for this court to hold that the child's statements were "excited utterances" extends that doctrine to extraordinary and improper lengths.

The facts surrounding the child's statements to the officer show conclusively, to me, that the child's taped statements were not spontaneous and, therefore, not excited utterances. The child's statements followed a 20-minute preliminary conversation between the officer and the child. The contents of that conversation are not before us, and we do not know what was said by either the child or the officer. It is undisputed that

the conversation took place 2 days after the incident in question.

I agree that the time interval is not controlling, see *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), but the interval should be considered. I also agree with the majority's statement that "[t]he key requirement [to a determination of spontaneity] is that the statement be made without time for conscious reflection."

What I cannot agree with is the majority's conclusion that the facts in this case permit the reception of the child's taped statements as excited utterances. In this regard, the majority opinion states: "Cindy's statements were made to a police officer, an authority figure commanding truthfulness. Related to this, the interview was conducted by one professionally trained in eliciting the truth from an interviewee." In the circumstances in this case, I cannot see how statements *elicited* (and I do believe that is the appropriate word) from a 4-year-old child by a trained interviewer 2 days after an event could be spontaneous. I think we here stretch the excited utterance rule to the point where all utterances by a child may be admissible. I think that is wrong.

Nonetheless, I concur because, as stated above, I believe there were appropriate other grounds for the admission of the child's statements to the officer. Overwhelming other evidence pointed to the defendant's guilt, including spontaneous statements of the same child to the physician who treated her.

HASTINGS, C.J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. GREG ALLEN SULLIVAN, APPELLANT.

461 N.W.2d 84

Filed October 5, 1990. No. 89-1213.

1. **Pretrial Procedure: Appeal and Error.** The denial of a motion in limine is not an appealable order and does not, in and of itself, constitute reversible error.
2. **Trial: Evidence: Hearsay.** To qualify as an excited utterance, the statement must have been made spontaneously.

3. _____: _____: _____. Spontaneity is a key requirement for the excited utterance exception and is demonstrated by a showing that the statement was made without time for conscious reflection.
4. **Trial: Evidence: Convictions: Appeal and Error.** Improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other evidence to support the conviction.
5. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by statute will not be disturbed on appeal absent an abuse of discretion.

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

Richard L. Kuhlman for appellant.

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

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

BOSLAUGH, J.

After trial to a jury the defendant, Greg Allen Sullivan, was convicted of robbery and sentenced to 10 to 15 years' imprisonment with 40 days' credit for time served. He has appealed and has assigned the following errors: (1) The trial court erred in overruling his motion in limine, (2) the trial court erred in admitting the hearsay testimony of Steve Wickman, and (3) the trial court abused its discretion by imposing an excessive sentence upon him.

The record shows that on December 23, 1988, at approximately 7 p.m. a man entered Pete's Place located north of Fremont, Nebraska. He was wearing dark-green coveralls, a blue ski mask, and brown cloth gloves. The man told Pamela Shinaut Redding, who was working at that time, to give him all of the money. Redding refused, and the man came around the counter and opened the cash register. When Redding slammed the cash drawer on the man's hand, he hit her with a plastic gun. When he opened the drawer again, Redding again slammed the drawer on his hand. The man then pushed Redding back and asked her if she wanted to die. He removed $180 in 20-dollar bills from the cash register and left the store.

After following the man into the parking lot, Redding ran back into the store and dialed 911. She reported the incident,

what the robber was wearing, his physical characteristics, and that she thought his license plate was 5B9534. She first described the car as a blue Chrysler, but later said that it was a dark-blue Ford Fairmont that was very dirty.

Officer Terry Duffy, after hearing a radio report of the robbery, waited north of Fremont for the suspect's vehicle to pass by. After he had started back to Fremont, he met Wickman, who flashed his headlights and indicated that he wanted Officer Duffy to stop. Wickman said that he had just been at Pete's Place and saw the robber's car leaving as he pulled into the parking lot. After Wickman learned of the robbery, he tried to follow the robber's car but lost it in traffic. Officer Duffy told Wickman that the police were looking for a Ford Fairmont, but Wickman told Duffy that the suspect's car was not a Fairmont but was another Ford product. The officer suggested the car might be a Thunderbird, and Wickman said that was what he was trying to think of and that it was an early 1980's model. Officer Duffy then radioed in this information.

Officer Duffy testified to these facts at trial. Prior to Officer Duffy's testimony before the jury, the defendant moved in limine to exclude the testimony relating to Wickman's remarks on the ground it was hearsay. The motion was overruled, and Duffy was allowed to testify on the basis of the excited utterance exception to the hearsay rule.

At about 7:16 p.m. on the night of the robbery, Officer Terry Mohler stopped the defendant west of Fremont because the defendant was driving a car that matched the description of the car used in the robbery, his dark-blue 1980 Ford Thunderbird.

Subsequent to the robbery, Redding identified the defendant's car as similar to the one that the robber drove, and she identified the defendant's voice as the robber's from two separate tape-recorded voice exemplars.

The clothes worn by the robber were found in a ditch north and west of Fremont, in the vicinity of the place where Officer Mohler had stopped the defendant. Redding identified the clothing as that worn by the robber. After initially denying that he recognized the clothing, the defendant admitted later that the clothing belonged to him.

The clothes, along with hair, blood, and saliva samples taken

from the defendant, were sent to the State Patrol Criminalistics Laboratory. The serologist who performed tests on these items testified that a hair found on the ski mask was from a human Caucasian head and was quite distinctive and that the defendant's samples had the same features. She also testified that saliva or mucus found on the glove was from a nonsecretor, which nonsecretors constitute 25 percent of the population, and that the defendant's sample showed that he is a nonsecretor.

The defendant's first assignment of error is without merit. The denial of a motion in limine is not an appealable order and does not, in and of itself, constitute reversible error. *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983).

The defendant did, however, object to the testimony of Officer Duffy prior to Officer Duffy's testimony before the jury. The issue is whether it was error for the trial court to admit the testimony of Officer Duffy concerning what Wickman had said regarding the car driven by the robber.

The defendant argues that Wickman's statements to Officer Duffy should not have been admitted because Wickman was not the person who was robbed, the description of a Thunderbird resulted from "cross-examination" by a police officer, and Wickman was not cooperative because he failed to obey a subpoena and testify at trial.

In concluding that Wickman's statements to Duffy were admissible under the excited utterance exception to the hearsay rule, Neb. Rev. Stat. § 27-803(1) (Reissue 1989), the trial court stated:

> This condition that must exist to determine if it's an excited utterance is set forth in State versus Lee, which is 216 Nebraska, Page 63. The first condition is there must have been a startling event. I find that there was a startling event; ie, [sic] the robbery, and Mr. what's-his-name, Wickman, coming upon the scene.
>
> Two, the State [sic] must relate to that event, the statement of Mr. Wickman to the officer in regards to the description of the car, and those facts certainly do relate to the events. And three, the State [sic] must have [been] made, while the declarent [sic] was under the distress of an exciting event. This statement was made approximately

> five minutes after the startling event, and the testimony of the officer indicates to the court that the defendant — that the declarent [sic] was still under the stress of the exciting event.

In addition to the elements stated by the trial court, in our analysis of the excited utterance exception in *In re Interest of R.A. and V.A.*, 225 Neb. 157, 162-63, 403 N.W.2d 357, 362-63 (1987), we stated:

> The excited utterance exception is based on the common-law res gestae exception. . . . The underlying theory of the exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." . . . Spontaneity is the key factor in determining whether a statement falls within the exception. . . .
>
> . . . .
>
> The contemporaneous requirement, in the res gestae context, traditionally meant the statement was made while the exciting event was still in progress. The spontaneity requirement meant the statement was made while the declarant was still under the influence of the exciting event and the statement was an unreflected statement concerning the event.

(Citations omitted.)

Spontaneity remains a key requirement for the excited utterance exception and is demonstrated by a "showing the statements were made without time for conscious reflection." *Id.* at 166, 403 N.W.2d at 364.

In this case, the spontaneity of Wickman's statement to Officer Duffy regarding the model of the robber's car is questionable. Officer Duffy's testimony shows that Wickman said that the robber drove a Thunderbird only after Officer Duffy had suggested that model. This shows that Wickman made the statement after time for conscious reflection. We believe the trial court erred in finding that Wickman's statements to Officer Duffy were admissible under the excited utterance exception.

However, even though the trial court erred in admitting

Officer Duffy's testimony regarding Wickman's statements, "improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other . . . evidence to support the conviction." *State v. Rowland*, 234 Neb. 846, 853, 452 N.W.2d 758, 763 (1990).

In *State v. Lee*, 216 Neb. 63, 341 N.W.2d 600 (1983), quoting *State v. Russ*, 191 Neb. 300, 214 N.W.2d 924 (1974), the trial court refused to declare a mistrial following the introduction, over objection, of evidence of other crimes. Since there was, however, other overwhelming evidence to conclusively establish the defendant's guilt, the error was harmless beyond a reasonable doubt.

In *State v. Reed*, 201 Neb. 800, 807, 272 N.W.2d 759, 763 (1978), improper hearsay was admitted over objection; however, this court concluded that "the error was not so prejudicially erroneous as to require a new trial." There was strong evidence other than the hearsay statement upon which the jury could rely to find the defendant guilty. *Id.*

In this case, the other evidence upon which a jury could rely to establish the defendant's guilt was overwhelming. Accordingly, although Officer Duffy's testimony was inadmissible, the trial court's failure to exclude it did not constitute reversible error because the error was harmless beyond a reasonable doubt.

The defendant's final assignment of error, regarding his sentence, is also without merit. The defendant was convicted of robbery, a serious offense and a Class II felony which is punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. See Neb. Rev. Stat. § 28-324 (Reissue 1989) and § 28-105 (Reissue 1985). A sentence imposed within the limits prescribed by statute will not be disturbed on appeal absent an abuse of discretion. *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

The presentence report shows that the defendant has a history of chronic substance abuse. According to the presentence report, he struck the victim twice during the robbery. The defendant has demonstrated a high need for control and has difficulty dealing with those in authority.

The defendant's sentence is within the limits prescribed by

statute, and under the facts and circumstances of the case, the trial court did not abuse its discretion in imposing it.

The judgment is affirmed.

AFFIRMED.

THOMAS DAVID BINKERD, APPELLANT, V. CENTRAL TRANSPORTATION CO., INC., ET AL., APPELLEES.

461 N.W.2d 87

Filed October 5, 1990. No. 89-1451.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In examining the sufficiency of the evidence to support the factual findings made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Trial.** Determinations as to causation are, ordinarily, a matter for the trier of fact.
4. **Workers' Compensation: Proof.** An employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
5. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
6. **Workers' Compensation: Appeal and Error.** When the record presents conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John A. Wagoner and James A. Widtfeldt for appellant.

Scott A. Burcham, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

GRANT, J.

Plaintiff, Thomas David Binkerd, appeals from an order of a rehearing panel of the Workers' Compensation Court dismissing plaintiff's amended petition against defendants, Central Transportation Co., Inc. (Central), and Great West Casualty Company. Plaintiff timely appealed. Here he assigns three errors, which may be summarized as one: The Worker's Compensation Court erred in finding, as the panel stated, that

> based upon the weight and credibility it gives to the various witnesses and evidence before it that the events of March 1987; December 22, 1987; and June 20, 1988, are sufficiently independent intervening causes of a material and substantial nature so as to be new events and that the defendants' liability for the accident of December 2, 1985, has been previously compensated and that plaintiff's Amended Petition must therefore be dismissed.

We affirm.

"The findings of fact made by the compensation court after rehearing shall have the same effect as a jury verdict in a civil case and will not be set aside unless clearly wrong." *Martinez v. Nebraska Dupaco*, 235 Neb. 720, 721, 457 N.W.2d 285, 286 (1990). In examining the sufficiency of the evidence to support the factual findings made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Martinez v. Nebraska Dupaco, supra*. Determinations as to causation are, ordinarily, a matter for the trier of fact. *Sherwood v. Gooch Milling & Elevator Co.*, 235 Neb. 26, 453 N.W.2d 461 (1990).

The record, viewed in the light most favorable to the defendant Central, shows the following: Plaintiff injured his back on December 2, 1985, while working as a truckdriver for defendant Central. On that date, plaintiff was attempting to climb some icy steps at a loading dock in Kearney, Nebraska, when he slipped and fell on his back. He felt no immediate pain and finished his delivery. While en route to his next destination, he began to experience pain in his lower back and right leg. He stopped at Holdrege, Nebraska, and checked into Phelps County Memorial Hospital, where he was treated by Dr. Stuart Embury. Dr. Embury examined plaintiff and consulted with Dr.

Robert Urban, whose diagnosis was "sub-acute lumbosacral sprain which carries with it no permanent disability." The final diagnosis by Dr. Embury was "[a]cute low back strain with sciatica." Plaintiff was released after 5 days at Phelps County Memorial Hospital and resumed work for defendant Central. According to a medical history later given by plaintiff to Dr. John Fox, " '[a]fter the 1985 on-the-job injury, his symptoms cleared after about two weeks of hospital treatment.' "

It is uncontested that plaintiff suffered an injury from this accident and that it occurred while plaintiff was in the employ of defendant. Central's insurance carrier, Great West Casualty, made payments for plaintiff's medical expenses arising from this incident. The last payment was made in January 1986. Plaintiff continued to work as a truckdriver for defendant Central until defendant Central fired him in April 1986. He testified that "[t]hree minor [truck-driving accident] incidents . . . caused my termination." After his employment with defendant, plaintiff held a series of jobs in truck driving or farm labor.

Plaintiff testified that after his release from the Holdrege hospital, he did not see another doctor about his back until June 1987, when he went to the Veterans' Administration hospital in Grand Island, Nebraska. This visit was precipitated by an incident in March 1987, when plaintiff injured his back while lifting and moving a couch. He and his wife each stated that while lifting the couch they heard plaintiff's back "pop." Thereafter, he experienced continuous low back pain until he was treated at the VA hospital in June 1987. Physicians there performed an electromyographic study on plaintiff. That test disclosed no abnormalities and showed no nerve compression or damage.

After his release from the VA hospital, plaintiff took a job as a truckdriver, but left this job within a month because of a personality clash with a coworker. He then obtained employment as a farm worker with Ron Holtgrew and then with National Farms. While working for National Farms in December 1987, plaintiff injured his back while scooping corn from a feedbin. Two weeks later, he saw Dr. Robert Randall in Atkinson, Nebraska, and told Dr. Randall that his back first

began to bother him after the corn-scooping incident, but related no previous history of back problems. Plaintiff was referred to Dr. John Fox in Omaha, who performed surgery on plaintiff in January 1988 to correct a ruptured disk. Plaintiff went to work as a general farm laborer in April 1988. In June 1988, while bending over to retrieve a small plastic toy which had blown out of his truck, plaintiff fell head over heels into a ditch on the side of the road. Plaintiff experienced pain after this incident, and in July 1988, Dr. Fox again operated on plaintiff's back for a ruptured disk in the same region as the first surgery.

Plaintiff contends that the 1985 injury was latent and progressive and that, therefore, he is entitled to compensation for all of his back problems subsequent to that injury, notwithstanding the fact that he did not file an action until February 1988, more than 2 years after the last payment for the 1985 accident was made. The compensation court correctly stated that causation is the central issue in this case and determined that plaintiff's 1985 injury was not latent and progressive and that the incidents which occurred in March 1987, December 1987, and June 1988 were independent intervening causes sufficient to terminate defendants' liability for the December 1985 accident. The evidence, if believed by the trier of fact, is sufficient to support the conclusion that plaintiff did not show by competent medical testimony that the 1985 accident caused his later condition resulting in the January and July 1988 surgeries and resultant disabilities.

In this workers' compensation case, plaintiff must prove by a preponderance of the evidence that the 1985 accident caused his later back problems, including his two surgeries. He did not do so. "[A]n employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability." *Fenster v. Clark Bros. Sanitation*, 235 Neb. 336, 342, 455 N.W.2d 169, 173 (1990). The compensation court panel did not err in determining that plaintiff did not establish a causal link between the 1985 accident and his subsequent surgeries in 1988.

While defendants do not contest that plaintiff did suffer an injury in 1985, the medical evidence does not show that the 1985

injury caused the disk protrusions which later necessitated surgery. While Dr. Fox's initial opinion was that the December 1985 accident triggered plaintiff's later problems, that opinion was based on an incomplete medical history as related by plaintiff in that Dr. Fox was not told of the 1987 moving accident nor was he told of the December 1987 corn-scooping incident.

The report of Dr. Charles Taylon showed that plaintiff was evaluated by Dr. Taylon in February 1989. Among records examined by Dr. Taylon was the record of an examination of plaintiff at Methodist Hospital in Omaha after the December 1987 incident. This examination showed plaintiff then had a severe L5 radiculopathy associated with a foot drop, requiring surgery. Based on this information, Dr. Taylon concluded that "[t]he major contributing incident related to his back problem appears to have been in December of 1987," and further stated that he had "objective information that the patient did not have a significant pinched nerve in June of 1987 in the V.A. Hospital, but subsequently did have a pinched nerve in December of 1987."

We have held: "As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony." *Martinez v. Nebraska Dupaco*, 235 Neb. 720, 723, 457 N.W.2d 285, 288 (1990). When the record presents conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court. *Martinez v. Nebraska Dupaco, supra.*

The decision of the compensation court on rehearing, finding that plaintiff's later condition was caused by independent intervening incidents and dismissing plaintiff's claim, is supported by competent evidence in the record and is not clearly erroneous.

The decision of the Workers' Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK C. THOMAS, APPELLANT.

461 N.W.2d 513

Filed October 12, 1990. No. 89-1242.

1. **Verdicts: Appeal and Error.** On a claim of insufficiency of the 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.
2. **Criminal Law: Evidence: Appeal and Error.** When insufficiency of the evidence is alleged by a criminal defendant on appeal, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
3. **Courts: Appeal and Error.** Where a cause has been appealed to the Supreme Court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court.
4. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.

Appeal from the District Court for Buffalo County, DEWAYNE WOLF, Judge, on appeal thereto from the County Court for Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of District Court affirmed.

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

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

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

GRANT, J.

In the county court for Buffalo County, defendant, Mark C. Thomas, was charged in one complaint with three misdemeanors: count I, first degree criminal trespass, in violation of Neb. Rev. Stat. § 28-520 (Reissue 1989), in entering or remaining in room 242 of the Quality 8 Motel in Kearney, Nebraska, without permission, on September 16, 1988; count

II, first degree criminal trespass, in violation of § 28-520, in entering and remaining in room 246 of the same motel, without permission, on September 18, 1988; and count III, theft of services by deception, in an amount less than $100, in obtaining lodging at the same motel by trespassing, in violation of Neb. Rev. Stat. § 28-515(1) (Reissue 1989), on September 16 and 18, 1988.

After jury trial in which all three counts were tried, defendant was convicted. He was sentenced to a 90-day term of imprisonment on each count, the sentences to be served concurrently.

Defendant appealed to the district court for Buffalo County, where the convictions were affirmed. Defendant then timely appealed to this court, where he assigns four errors, contending that the trial court (the county court) erred (1) in failing to sustain defendant's motion to dismiss count III at the conclusion of the State's evidence, (2) in failing to properly instruct the jury on the material elements of the crimes charged in counts I and II and in giving an instruction on presumption in connection with count III, (3) "in failing to find that the defendant-appellant was placed in double jeopardy," and (4) in failing to give credit for time served on the sentences imposed. We affirm.

The record shows the following: On September 16, 1988, defendant was found in room 242 of the Quality 8 located in Kearney when guests who had properly rented the room entered it and observed the defendant leaving the bathroom. One of these guests identified defendant at trial. She testified that when she asked defendant if the room was occupied, he responded, "['Y]es, it is[,'] and he turned around and walked out." The motel registry reflected that no one was assigned to that room before the guests arrived.

On the morning of September 18, 1988, a manager of the same Quality 8 used his passkey and found defendant in room 246 after a maid, who had attempted to enter the room to clean, alerted management that the room was locked with the deadbolt from the inside, and a check of the motel's registry revealed that the room had not previously been rented to anyone. The manager testified that one bed was rumpled, as if

someone had been on it; that defendant appeared disheveled, as if he had just awakened; and that there was a duffelbag sitting on one of the tables. Defendant produced a key with the number 246 on it and gave it to the manager, but denied having any other motel keys. A search of the duffelbag which was found with defendant in room 246 revealed another key, with the number 242 on it.

Defendant's first assignment of error concerns the sufficiency of the evidence presented to convict him for theft of services, as charged in count III. In *State v. Grantzinger*, 235 Neb. 974, 978, 458 N.W.2d 461, 464 (1990), we held:

> On a claim of insufficiency of the 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.

Further, when insufficiency of the evidence is alleged by a criminal defendant on appeal, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. See *State v. Grantzinger, supra*.

The record contains a great deal of evidence which, when viewed in the light most favorable to the State, would allow a jury to conclude that the motel's services had been taken without compensation. The evidence is circumstantial, but we have held:

> One accused of a crime may be convicted on the basis of circumstantial evidence if the evidence, viewed as a whole, establishes the guilt of the defendant beyond a reasonable doubt. . . .
>
> . . . .
>
> . . . Whether a defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence.

State v. Saltzman, 235 Neb. 964, 969, 458 N.W.2d 239, 243 (1990). Defendant's first assignment is without merit.

Defendant's second assignment concerns the instructions given by the trial court. The transcript before us shows that the instructions given to the jury were not in the transcript presented to the district court for review. There is no indication of requested instructions. There is no record of an instruction conference. In its order affirming the county court judgment, the district court stated:

> The evidence brought before this Court does not include a copy of the set of instructions given to the jury but the Court would assume that the elements would be different and in any event no objection has been made by the Defendant to the instructions given by the Trial Court.

In his appeal from the district court to this court, defendant was represented by a different attorney than the attorney who represented defendant both at trial in the county court and during the appeal to the district court. In this court, defendant's current attorney obtained a supplemental transcript, dated 5 months after the order of the district court. This supplemental transcript contains the instructions given by the county court. Obviously, those instructions were not presented to the district court in the appeal to that court. Further, the district court noted there were no objections to the instructions, and the issue was not presented to the trial court.

In such a situation, this court will not consider initially an issue that was not presented to the district court sitting as an appellate court in reviewing an action of the county court. We have stated:

> "In disposing of an appeal the Supreme Court considers only those errors which are properly assigned and presented to this court. [Citation omitted.] Where a cause has been appealed to the Supreme Court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. [Citation omitted.]"

State v. Painter, 224 Neb. 905, 910-11, 402 N.W.2d 677, 681 (1987) (quoting *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985)). We will not consider defendant's second assignment of error, since it was not presented to the district court, where it would not have been ruled on favorably to defendant in any event, because of defendant's failure to object to, or request, instructions.

Plaintiff's third assignment of error alleges that "[t]he Trial Court erred in failing to find that the defendant-appellant was placed in double jeopardy." The U.S. and the Nebraska Constitutions each provide that no person shall be put in jeopardy twice for the same offense. U.S. Const. amend. V; Neb. Const. art. I, § 12. On appeal to this court from the district court, defendant for the first time alleges that the same act, being in the motel rooms, constitutes both criminal trespass and theft of services and that therefore, he was punished twice for the same offense. At a minimum, count III constitutes unnecessary overkill.

Defendant, however, did not raise this issue at the trial level nor on his appeal from county court to district court. Whether the double jeopardy clause has been violated is a constitutional question. Our rule has been stated: " ' "[E]xcept in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived." ' " *State v. Moore*, 235 Neb. 955, 956-57, 458 N.W.2d 232, 234 (1990) (quoting *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987)). It is clear that this is not the most unusual of cases. Defendant has been sentenced to three concurrent 90-day jail terms. The evidence is overwhelming that defendant was, at the least, trespassing on two separate occasions. Determining the difficult problem concerning double jeopardy in defendant's favor would not change defendant's punishment of 90 days in jail. Defendant failed to raise the constitutional issue at trial in the county court and therefore waived his right to raise it in the district court and in this court. His third assignment of error will not be considered.

Defendant's final assignment of error contends that the trial court erred in refusing to give defendant credit for time

previously served. We have stated: "[W]here the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time." *State v. Vrtiska*, 227 Neb. 600, 608-09, 418 N.W.2d 758, 764 (1988). Defendant was sentenced to 90 days on each count, the sentences to be served concurrently. This is less than the maximum 1-year sentence allowed for Class I misdemeanors, alleged in counts I and II, and less than the 6-month maximum sentence allowed for the Class II misdemeanor alleged in count III. Defendant's presentence report, available to the trial court, shows that defendant was placed on 3 years' probation in 1985 for theft and was placed on federal probation in 1988 for possession of unregistered firearms. The court's refusal to give credit for time served was not an abuse of discretion. Neither defendant nor the State argued the applicability of Neb. Rev. Stat. § 83-1,106 (Cum. Supp. 1990) to the misdemeanor sentences herein imposed, and in the absence of submission of that issue to this court, we make no determination in that regard. This assignment of error is without merit.

In view of the confusion apparent in this case concerning appeals to this court from district courts reviewing appeals from county courts, we reiterate the rule set out in *State v. Erlewine*, 234 Neb. 855, 857, 452 N.W.2d 764, 767 (1990):

> The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court. This rule shall be effective so as to apply to all county court decisions appealed to the district court after the filing date of this opinion.

The *Erlewine* opinion was filed on March 23, 1990, so the rule set out above is not applicable to this case, where the notice of appeal was filed March 15, 1989. The rule should be noted.

AFFIRMED.

MASON STATE BANK, APPELLEE AND CROSS-APPELLANT, V. ALVIN E. SEKUTERA, APPELLANT AND CROSS-APPELLEE.

461 N.W.2d 517

Filed October 19, 1990. No. 88-610.

1. **Default Judgments: Pleadings: Appeal and Error.** Whether default judgment should be entered because of a party's failure to timely respond to a petition rests within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify a reversal on such a ground.
2. **Trial: Pretrial Procedure.** Under Neb. Ct. R. of Discovery 36(b) (rev. 1986), a trial court has discretion to permit withdrawal or amendment of admissions resulting from the failure to timely respond to a request for such when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining his or her action or defense on the merits.
3. **Uniform Commercial Code: Security Interests: Notice: Pleadings: Proof.** Compliance with the notice provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980) is a condition precedent to a secured creditor's right to recover a deficiency, placing upon the creditor the burden of pleading and proving such compliance; failure to plead and prove compliance is an absolute bar to the recovery of a deficiency.
4. **Trial: Pretrial Procedure.** Ordinarily, the issues specified at a pretrial conference control the issues on which a case is tried.
5. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus not appealable, when both parties have moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and can determine the controversy, making an order specifying the facts that appear without substantial controversy and directing such further proceedings as it deems just.
6. **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.
7. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

Appeal from the District Court for Sherman County: DEWAYNE WOLF, Judge. Reversed and remanded with direction.

Raymond A. Hervert, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

John O. Sennett and Brad Roth, of Sennett & Roth, for appellee.

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

PER CURIAM.

On November 23, 1984, defendant-appellant, Alvin E. Sekutera, executed two promissory notes payable to the order of plaintiff-appellee, Mason State Bank, one in the amount of $48,300 and the other in the amount of $49,936.38. Both of the notes were due on April 23, 1985. To secure these notes, Sekutera and his wife granted Mason State Bank a security interest in certain cattle.

After Sekutera defaulted on his promissory notes and pursuant to a replevin action which it had filed, Mason State Bank took control of the cattle which secured its advances to Sekutera. On June 17, 1986, Mason State Bank's attorney sent a letter to the Sekuteras, advising them that the cattle securing this debt would be sold on July 27, 1986. However, the cattle were instead sold a month earlier, on June 27, 1986.

After selling the cattle, Mason State Bank applied the sale proceeds to the notes. On May 4, 1987, Mason State Bank commenced this action for the amount remaining unpaid on the notes. On June 26, 1987, Sekutera demurred to Mason State Bank's petition. Apparently on October 16, 1987, the district court entered an order respecting Sekutera's demurrer, which reads in part:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:
>
> A. The DEMURRER of [Sekutera] is overruled.
>
> B. [Mason State Bank] separately number and state the causes of action of [Mason State Bank] on each of [its] promissory notes.
>
> C. [Mason State Bank] is given 10 days to file an

amended petition.

D. [Sekutera] is given 20 days thereafter to plead or answer [Mason State Bank's] amended petition.

On October 20, 1987, Mason State Bank filed an amended petition, and on January 12, 1988, it filed a motion for a default judgment "for the reason that no Answer or other pleading ha[d] been filed in behalf of [Sekutera]." On February 4, 1988, Sekutera filed an answer to Mason State Bank's amended petition, and at a February 5, 1988, hearing on its motion for default judgment, the district court found that Mason State Bank's motion was "moot," as by then Sekutera had answered the petition.

On May 5, 1988, Mason State Bank notified the district court that it had, on the previous day, served a request for admissions upon Sekutera. The document recited in part:

> Mason State Bank . . . requests that [Sekutera], within thirty (30) days from the date of service herein, or forty-five (45) days from the service of summons, pursuant to Nebraska Discovery Rule 36, make the following admissions:
>
> . . . .
>
> REQUEST FOR ADMISSIONS NO. 12: That you were given commercially reasonable notice of the sale of the cattle . . . .

On June 10, 1988, after receiving no response from Sekutera, Mason State Bank filed a motion which sought an order declaring that the foregoing request, among others, be deemed admitted.

On June 13, 1988, Mason State Bank filed a motion for summary judgment, and on June 14 it filed a notice of hearing indicating that its motion for summary judgment would be heard on July 8, 1988. A copy of this notice was mailed to Sekutera's attorney on June 13, 1988.

On July 7, 1988, Sekutera filed a pleading stating that on July 6, 1988, he had filed his answers to Mason State Bank's request for admissions, asked the district court to deny Mason State Bank's motion that its request be deemed admitted, and also asked the district court to "allow" his answers to Mason State Bank's request. In addition, on July 8, 1988, Sekutera also

filed a motion for summary judgment.

Following a July 8, 1988, hearing on the parties' motions for summary judgment, the district court filed a journal entry which states the following in part:

> [T]he Court having taken under advisement [Mason State Bank's] Motion to have Requests for Admission admitted, and [its] and [Sekutera's] Motions for Summary Judgment, hereby finds:
>
> 1. That [Mason State Bank's] Motion to have answers to Requests for Admission deemed admitted is hereby overruled, and; [Sekutera's] Response to [Mason State Bank's] Motion, for good cause shown, is allowed and [Sekutera's] ANSWERS TO REQUEST FOR ADMISSIONS . . . are allowed to be filed out of time, and;
>
> 2. That [Mason State Bank's] Motion for Summary Judgment should be and is hereby sustained and granted, and;
>
> 3. That [Sekutera's] Motion for Summary Judgment should be and is hereby overruled.

The court then entered a $57,397.22 deficiency judgment in favor of Mason State Bank.

Sekutera appeals and asserts, in summary, that the district court erred (1) in failing to find that the notice Mason State Bank provided him pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980) was insufficient and (2) in thus failing to enter summary judgment in his favor. Mason State Bank cross-appeals, asserting that the district court erred (1) in failing to sustain its motion for default judgment and (2) in overruling its motion to have its requests for admissions deemed admitted.

CROSS-APPEAL

We deal first with Mason State Bank's cross-appeal.

Default Judgment.

Mason State Bank first argues that the district court erred in failing to sustain its motion for a default judgment. While Mason State Bank asserts that the district court "could" have sustained its motion for a default judgment because of Sekutera's failure to timely plead to or answer its amended

petition, as this court stated in *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 333, 99 N.W.2d 615, 618 (1959), "[s]uch matters rest largely within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify a reversal on such a ground." See, also, *Starr v. King*, 234 Neb. 339, 451 N.W.2d 82 (1990). The record contains no evidence of such an abuse of discretion. Consequently, Mason State Bank's first assignment of error in its cross-appeal is without merit.

Request for Admissions.

The second concern is whether the district court ruled properly concerning Mason State Bank's request for admissions.

In that connection we first note that Mason State Bank's motion to have its request deemed admitted was unnecessary. Under Neb. Ct. R. of Discovery 36 (rev. 1986), Mason State Bank's requests were automatically deemed admitted when Sekutera failed to respond within the 30-day period which was applicable in this case.

Rule 36(a) states in relevant part:

> A party may serve upon any other party a written request for the admission . . . .
>
> Each matter of which an admission is requested shall be separately set forth by the party making the request, and shall be repeated by the responding party in the answer or objection thereto. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . .

In *Wibbels v. Unick*, 229 Neb. 184, 190-91, 426 N.W.2d 244, 249 (1988), this court stated:

> Rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. When a party has been served with a request for admission, pursuant to Rule 36, but fails to answer or object to the request, the subject matter of the request

> stands admitted by the unresponsive party and is conclusively established, *unless the court on motion permits withdrawal of the admission by a party's failure to respond.*

(Emphasis supplied.) Thus, Mason State Bank's request was automatically admitted by Sekutera when he failed to respond within 30 days.

These admissions would have been effective if the district court had not allowed Sekutera to withdraw them, as permitted under rule 36(b), which reads in relevant part:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining his or her action or defense on the merits.

Sekutera's pleading seeking to avoid the consequences of his untimely responses to Mason State Bank's request had the effect of a motion to withdraw his admissions. Under rule 36(b), the district court had discretion to and did allow such withdrawal. Mason State Bank fails to show that the district court abused its discretion by allowing Sekutera to withdraw his admissions. No abuse of discretion having been shown, Mason State Bank's second assignment of error must also be overruled. See *Wibbels v. Unick, supra*, citing *Schuett v. Hargens*, 173 Neb. 663, 114 N.W.2d 508 (1962).

APPEAL

The foregoing resolution of Mason State Bank's cross-appeal requires that we address the issues presented by Sekutera's appeal.

Before doing so, however, we turn our attention to Mason State Bank's argument that the issues raised are not properly before us because Sekutera did not plead lack of adequate notice as a defense and because the pretrial order excluded such an issue from consideration. While Sekutera's answer to Mason State Bank's amended petition did not specifically allege lack of

sufficient notice, the answer did in effect generally deny liability on the notes. Compliance with the notice provision of § 9-504(3) is a condition precedent to a secured creditor's right to recover a deficiency, placing upon the creditor the burden of proving compliance with that requirement. *General Electric Credit Corp. v. Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988); *Citizens State Bank v. Sparks*, 202 Neb. 661, 276 N.W.2d 661 (1979); *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976); *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974). Thus, it was incumbent upon Mason State Bank to prove such compliance, irrespective of Sekutera's answer, see *Butte State Bank v. Williamson*, 215 Neb. 296, 338 N.W.2d 598 (1983), and Sekutera's general denial put the matter of notice at issue.

It is true that, ordinarily, the issues specified at a pretrial conference control the issues on which a case is tried. *Hillcrest Country Club v. N.D. Judds Co., ante* p. 233, 461 N.W.2d 55 (1990); *Bump v. Firemens Ins. Co.,* 221 Neb. 678, 380 N.W.2d 268 (1986); *Hasenauer v. Durbin,* 216 Neb. 714, 346 N.W.2d 695 (1984). However, the pretrial order in this case does not do what Mason State Bank suggests. It merely observes that Sekutera's answer "is a general denial but admits the execution of the two notes" and takes cognizance of the further allegation that Mason State Bank had neither accounted for the proceeds of sale nor disposed of the property in a commercially reasonable manner. Such an order did not withdraw the question of the adequacy of Mason State Bank's notice.

Insufficiency of Notice.

The first of Sekutera's summarized assignments of error questions the sufficiency of Mason State Bank's notice to him that it was going to sell his cattle.

When a creditor sells collateral which is subject to a Uniform Commercial Code article 9 security interest to satisfy all or a portion of a borrower's debt, § 9-504 sets forth the creditor's rights and obligations. Subsection (1) of that section provides that after default, a secured party may sell the collateral. Subsection (3) provides for the disposition of the collateral by public or private sale and, with certain exceptions, requires that

reasonable notice of the sale be sent by the secured party to the debtor, and states in relevant part:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

Sekutera correctly argues that Mason State bank did not comply with the provisions of § 9-504 in that it failed to provide him reasonable notification of the time at which his cattle would be sold at public auction. As noted earlier, the notice recited that the livestock would be sold a month after the date it was in fact sold. The effect of this error was to provide Sekutera with no notice at all of the public sale of his collateral. Accordingly, the notice which Mason State Bank sent to Sekutera was insufficient as a matter of law. The record therefore sustains Sekutera's first summarized assignment of error.

Summary Judgment.

We thus reach the question presented by Sekutera's second summarized assignment of error, to wit, whether the district court should have entered summary judgment in his favor rather than in favor of Mason State Bank.

There is no question but that Mason State Bank must bear the consequences of its failure to provide Sekutera the reasonable notice required by § 9-504(3). See *Havelock Bank v. McArthur*, 220 Neb. 364, 370 N.W.2d 116 (1985). See, also, *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989); *General Electric Credit Corp. v. Lewis*, 230

Neb. 429, 432 N.W.2d 27 (1988); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987). The question is, What are those consequences?

Although we recently, in *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989), recognized that whether a creditor's notices sufficiently informed guarantors of their status as debtors is to be determined in light of the entire conduct of the parties, we have, in a long line of cases beginning with *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974), adhered to the rule that compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency, that the burden of proof is on the secured party to prove compliance with the statutory notice requirements, and that failure to give reasonable notice is an absolute bar to the recovery of a deficiency. E.g., *American Honda Finance Corp. v. Bennett, supra; General Electric Credit Corp. v. Lewis, supra; Deutsche Credit Corp. v. Hi-Bo Farms, Inc., supra; Allis-Chalmers Corp. v. Haumont,* 220 Neb. 509, 371 N.W.2d 97 (1985); *Havelock Bank v. McArthur, supra; Borg-Warner v. Watton,* 215 Neb. 318, 338 N.W.2d 612 (1983); *Butte State Bank v. Williamson,* 215 Neb. 296, 338 N.W.2d 598 (1983); *First Nat. Bank & Trust Co. v. Hughes,* 214 Neb. 42, 332 N.W.2d 674 (1983); *Citizens State Bank v. Sparks,* 202 Neb. 661, 276 N.W.2d 661 (1979); *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.,* 196 Neb. 398, 243 N.W.2d 745 (1976).

In recently departing from its former rule, which reduced a creditor's deficiency judgment against a debtor who was not given proper notice by the amount of such damages as the debtor could prove, and adopting instead the absolute bar rule to which we have steadfastly adhered, the Arkansas Supreme Court, in *First State Bank of Morrilton v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987), made the simple observation that one seeking a deficiency judgment must meet the statutory requirements for obtaining one.

Having reaffirmed the consequences of a creditor's failure to give adequate notice of the sale of collateral, we must now ascertain whether Sekutera is entitled to summary judgment. We begin by recalling that, although the denial of a motion for summary judgment is not a final order and thus not appealable, when both parties have moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and can determine the controversy, making an order specifying the facts that appear without substantial controversy and directing such further proceedings as it deems just. *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 440 N.W.2d 456 (1989). 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. *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990); *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); *Muckey v. Dittoe*, 235 Neb. 250, 454 N.W.2d 682 (1990). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 428 N.W.2d 914 (1988).

In arguing against this court's potential entry of summary judgment in Sekutera's favor, Mason State Bank asserts that an issue of material fact remains as to whether the perishability of the cattle sold negated the requirement that notice be sent. See § 9-504(3). In making this assertion, Mason State Bank relies upon *City Bank & Trust Co. v. Van Andel*, 220 Neb. 152, 368 N.W.2d 789 (1985). Whether the cattle were, in fact, perishable in this case does present a question of fact; however, Mason

State Bank did not plead or present evidence that the cattle sold were "perishable" under § 9-504(3). Therefore, the perishability of the cattle is not a genuine issue of material fact presented by Mason State Bank for the court's consideration.

CONCLUSION

Sekutera having established that Mason State Bank's notice to him was insufficient as a matter of law, and the record presenting no other genuine issue of material fact, the district court erred in denying Sekutera summary judgment and in entering a judgment in favor of Mason State Bank. Accordingly, the judgment of the district court is reversed and the cause remanded with the direction that the court enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. CON M. BRADLEY, APPELLANT.

461 N.W.2d 524

Filed October 19, 1990. No. 89-360.

1. **Appeal and Error.** Neb. Ct. R. of Prac. 9D(1)d (rev. 1989) limits the review of the Nebraska Supreme Court to claimed errors which are assigned and argued in an appellant's brief.
2. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
3. **Trial: Juries: Appeal and Error.** If there is some incorrect conduct in a jury trial which, on a review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the defendant, the error is harmless.
4. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that a nonevidential error prejudiced the defendant.
5. _____: _____. In order for an error to entitle one to reversal of a conviction, actual prejudice must be shown, rather than merely the possibility of prejudice.
6. **Trial: Evidence: Convictions: Appeal and Error.** The improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other evidence to support the conviction.
7. **Constitutional Law: Trial: Pretrial Procedure.** While an accused has the right to be present at all stages of the trial when the accused's absence might frustrate the fairness of the proceedings, the sixth amendment to the U.S. Constitution does

not require the presence of the accused at every pretrial hearing.

8. **Trial: Venue.** The refusal of a trial court to grant a motion for a public opinion poll rests within that court's discretion.
9. **Venue: Juror Qualifications.** Voir dire examination is the better, more probative forum for ascertaining the existence of community and individual prejudice or hostility toward the accused than is a public opinion poll.
10. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based upon the evidence presented in court.
11. **Juror Qualifications: Death Penalty.** It is entirely permissible to exclude from jury service venirepersons whose views on capital punishment are such as to prevent or substantially impair their ability to impartially apply the law to the evidence.
12. **Trial: Juries.** Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine a venireperson out of the presence of all other venirepersons.
13. _____: _____. The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court.
14. **Criminal Law: Trial: Juries.** Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court.
15. **Criminal Law: Trial: Juries: Appeal and Error.** To warrant reversal, denial of a motion to sequester the jury before submission must be shown to have prejudiced the defendant.
16. **Trial: Records: Rules of the Supreme Court.** A trial court has a duty to provide a party with a verbatim trial record which comports to the requirements of Neb. Ct. R. of Official Ct. Rptrs. 4 (rev. 1989), and such record shall, at a party's request, include any comments the trial judge may have made.
17. **Trial: Records: Judges.** The failure of a trial judge to keep a proper verbatim record may constitute grounds for judicial discipline.
18. **Trial: Records: Liability.** The failure of a court reporter to fulfill the duties of that office may make the reporter civilly liable to a litigant damaged thereby.
19. **Trial: Records: Appeal and Error.** While it is true that a party is entitled to have reported any comments made by a trial judge, it is, in the final analysis, in the absence of any prejudicial comment's being made in the presence of the jury, the correctness and effect of any questioned ruling which controls the disposition of an appeal.
20. **Convictions: Records.** In the absence of a showing of prejudice, an omission from a bill of exceptions does not vitiate a defendant's conviction.
21. **Motions for Continuance: Appeal and Error.** There is no abuse of discretion by the district court in denying a request for a continuance unless it clearly appears that the movant suffered prejudice as a result of that denial.
22. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond

a reasonable doubt.

23. **Criminal Law: Evidence: Appeal and Error.** In reviewing a criminal case for alleged insufficiency of the evidence, the State is entitled to have all relevant evidence favorable to the State treated as true, as well as to have every beneficial inference reasonably deducible from that evidence.
24. **Convictions: Appeal and Error.** It is not the province of an appellate 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, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
25. **Criminal Law: Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
26. _____: _____: _____. 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.
27. **Criminal Law: Directed Verdict.** In a criminal case a trial court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.
28. **Trial: Prosecuting Attorneys: Motions for Mistrial: Proof.** Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
29. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** Remarks made by the prosecutor during final argument which do not mislead or unduly influence the jury do not rise to the level sufficient to require granting a mistrial.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Tad D. Eickman and Lynn B. Lamberty, of Steinacher, Vosoba, Hanson & Eickman, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

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

CAPORALE, J.

I. INTRODUCTION

Defendant, Con M. Bradley, was, pursuant to verdict, adjudged guilty of first degree murder, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989), and the use of a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205

(Reissue 1989). He was thereafter sentenced to life imprisonment on the murder conviction and to imprisonment for 20 years on the use of a firearm conviction. In this appeal he assigns and discusses in his briefs 24 claimed errors which, in summary, combine to challenge the district court's rulings or conduct with respect to (1) Bradley's plea in abatement, (2) reciprocal discovery, (3) Bradley's absence during certain proceedings, (4) data relating to the State's witnesses, (5) venue, (6) seating and managing the jury, (7) endorsement of witnesses, (8) making the trial record, (9) admission of certain evidence, (10) sufficiency of the evidence, and (11) conduct of the prosecutor.

In addition, Bradley assigns six errors which he does not discuss in his briefs, namely, the district court's (1) method of selecting alternate jurors, (2) refusal to allow him to employ a pathologist, except for limited purposes, (3) overruling a motion in limine, (4) refusal to permit "continuing objections," (5) failure to include in its charge to the jury certain instructions he requested, and (6) pressuring him into testifying. Because this court ought not to both conceptualize arguments and sit in judgment of them, Neb. Ct. R. of Prac. 9D(1)d (rev. 1989) limits our review to claimed errors which are assigned and argued in an appellant's brief. Accordingly, we do not consider the six unargued assignments of error last listed above. *State v. Jolitz*, 231 Neb. 254, 435 N.W.2d 907 (1989); *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989).

None of the 11 summarized assignments of error properly before us having merit, we affirm.

II. FACTS

The victim, Kirk Glasgow, was a resident of Lincoln, Lancaster County, Nebraska, who disappeared after working his 3:30 p.m. to midnight shift at his place of employment in Crete, Saline County, Nebraska, on July 23, 1987. His remains, consisting only of bones, including the skull, were found by a farmer who was disking a field in the last-mentioned county on March 23, 1988. An autopsy of the remains revealed two bullet wounds to the skull, either of which could have been fatal.

At the time of his disappearance, the victim was involved in

divorce proceedings and was separated from his wife, Valerie Knobel Glasgow. The victim and his wife had two children, a son and a daughter who were, respectively, 4 and 2 years old. Although the wife had temporary custody of the children, they spent 3 days each week with the victim in addition to spending every other weekend with him.

The victim and his wife had agreed that the children would spend Friday, July 24, 1987, with him while the wife worked. When the wife arrived at the victim's residence that morning, she found no one present, but heard what she assumed to be a clock radio "buzzing or playing." She then attempted to contact her estranged husband throughout the weekend but failed to reach him, and on Monday, July 27, 1987, informed police that the victim was missing.

Bradley knew the victim and was also well acquainted with the victim's wife, having met her in 1976 while attending Doane College with her brother, Bruce Knobel. In May 1987, Bradley began visiting the victim's wife on a regular basis, both via telephone and in person. Indeed, Bradley had been sexually intimate with her on one occasion in May 1987. The victim's wife confided in Bradley concerning her personal affairs, including matters relating to problems she was having with her pending divorce. Bradley had spoken with the victim's wife via the telephone for approximately 40 minutes on the evening of July 23, 1987, and in a September 22, 1987, letter to Norwood Tillery professed his love for her.

Bradley possessed a federal firearms license, and he and Anthony Stacy had been partners in the business of buying and selling firearms. Bradley had also, prior to his conviction in this case, purchased stolen military equipment from Stacy. The State's evidence linking Bradley to the victim's murder was based primarily upon Stacy's in-court testimony and upon the tape recording of a telephone conversation between Bradley and Stacy.

Although he was unable to remember the specific date, Stacy testified that he was visiting Bradley at the latter's home one night in July 1987 and that during this visit, the two discussed "[f]irearms, life, girls, just everything in general." During this discussion, Bradley told Stacy that he (Bradley) "got rid of

Valerie's husband." Stacy testified: "[Bradley] told me that he had taken the individual out in the field and shot him in the head and shot him two or three more times to make sure he was dead."

According to Stacy, Bradley admitted that he had "planned everything," that "everything went just like he planned," and that he killed the victim because he was "harassing" his estranged wife. Stacy also testified that Bradley "used the excuse of the [victim's] buying a car to go over to his house to see him." Robert Carnes, a shift superintendent where the victim was employed, testified that he had sold the victim a car on July 23, 1987.

Bradley also told Stacy that he had used a "faded" Smith & Wesson revolver to kill the victim. Stacy knew the gun to which Bradley was referring because the "bluing" on that gun had been "rubbed off," so that "about 90 percent or so of it looked like a nickel gun instead of a blue color gun." Stacy testified that in August 1987, as requested by Bradley, he retrieved the alleged murder weapon from a house where Bradley had previously lived and gave it to Bradley's brother. The weapon was eventually recovered by law enforcement officials and identified by Stacy at trial.

Stacy also testified that he was told by Bradley that the latter had inserted a small file into the barrel of the revolver to distort the rifling. The State's ballistics expert found evidence of "gouging . . . or scratching toward the muzzle area of the weapon . . . ." According to this witness, a bullet found in the victim's skull and another bullet recovered from the field in which the victim's remains were found could have been fired by the weapon which the police recovered, but the witness could not state with certainty whether these bullets in fact had been fired from that weapon.

Stacy originally denied any knowledge of Bradley's involvement in the victim's murder, testifying that such denial was motivated by his concern that his own wife would leave him if she discovered that he possessed unreported information concerning a homicide, and by his fear of being implicated in an attempted robbery and the theft by him of military equipment. However, when questioned by law enforcement officials on

June 26, 1988, Stacy informed them that Bradley had admitted killing the victim. Stacy then telephoned Bradley in the presence of the police and allowed them to record the conversation. Stacy also telephoned Bradley on July 27, 1988, again allowing the police to record the conversation.

During the course of the taped telephone conversations, Stacy and Bradley discussed the police investigation of the victim's murder. At one point during the July 27 taped conversation, Bradley indicated that he knew "exactly" what type of bullet was used to kill the victim.

The record contains evidence that after the police investigation began to focus upon Bradley as a primary suspect in the victim's murder, Bradley unsuccessfully attempted to use some of his acquaintances to fabricate an alibi.

III. ANALYSIS

We consider in turn each of the 11 summarized assignments of error Bradley discussed in his briefs, as enumerated in part I above.

1. Plea in Abatement

We first deal with the claim that the district court erred in overruling the plea in abatement Bradley filed on September 12, 1988. Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987). Thus, the deciding issue is whether the evidence was sufficient to support the conviction, a matter analyzed and resolved against Bradley in part III(10) below.

2. Reciprocal Discovery

Next, we consider the assertion that the district court erred in granting the State's motion for reciprocal discovery, in threatening to withhold a portion of Bradley's attorneys' fees if they should fail to comply with the reciprocal discovery order, and in overruling his motion for limitation of reciprocal discovery.

Before trial, Bradley filed a motion for discovery requesting

production of all statements of any witnesses the State expected to testify at trial, along with other documents and reports relating to the criminal investigation concerning him. The State then filed a motion for reciprocal discovery of information and material in the possession of Bradley's attorneys, and the district court granted both motions, noting that issues relating to the work product of Bradley's attorneys could be raised separately.

Bradley later moved to limit reciprocal discovery. In response to this motion the district court stated:

> For the record, let the Court announce a rule that he believes should be followed and until such time as the Court is shown otherwise — the rule of the Court is that the defense requirement of reporting the result — results and details of their investigations to the prosecutor's office is very limited.
>
> The Court believes that they are not required to disclose to the prosecution new evidence or evidence that they've discovered which indicates that the defendant is guilty.
>
> But the Court believes that anything that the defendant discovers and which will be used at trial must be disclosed to the prosecutor. The Court has no idea how to enforce such a rule except to say that in the event that we are close to trial, close to the trial date or we are at trial and the defendant discloses or uses evidence unknown to the prosecutor's office, and if the prosecutor asks for time and is justified in doing so, asks for the time to investigate the matter which requires delay in the trial, from that point on counsel for the defendant will have to work without pay.

Bradley asserts that the district court's threatened sanction deprived him of his rights to effective assistance of counsel and to equal protection and that the threatened sanction was not justified by statute. While no such sanctions were ever imposed, Bradley nevertheless argues that their absence makes no difference "because the threat of sanctions created an unreasonable conflict between defense counsel and their client." Reply brief for appellant at 11.

In resolving this summarized assignment of error and many of those which follow, we are bound by the rule that if there is

some incorrect conduct in a jury trial which, on a review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the defendant, the error is harmless. *State v. Thompson*, 231 N.W.2d 771, 438 N.W.2d 131 (1989); *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989); *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). A conviction will not be set aside in the absence of a showing that a nonevidential error prejudiced the defendant. See, *State v. Boppre, supra*; *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990); *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). Actual prejudice must be shown, rather than merely the possibility of prejudice. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986).

In attempting to show that he in fact was prejudiced by the district court's actions, Bradley states in his reply brief that his attorneys surrendered to the State reports which were compiled by his court-appointed defense investigator. Bradley then directs us to the State's cross-examination of Patricia Harrison, a former neighbor of the Glasgows', wherein Harrison states her belief that the victim was using the issue of custody over his two children as leverage against his estranged wife during the course of their divorce proceedings, and cites the following exchange:

> Q. Is that — that would be what you told the private investigator that was helping the defense in this case, is that right?
>
> A. I may have, I don't remember.
>
> Q. You told her that [the victim] was using the kids as leverage?
>
> A. That I felt that way, yes, I did.

Bradley asserts that this exchange shows that he was harmed by the State's receipt of his investigator's reports.

We first note that there is nothing in the record to show the source of the State's knowledge of what Harrison had told the investigator for the defense. However, we assume for the purpose of our analysis that the State learned what Harrison had previously told the investigator as a result of the review of the defense investigator's report rather than as a result of its own investigation.

Nevertheless, the testimony which Bradley cites merely duplicates prior testimony given by the victim's wife. The improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other evidence to support the conviction. *State v. Rowland, supra*; *State v. Chapman, supra*. While the district court's threatened sanction might very well, under some circumstances, result in a deprivation of a defendant's rights, and for that reason appears an unwise ploy, the record before us fails to illustrate that the proceedings in this case were materially affected either by the court's granting of reciprocal discovery or by its threatened sanction. Thus, Bradley has failed to show that he was prejudiced thereby.

3. Absence

The third summarized assignment of error arises from the fact that as the result of a separate conviction on an unrelated charge, Bradley was in the custody of the Nebraska Department of Correctional Services at Lincoln from the time of his arraignment in this case through the trial and the sentencing hearing. Thus, in order for him to be present in Saline County, where the proceedings involved were conducted, it was necessary for the district court to issue an order directing the Department of Correctional Services to transport Bradley to that county.

Bradley filed motions asking that he be present at all hearings, in camera meetings, and depositions. The district court declined to issue such a blanket order and refused to issue an order requiring that Bradley be transported to Saline County to facilitate his attendance at a hearing on a motion for a change of venue and an application for funds to retain a public opinion expert who would conduct a survey in support of a change of venue motion. The district court further refused to issue an order facilitating Bradley's attendance at Stacy's pretrial deposition. Bradley argues that the district court's failure to allow his presence during these proceedings violated his rights under the sixth amendment to the U.S. Constitution.

It is true that an accused has the right to be present at all stages of the trial when the accused's absence might frustrate the

fairness of the proceedings. However, the sixth amendment does not require the presence of the accused at every pretrial hearing. *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). See, also, *U.S. v. Gerena*, 683 F. Supp. 330 (D. Conn. 1988).

Regarding Bradley's argument with respect to the hearing on his application for funds to retain a public opinion expert and the contemporaneous hearing on his change of venue motion, this court, in *State v. Anderson and Hochstein, supra*, held that the defendants' absence did not frustrate the fairness of the proceedings when their attorneys were arguing matters of law before the court. Here, in Bradley's absence, his attorneys argued legal issues relating to the change of venue motion. It is apparent that Bradley's absence did not affect the fairness of those proceedings.

Bradley also contends that he should have been allowed to attend Stacy's deposition. We, however, are aware of no authority for the proposition, nor has any been cited to us, that a defendant must be allowed to confront his accuser during all discovery proceedings when that witness also testifies at trial. Bradley was, of course, present when Stacy testified at trial. Consequently, Bradley was afforded his sixth amendment right to confront his accuser.

4. Witness Data

The fourth summarized assignment of error alleges Bradley was prejudiced in the preparation of his defense by the district court's failure to require the State to reveal the criminal records of its witnesses.

Prior to trial, Bradley filed a motion requesting that he be given access to any information which would be available to the State regarding the criminal records of its witnesses. This motion was sustained in part by the district court. However, the State's attorney reported that he was unable to obtain witnesses' criminal records from the Nebraska State Patrol and other investigative agencies in the absence of either an active criminal investigation of a witness or a court order calling for disclosure of criminal records of witnesses specified in the

order. Bradley's attorneys then stated that they would prepare such an order for issuance by the court, but the record contains no evidence that such an order was ever presented to the court, and, thus, Bradley cannot now complain that no such order was entered.

At any rate, the issue which Bradley attempts to raise would not be one which would require a reversal of his conviction, for he again, either by means of evidence in connection with his motion for new trial or otherwise, fails to show any prejudicial effect of his failure to acquire the records in question.

5. VENUE

By the fifth summarized assignment of error, Bradley quarrels with the district court's refusal to provide him with funds to employ a pollster to study the effect of pretrial publicity on potential jurors and with the overruling of his motion for a change of venue.

The pollster question was recently addressed in *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990), wherein we reaffirmed the proposition that the refusal of a trial court to grant a motion for a public opinion poll rests within the court's discretion, and observed that voir dire examination is the better, more probative forum for ascertaining the existence of community and individual prejudice or hostility toward the accused.

Bradley, without meaningful citation to the record, claims that 21 of the 63 persons questioned during the voir dire examination were removed for cause and that 8 of the 63 examined were removed because they had formed an opinion about Bradley's guilt prior to being questioned. Even accepting those claims as true, they fall far short of establishing that the district court abused its discretion in denying Bradley funds for a public opinion poll.

Bradley also contends that as applied by this court, Nebraska's statute concerning venue changes in criminal cases, Neb. Rev. Stat. § 29-1301 (Reissue 1989), conflicts with the due process requirements of the federal Constitution, and the district court thus erred in denying him a change of venue. Bradley urges that the requirement of § 29-1301 that crimes be

prosecuted in the county where the offense was committed unless "a fair and impartial trial *cannot* be had therein" (emphasis supplied), coupled with this court's rulings that the issue is addressed to the trial court's discretion and that an abuse of discretion occurs "where a defendant establishes that local conditions and pretrial publicity make it *impossible* to secure a fair trial" (emphasis supplied), *State v. Boppre, supra* at 936, 453 N.W.2d at 420, conflicts with the standard set forth by the U.S. Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), which states: "[W]here there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." (Emphasis supplied.)

However, notwithstanding that the *Sheppard* community had been saturated with "inherently prejudicial publicity" and "disruptive influences in the courtroom," 384 U.S. at 363, in deciding that Sheppard had been denied a fair trial, the U.S. Supreme Court relied not on the attendant pervasive publicity alone but on the totality of the circumstances, stating: "While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held." *Sheppard, supra* at 384 U.S. at 354-55.

Considering the fact that the *Sheppard* Court specifically noted its decision was not based on the existence of pretrial publicity, it becomes clear that the "reasonable likelihood" language on which Bradley places such heavy reliance is not entitled to the weight he would like to have us give it. In point of fact, a later decision of the U.S. Supreme Court leads to the conclusion that in its view, as we said in *State v. Boppre, supra*, voir dire examination provides the best opportunity to determine whether venue should be changed. In *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), the Court referred to three cases which, in reversing trial court convictions, presumed the existence of prejudice. Of these, only *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963), was decided on the basis that the pretrial publicity

was so pervasive and prejudicial that a presumption of denial of due process was warranted. The other two cases, *Sheppard, supra*, and *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), were decided on the totality of the "carnival atmosphere" present.

Rideau, on the other hand, involved the sound filming and subsequent repeated televised broadcasts of the defendant's "confession" during a custodial encounter with the sheriff. The *Rideau* Court viewed this circumstance as sufficient to mandate a change of venue without an examination of the voir dire process, saying:

> For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

(Emphasis in original.) *Rideau, supra* at 373 U.S. at 726.

The *Murphy* case drew extensive local and national attention because the defendant was a nationally known thief who had been convicted of a murder and a federal securities violation while awaiting trial on burglary-related charges in Dade County, Florida.

> The events of 1968 and 1969 drew extensive press coverage. Each new case against petitioner was considered newsworthy, not only in Dade County but elsewhere as well. The record in this case contains scores of articles reporting on petitioner's trials and tribulations during this period; many purportedly relate statements that petitioner or his attorney made to reporters.

Murphy, supra at 421 U.S. at 796.

Despite such extensive pretrial publicity, the U.S. Supreme Court did not apply *Sheppard*'s "reasonable likelihood" test, as Bradley asserts should be done in this case. Instead, in holding that no change of venue was mandated, the *Murphy* Court examined the voir dire selection process. It reasoned that "[q]ualified jurors need not . . . be totally ignorant of the facts and issues involved," *Murphy, supra* at 421 U.S. at 799-800,

and concluded that "[t]he *voir dire* in this case indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that *could not* be laid aside." (Emphasis supplied.) 421 U.S. at 800.

In adhering to our previous view, we are not unmindful that notwithstanding *Murphy*, some states have given the *Sheppard* language overriding importance and have adopted the method of analysis Bradley espouses. E.g., *Martinez v. Superior Court of Placer County*, 29 Cal. 3d 574, 629 P.2d 502, 174 Cal. Rptr. 701 (1981); *State v. Smith*, 58 Or. App. 458, 648 P.2d 1294 (1982). Indeed, California has gone so far as to change its venue statute by replacing the "cannot" language common to such enactments with the "reasonable likelihood" language found in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Cal. Penal Code § 1033 (West 1985). Other states, however, share our view. E.g., *Brown v. State*, 601 P.2d 221 (Alaska 1979); *People v. McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976).

That ours represents the better reasoned view is further supported by the like application the federal courts make of Fed. R. Crim. P. 21(a), which provides that a change of venue may be had "if the court is satisfied that there exists . . . so great a prejudice against the defendant that the defendant *cannot* obtain a fair and impartial trial at any place fixed by law for holding court in that district." (Emphasis supplied.) E.g., *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. Delay*, 500 F.2d 1360 (8th Cir. 1974). But cf., *United States v. Marcello*, 280 F. Supp. 510 (E.D. La. 1968). It is also significant that the "cannot" language present in the rule at the time *Sheppard* was decided has not been changed.

Since we conclude that Bradley's constitutional argument is without substance, we move to a determination of whether the denial of his motion for change of venue was correct under Nebraska law. The factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated in the area to which venue could be changed, the length of time between the dissemination of the

publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

Not only has Bradley failed to establish any particular difficulty in selecting a fair and impartial jury, he has not shown the existence of pervasive misleading pretrial publicity. Although he submitted numerous newspaper articles, only five of those he presented appeared in the various area papers during the 4-month period prior to the beginning of the jury selection, and these articles were factual in nature. No evidence of the nature or extent of any television or radio broadcasts was submitted. Under these circumstances, it cannot be said the district court abused its discretion by denying Bradley's motion. After all, the law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based upon the evidence presented in court. *State v. Boppre, supra*; *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

6. Jury Selection and Management

In the sixth summarized assignment of error, Bradley attacks the district court's rulings concerning the seating and management of the jury. Specifically, he asserts the district court erred in (a) permitting the State to "death qualify" the jury, (b) refusing to permit venirepersons to be questioned separately, (c) refusing to excuse one venireperson for cause, and (d) refusing to sequester the jury during trial.

(a) Death Qualification

Bradley first proclaims that the State should have been required to show that it intended to seek the death penalty and to list the aggravating circumstances supporting its death penalty request as a prerequisite to "death qualifying" the jury. This contention ignores the fact that the determination of a proper sentence is a judicial, not a prosecutorial, function. Neb. Rev. Stat. §§ 29-2520 et seq. (Reissue 1989). Taken to its

logical end, under Bradley's theory, in any first degree murder case in which the State seeks a death-qualified jury, the appropriate punishment would have to be determined before the guilt or innocence of the accused could be judged.

Bradley was potentially subject to the death penalty. Neb. Rev. Stat. § 28-105 (Reissue 1985) and § 28-303. While it was up to the court to determine the appropriate sentence in the event of a finding of guilt, the State, like Bradley, was entitled to a jury which would be impartial regardless of the potential punishment to be imposed. It is entirely permissible to exclude from jury service venirepersons whose views on capital punishment are such as to prevent or substantially impair their ability to impartially apply the law to the evidence. *State v. Boppre, supra*; *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); Neb. Rev. Stat. § 29-2006(3) (Reissue 1989) (which provides that it is good cause to challenge one called for jury service in a capital case if his or her opinions are such as to prevent "finding the accused guilty"). See, also, *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990).

(b) Questioning of Venirepersons

Bradley also quarrels with the fact that the district court refused to permit him to question each venireperson separately from the others. He claims that, as a result, he was not able to ask the "searching questions" required in the circumstances. However, the record of the voir dire examination is replete with questions regarding pretrial publicity and whether such publicity had caused anyone to form an opinion as to Bradley's guilt or innocence.

Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine a venireperson out of the presence of all other venirepersons. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). See, also, *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. Fiegl*, 184 Neb. 704, 171 N.W.2d 643 (1969). Bradley does not show what would have been different about his voir dire examination had he been able to question each venireperson individually, nor does he demonstrate that a biased jury was in fact selected. Accordingly, he has failed to

establish any prejudice by virtue of the court's ruling in this regard.

(c) Nonremoval of Venireperson

Bradley next challenges the district court's failure to excuse a particular venireperson from jury service for cause. The venireperson in question stated that if the trial were to last 3 weeks, his mind might wander at times, and in that event he would accept the recollection of other jurors for anything he might have failed to hear. He also stated that if the evidence were 90 percent one way but for a technicality, he would tend to ignore the technicality. Bradley claims these responses established that the subject venireperson was unfit for jury service because he could neither listen to the evidence nor apply the court's instructions and thus should have been excused for cause. He argues that the district court's failure to do so forced him to use a peremptory challenge he should not have been obligated to exercise against the subject venireperson.

Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), makes it clear that as long as a state's statutorily mandated number of peremptory challenges is granted, the federal Constitution's requirement of due process of law is met. The effect of *Ross* is to leave to each state the question of whether the wrongful denial of a challenge for cause violates due process because a peremptory challenge must then be used to eliminate that venireperson. In any event, there can be no question as to whether a challenge for cause has been wrongfully denied if the denial was not erroneous.

The law of this state is that the retention or rejection of a venireperson as a juror is a matter of discretion with the trial court. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Rice*, 231 Neb. 202, 435 N.W.2d 889 (1989); *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988); *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987).

In addition to the expressions recited above, the venireperson in question stated that Bradley was "innocent right now" and that he really could not determine how he would react to the evidence until actually confronted with the need to do so. In actuality, the subject venireperson did nothing more than

acknowledge the human inability to be 100 percent attentive during an entire 3-week period and that he could not predict how he would evaluate the evidence until the moment of decision came. Under those circumstances, the district court did not abuse its discretion in refusing to remove the subject venireperson for cause.

(d) Nonsequestration of Jury

In regard to this sixth summarized assignment of error, Bradley lastly contends the district court erred in failing to sequester the jury during the trial. The applicable rule is that whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court. *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976). See, also, *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975); *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970). To warrant reversal, a denial of a motion to sequester the jury before submission must be shown to have prejudiced the defendant. *State v. Ell, supra*; *State v. Kirby, supra*. However, after the cause is finally submitted, unless sequestration is waived by the defendant, jurors must be kept together under the charge of an officer until they agree to a verdict or are discharged. Neb. Rev. Stat. § 29-2022 (Reissue 1989).

Bradley argues only that sequestration would have emphasized to the jurors the importance of impartiality. Such a statement does not, in and of itself, demonstrate that Bradley was prejudiced by the district court's failure to sequester the jury.

7. Endorsement of Witnesses

The seventh summarized assignment of error rests on the premise that the district court erred in permitting the late endorsement of additional State's witnesses and in refusing to grant Bradley a continuance as a result thereof and as a consequence of the State's failure to disclose evidence in compliance with the court's discovery order. Bradley specifically objects to the late endorsement of the victim's father, Robert Glasgow, as a witness for the State.

While the motion to endorse additional witnesses, which included the name of Robert Glasgow, was not filed until the

date on which jury selection began, the record indicates that the State had previously informed Bradley's attorneys that it planned to call Robert Glasgow to testify at trial. Furthermore, such witness' testimony is primarily duplicative of testimony provided by other witnesses and contains nothing which could have in any way surprised Bradley or his attorneys. Nevertheless, in an effort to show that he was somehow prejudiced by Robert Glasgow's testimony, Bradley asserts that the witness should not have been allowed at trial to identify a picture of the victim with his two young children. Suffice it to say that the picture which Robert Glasgow identified could not have been prejudicial in light of the subsequent introduction of evidence that the victim was married and had two young children. Nor did the timing of the endorsement of Robert Glasgow as a State's witness materially affect the proceedings in the district court.

Likewise, the late endorsement of other witnesses, most of whom were not called at trial, had no demonstrated material effect upon Bradley's trial.

8. TRIAL RECORD

Bradley complains of the district court's failure to require the court reporter to record all trial-related proceedings. The foundation for this eighth summarized assignment of error was laid by Bradley's pretrial motion that all proceedings in the district court be reported, including arguments of counsel, statements of the court, and discussions in chambers.

Neb. Ct. R. of Official Ct. Rptrs. 4 (rev. 1989) provides that the reporter shall make a verbatim record of enumerated proceedings and, at the request of any party or the court, of certain other matters, including arguments on motions and objections and the rulings of the court thereon. *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986), makes clear that a trial court has a duty to provide a party with a verbatim trial record which comports to the requirements of the foregoing rule and that such record shall, at a party's request, include any comments the trial judge may have made. Indeed, the failure of a trial judge to keep a proper verbatim record may constitute grounds for judicial discipline, *Matter of Cieminski*,

270 N.W.2d 321 (N.D. 1978), and the failure of a court reporter to fulfill the duties of that office may make the reporter civilly liable to a litigant damaged thereby, *Grant v. Fletcher*, 564 S.W.2d 944 (Mo. App. 1978).

In this case the district court initially stated it would require all proceedings to be recorded in accordance with Bradley's request. However, it later refused to allow the reporting of bench conferences, stating that objections should be made in open court so that they could be reported.

Bradley asserts that had the district court allowed the record he requested, he, on preparing for appellate review, might have been alerted to the existence of errors which occurred at bench conferences or during other off-the-record discussions. However, after the district court's second ruling, it was incumbent upon Bradley to make all objections in open court and to object to any off-the-record discussions.

While it is true that a party is entitled to have reported any comments made by a trial judge, *Kennedy v. Kennedy, supra*, it is, in the final analysis, in the absence of any prejudicial comment's being made in the presence of the jury, the correctness and effect of any questioned ruling which controls the disposition of an appeal. See *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983) (stating that a right result reached for the wrong reason will be affirmed). Here, there is no claim the trial judge made any prejudicial comment in the presence of the jury, and the record is otherwise adequate to address the effect of the rulings Bradley questions. Thus, he has shown no prejudice by the district court's failure to provide him with the record he requested.

In the absence of a showing of prejudice, an omission from a bill of exceptions does not vitiate a defendant's conviction. See *Phipps v. State*, 4 Tenn. Crim. App. 511, 474 S.W.2d 154 (1971).

9. Admission of Evidence

In connection with the ninth summarized assignment of error, Bradley urges that the district court (a) erred in failing to suppress certain evidence, (b) erred in receiving a certain

weapon in evidence, and (c) erred in permitting him to be cross-examined in certain respects, and (d) that if no one erroneous ruling prejudiced him, the combined effect of all such rulings did.

(a) Nonsuppression

The background for the nonsuppression claim rests in the fact that while in the custody of the Nebraska Department of Correctional Services, awaiting trial as described in part III(3) above, Bradley resided at a community correctional center and worked at one of the department's divisions, the Cornhusker State Industries. While at the Cornhusker State Industries facility and while at the center, Bradley had ready access to a telephone and some freedom of movement, but he was not allowed to leave either of the premises without permission.

While Bradley was working at the Cornhusker State Industries facility on April 27, 1988, he was questioned by Lincoln Police Detective Elgin Kuhlman and by Nebraska State Patrol Investigator Jack Wyant. Bradley was again questioned by Wyant and Kuhlman on May 17, 1988. Neither Wyant nor Kuhlman issued a *Miranda* warning before either of those interviews.

On June 26, 1988, Stacy telephoned Bradley at the center and on June 27 telephoned him at Cornhusker State Industries. While these telephone conversations between Bradley and Stacy were recorded by police, it was Stacy's idea to telephone Bradley. Stacy initiated the calls, as Bradley had previously requested that Stacy call him, and Bradley had given Stacy the telephone numbers Stacy used.

Before trial, Bradley filed a motion to suppress any information which the authorities had obtained as a result of their April 27 and May 17, 1988, meetings with Bradley on the ground that Bradley was not advised of his rights under *Miranda* prior to being questioned. Bradley also sought to suppress the tape-recorded conversations with Stacy. After initially overruling the motion, the district court reversed itself in part on the second day of jury selection and suppressed information stemming from the authorities' April 27 and May 17 questioning of Bradley.

Bradley argues that the district court erred in failing to suppress the taped telephone conversations between him and Stacy. In presenting this argument Bradley contends that the taped telephone conversations should have been suppressed because he was in custody when Stacy called him and because Stacy was acting as an agent of the police when he called. Bradley relies upon *Mathis v. United States*, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968), and *State v. Fuller*, 204 Neb. 196, 281 N.W.2d 749 (1979), in presenting his argument. However, as stated in *Leviston v. Black*, 843 F.2d 302, 304 (8th Cir. 1988), *cert. denied* 488 U.S. 865, 109 S. Ct. 168, 102 L. Ed. 2d 138:

> "*Miranda* warnings are required for official interrogations only where 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *United States v. Helmel*, 769 F.2d 1306, 1320 (8th Cir.1985) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966)). While *Miranda* may apply to one who is in custody for an offense unrelated to the interrogation, *see Mathis v. United States*, 391 U.S. 1, 4-5, 88 S.Ct. 1503, 1504-05, 20 L.Ed.2d 381 (1968), incarceration does not *ipso facto* render an interrogation custodial, *Cervantes v. Walker*, 589 F.2d 424, 427 (9th Cir.1978), *cited in Flittie v. Solem*, 775 F.2d 933, 944 (8th Cir.1985) (en banc). In all cases, we must consider the totality of the circumstances, including the individual's "freedom to leave the scene and the purpose, place and length" of the questioning. *Helmel*, 769 F.2d at 1320. . . . When an individual is incarcerated for an unrelated offense, this requires some restriction on his freedom of action in connection with the interrogation itself. *See Cervantes*, 589 F.2d at 427-28.

On June 26, 1988, Stacy telephoned Bradley at the center where Bradley was held in custody. On June 27, Stacy telephoned Bradley where he worked under the supervision of the Department of Correctional Services. It was common for Bradley to engage in telephone conversations at these locations. Under the circumstances, Bradley could not have felt compelled to speak with Stacy on the telephone, and he could

have discontinued the conversation at any time. Thus, based upon *Leviston*, the authorities were not required to "mirandize" Bradley in order to render those taped telephone conversations admissible.

Furthermore, the circumstances surrounding the taped telephone conversations fall squarely within the rule recently announced in *Illinois v. Perkins*, ____ U.S. ____, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990), a case in which the U.S. Supreme Court, reasoning that the situation was not inherently coercive, held that an undercover police officer posing as a fellow inmate was not required to provide *Miranda* warnings to an incarcerated suspect before asking questions intended to elicit an incriminating response. Thus, the tapes of the June 26 and 27, 1988, telephone conversations between Bradley and Stacy were properly admitted by the district court.

Bradley also argues that Stacy's in-court testimony and the tapes of the telephone conversations between him and Stacy were the fruits of the improper (for failure to give *Miranda* warnings) April 27, 1988, interrogation, asserting that the authorities would not have interviewed Stacy in the absence of information they received while interrogating Bradley on April 27. Bradley thus contends that the district court erred in failing to suppress that evidence and in admitting that evidence over his objections at trial.

Kuhlman testified at trial that Bradley had given Stacy's name to him and to Wyant. At the suppression hearing Kuhlman had also testified that he had done no research concerning Bradley's background prior to questioning him. Bradley asserts that this testimony shows that the authorities questioned Stacy as the direct result of their improper interrogation of himself, that Stacy's testimony and the taped telephone conversations between him and Stacy thereby represented "fruit" of the improper interrogation, and that such evidence therefore should have been suppressed.

At trial, however, after reviewing State Patrol reports, Kuhlman recalled that prior to the time he and Wyant questioned Bradley, authorities had learned that Stacy was Bradley's partner in a gun dealership and that Bradley had been attempting to contact Stacy. Consequently, the district court

ruled that authorities would have inevitably contacted Stacy and, therefore, that neither Stacy's testimony nor the taped telephone conversations were "fruits" of the improper interrogation of Bradley. See *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

While the "inevitable discovery" doctrine is dispositive of this issue, Bradley further argues that the district court abused its discretion by not allowing a continuance or other opportunity for him to investigate the accuracy of Kuhlman's "changed" testimony.

There is no abuse of discretion by the district court in denying a request for a continuance unless it clearly appears that the movant suffered prejudice as a result of that denial. *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990). Here, Bradley provides us with no indication, either by testimony at his motion for new trial or otherwise, of what would have been revealed by further investigation of Kuhlman's trial testimony, and does not show that he was in any way prejudiced by the district court's refusal to grant him a continuance.

(b) Receipt of Weapon

Bradley also argues the State failed to lay sufficient foundation for admittance in evidence of the gun as the murder weapon. But as noted in part II, Stacy identified the gun at trial and testified that he was told by Bradley that Bradley had used a like Smith & Wesson revolver to kill the victim and that, as requested by Bradley, Stacy retrieved the subject gun from a house where Bradley had previously lived and gave it to Bradley's brother.

Bradley asserts that questions concerning the chain of custody of the gun from the time Stacy retrieved it until trial, along with the State's ballistics expert's inability to positively identify the gun as the murder weapon, should have precluded the introduction of the gun as evidence at trial. However, given Stacy's testimony, Bradley's assertion goes merely to the weight to be given to the evidence presented rather than to the admissibility of that evidence.

(c) Cross-examination

Bradley's complaints in regard to his cross-examination

relate to two areas, (i) information stemming from the suppressed April 27, 1988, interview and (ii) certain letters he had written.

(i) Suppressed Interview

When the State cross-examined Bradley after he had testified on his own behalf, the prosecutor asked him whether he had been to the victim's apartment between midnight and 3 a.m. on one occasion in July 1987. It does appear that information received directly from the suppressed April 27, 1988, interrogation of Bradley was the basis of the question, for at an earlier hearing on the motion to suppress that conversation, Kuhlman testified that it was during that interview that Bradley informed him that he had gone to the victim's apartment between midnight and 3 a.m. on one occasion.

The district court found that reference to the April 27, 1988, conversation was allowable on cross-examination as a result of responses Bradley made on direct examination. However, in reviewing the testimony which Bradley provided on direct examination, we find nothing to support such a ruling, nor does the State direct us to any part of the record which it claims supports the ruling.

It is true that an error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990); *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). However, it is equally true, as noted previously in part III(2), that the improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other competent evidence to support the conviction.

Bradley asserts that by improperly permitting the State to cross-examine him concerning the early morning visit to the victim's apartment, the district court enabled the State to argue that Bradley was "stalking" the victim and to thereby establish that the murder was premeditated. However, the effect of the court's apparent error could not have had as profound an effect

as Bradley asserts, for Stacy testified that Bradley had told him that he, Bradley, had "planned everything," that "everything went just like he planned," and that he killed the victim because the victim was "harassing" his estranged wife. Stacy's testimony provided more direct evidence of Bradley's premeditation than did the testimony that Bradley had previously visited the victim's apartment. Thus, the evidence to which Bradley objects was cumulative and harmless beyond a reasonable doubt.

(ii) Letters

Bradley next alleges that the district court erred in allowing the State to attempt to impeach him by referring to and questioning him regarding certain letters he had written.

He first asserts that it was improper for the State to refer to these letters because the letters were not introduced into evidence at trial. Contrary to Bradley's argument, the letters to which the prosecutor referred did not have to be introduced into evidence, for Bradley admitted to having written them and testified as to their contents. See *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985).

Bradley also argues that it was improper for the prosecutor to ask him whether the letters were written in an effort to create an alibi which would clear him of the victim's murder. However, in its case in chief the State presented evidence that Bradley had attempted to fabricate an alibi which would prevent his conviction. On direct examination by his attorneys, Bradley provided testimony to rebut the evidence that he had attempted to fabricate an alibi. Consequently, the cross-examination in question constituted proper and relevant impeachment.

(d) Combined Effect of Rulings

Bradley also argues that even if no one of the allegedly erroneous rulings discussed in this opinion entitles him to a reversal of his conviction, the combined effect of all of them certainly does. The difficulty is that just as he fails to document the assertedly prejudicial effect of any one ruling, he fails to demonstrate the allegedly prejudicial effect of any designated combination of rulings.

10. SUFFICIENCY OF THE EVIDENCE

Bradley avers his convictions are not supported by the evidence and that the district court thus erred in failing to grant his motions for acquittal made at the close of the State's case in chief and at the close of all the evidence.

The controlling rules are that in reviewing a criminal case for alleged insufficiency of the evidence, the State is entitled to have all relevant evidence favorable to the State treated as true, as well as to have every beneficial inference reasonably deducible from that evidence. *State v. Williamson*, 235 Neb. 960, 458 N.W.2d 236 (1990). Moreover, it is not the province of an appellate 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, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Cortes, ante* p. 257, 460 N.W.2d 659 (1990); *State v. Grantzinger*, 235 Neb. 974, 458 N.W.2d 461 (1990); *State v. Broussard*, 235 Neb. 809, 457 N.W.2d 457 (1990). On a claim of insufficiency of the 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. Cortes, supra*; *State v. Grantzinger, supra*; *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). In a criminal case a trial court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989).

One commits first degree murder if he or she, among other things, "purposely and with deliberate and premeditated malice" kills another person. § 28-303(1). Anyone who, among other things, uses a firearm "to commit any felony which may be prosecuted in a court of this state . . . commits the offense of

using firearms to commit a felony." § 28-1205(1).

By the time the State had completed its case in chief, it had adduced sufficient evidence to support a finding that Bradley did deliberately and with premeditated malice purposely shoot and kill the victim in Saline County in order to relieve the victim's estranged wife of the stresses of her pending dissolution action. The State had thus established a prima facie case of first degree murder against Bradley. Inasmuch as first degree murder is a felony prosecutable in the courts of this state, § 28-303, the State had also established a prima facie case that Bradley had used a firearm to commit that felony. It necessarily follows, then, that the district court did not err in overruling the motions for acquittal.

11. Conduct of Prosecutor

Finally, in this 11th and last summarized assignment of error, Bradley argues that if all else fails, he is entitled to a reversal of his convictions because of the prosecutor's misconduct. Bradley first contends that he was denied a fair trial because the State did not comply with the district court's discovery order in that it "was slow to provide some investigative reports and did not provide some others," "endorsed several witnesses at the last minute," and failed to disclose prior to trial the photograph of the victim with his children, which photograph was identified by Robert Glasgow. Brief for appellant at 48.

We have analyzed the late endorsement of witnesses and Robert Glasgow's identification of the photograph of the victim and his children in part III(7) above and need not repeat that discussion here. Regarding reports which allegedly were not produced or were not produced in a timely manner, Bradley provides no indication of the nature or contents of these missing or late reports, and he thereby fails to show how he was prejudiced by the prosecutor's alleged misconduct.

Bradley also alleges that the prosecutor improperly took the "deposition" of the victim's wife without giving notice to defense counsel. Contrary to Bradley's assertion, the record shows that the State merely took a sworn statement from her. The State had no duty to notify Bradley that it planned to take her statement, and did not act improperly in doing so.

Bradley further contends that the State's attorney "argued his case" and made improper remarks during voir dire and during opening arguments. While Bradley generally claims that such alleged misconduct denied him his right to due process and a fair trial, he does not demonstrate that he was in fact prejudiced by the alleged misconduct.

In *State v. Wounded Arrow*, 207 Neb. 544, 548, 300 N.W.2d 19, 22 (1980), this court stated: "Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a 'substantial miscarriage of justice has actually occurred.' " See, also, *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985). Furthermore, remarks made by the prosecutor during final argument which do not mislead or unduly influence the jury do not rise to the level sufficient to require granting a mistrial. *State v. Boppre, supra*. Similar standards are applicable where one seeks a new trial by raising on appeal the issue of prosecutorial misconduct. As noted previously in part III(2), if there is some incorrect conduct in a jury trial which, on review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the defendant, the error is harmless.

Although Bradley cites us to a number of instances where he believes the prosecutor's statements during voir dire were improper, our review of the record reveals that these statements could not have had a material influence upon the jury. Nor could the jury have been materially influenced by allegedly improper statements made by the State's attorney during opening arguments.

Bradley next asserts that the prosecutor improperly referred to letters not introduced into evidence which the State had used to impeach him, that the prosecutor made representations of fact which were not consistent with the evidence presented at trial, and that the prosecutor expressed his personal belief that Bradley was guilty. The matter of the letters was addressed earlier in part III(9)(c)(ii) and need not be discussed again. As to the purported misrepresentations of fact, one relates to the testimony of the victim's wife, and the other relates to the testimony of the pathologist.

With respect to the victim's wife, the prosecutor in his

opening statement represented that she once claimed to never having been alone with Bradley. Bradley argues that having taken her sworn statement, the prosecutor had to know the fact was otherwise, and the comment was made only to disparage the victim's wife, whose testimony was generally favorable to Bradley. The difficulty is that Bradley fails to show that the victim's wife had never claimed she had not been alone with him. If she once made such a claim, the prosecutor could not know what version she might recite at trial, no matter what she said during her sworn statement. As we have said, one is allowed considerable latitude in making an opening statement, and the mere fact that one fails to prove all that one expected does not mean a statement was intentionally false. *Yechout v. Tesnohlidek*, 97 Neb. 387, 150 N.W. 199 (1914). See, also, *Russell v. State*, 62 Neb. 512, 87 N.W. 344 (1901).

Bradley also claims that in the prosecutor's closing argument, he misrepresented the pathologist's testimony. According to Bradley, the cause of death was a critical question in this case because if the victim was "struck in the head and killed outside of Saline County and his body deposited there," the State would have failed to prove venue. Brief for appellant at 54-55. The prosecutor stated the pathologist testified at trial that blunt trauma could have caused death only if the trauma had produced brain damage. The prosecutor then claimed there was no evidence of any such damage. A review of the pathologist's testimony reveals that he found a facial fracture in addition to bullet wounds, and testified that the fracture and wounds could have occurred as much as 12 hours apart. He further testified that if the facial fracture caused the death, it would likely not be from loss of blood, as Bradley suggested, but from injury to the brain. Thus, the prosecutor did not misstate the pathologist's testimony. Since, as Bradley himself concedes, there was no brain as such to examine, there could have been no physical evidence of brain injury. Neither was there any testimony based on reasonable medical certainty, or otherwise, that the facial fracture did in fact cause any brain injury.

Nor is Bradley any more accurate in characterizing the prosecutor's comments as to the issue of guilt during his

opening statement. The prosecutor did not state he himself believed Bradley to be guilty, as Bradley claims; rather, the prosecutor said the evidence would show that Bradley had killed the victim. See *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980).

IV. DECISION

Since, as stated in part I, none of the summarized assignments of error argued in Bradley's briefs have merit, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE ROBERT GLOVER, APPELLANT.

461 N.W.2d 410

Filed October 19, 1990. No. 89-847.

1. **Pleas.** In order for a plea of guilty to be entered freely, voluntarily, intelligently, and understandingly, the district court must have informed the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination; and the court must have examined the defendant to determine that he or she understands the foregoing. In addition, the record must establish that there is a factual basis for the plea and that the defendant knew the range of the penalties for the crime with which he or she is charged.
2. **Constitutional Law.** A defendant who has been once informed of his constitutional rights need not be reinformed of them on each subsequent court appearance.
3. **Evidence: Records: Appeal and Error.** An appellant who claims the evidence is insufficient to support a finding must present a bill of exceptions which contains all the evidence relevant to the questioned finding.
4. **Intent: Circumstantial Evidence.** Intent is a question of fact which may be inferred from the circumstances surrounding the transaction.
5. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

Patrick J. Birmingham for appellant.

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

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

CAPORALE, J.

Pursuant to a plea bargain, defendant, George Robert Glover, pled guilty to two counts of obtaining a controlled substance, Dilaudid, in violation of Neb. Rev. Stat. § 28-418(1)(c) (Reissue 1989), and to two counts of attempted delivery of that substance, in violation of Neb. Rev. Stat. §§ 28-201 and 28-416(1)(a) (Reissue 1989). He was thereafter so adjudged and sentenced to imprisonment for a period of from 20 months to 5 years on each of the obtaining convictions and to imprisonment for a period of not less than 3 nor more than 5 years on each of the attempted delivery convictions, all sentences to be served concurrently. He appeals and assigns as error the district court's (1) finding that the pleas were entered freely, voluntarily, intelligently, and understandingly and (2) imposition of sentences he claims are excessive. We affirm.

In connection with the first assignment of error, Glover first correctly points out that in order for a plea of guilty to be entered freely, voluntarily, intelligently, and understandingly, the district court must have informed the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination; and the court must have examined the defendant to determine that he or she understands the foregoing. In addition, the record must establish that there is a factual basis for the plea and that the defendant knew the range of the penalties for the crime with which he or she is charged. *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

Glover was originally charged with the two obtaining offenses described earlier and with two delivery offenses. The amended information therefore, by charging attempted

delivery rather than delivery of the Dilaudid, reduced the potential punishment. § 28-416(2). While the bill of exceptions covering the arraignment on the amended information reflects that the district court informed Glover of the penalties attendant to each of the four charges and of certain of his constitutional rights, it does not reflect that prior to the acceptance of his pleas, Glover was informed of his right to confront the witnesses against him or of the privilege against self-incrimination. However, when asked by the district court whether he had understood and remembered "the different constitutional rights that [the district court had explained] at the previous hearing," Glover responded, "Yes, I do." We have ruled that a defendant who has been once informed of his constitutional rights need not be reinformed of them on each subsequent court appearance. *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987). Although Glover claims that this rule does not apply when an information has been amended to charge a different crime, he cites no authority for his claim, and we find no logical basis for creating such an exception.

Therefore, since Glover has not presented us with the bill of exceptions of the hearing to which the district court referred in the foregoing exchange, this aspect of Glover's complaints is resolved adversely to him by the rule that an appellant who claims the evidence is insufficient to support a finding must present a bill of exceptions which contains all the evidence relevant to the questioned finding. Neb. Ct. R. of Prac. 5A(2) (rev. 1989). See *Ward v. Ward*, 220 Neb. 799, 373 N.W.2d 389 (1985). See, also, *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986).

In the remaining portion of his first assignment of error, Glover asserts that the record fails to show the existence of adequate factual bases for his pleas.

Section 28-418(1)(c) prohibits the intentional obtaining of Dilaudid, a controlled substance under the provisions of Neb. Rev. Stat. § 28-405 [Schedule II] (Reissue 1989), by, among other things, "misrepresentation, fraud, forgery, deception, or subterfuge." The record establishes that Glover, on the two occasions in question, obtained the substance as the result of providing physicians a false address, untruthfully claiming that

he was living with his sister. Since intent is a question of fact which may be inferred from the circumstances surrounding the transaction, *State v. Schwab*, 235 Neb. 972, 458 N.W.2d 459 (1990), adequate factual bases existed for accepting the pleas on the obtaining charges.

Section 28-416(1)(a) makes it unlawful for one to intentionally deliver a controlled substance, and § 28-201(b) makes one guilty of an attempt to commit a crime if one "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." The record establishes that in one instance Glover actually shared with another the Dilaudid he obtained and that in the second instance he intended to share it with that other, as it was the other who was paying for the trip to purchase the Dilaudid. Thus, again, adequate factual bases existed for accepting the attempted delivery pleas.

That brings us to the remaining assignment of error, which concerns itself with the sentences. The applicable rule is that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Garza, ante* p. 215, 459 N.W.2d 747 (1990). The obtaining convictions are Class IV felonies, § 28-418(2), punishable by imprisonment of from 0 to 5 years. Neb. Rev. Stat. § 28-105 (Reissue 1985). The attempted delivery convictions are Class III felonies, §§ 28-201(4)(b) and 28-416(2)(a), punishable by imprisonment of from 1 to 20 years. § 28-105. Thus, all the sentences imposed are within the applicable statutory limits.

The only remaining question is whether the sentences constituted an abuse of discretion. The gist of Glover's argument in this regard is that he should be treated leniently because he is addicted to Dilaudid. The district court considered that factor but properly observed that the dependency was a condition Glover himself fostered. The district court concluded probation would be inappropriate, as Glover had been placed on probation at least three previous times, and determined that any lesser sentence would depreciate the seriousness of the offenses and promote disrespect for the law. Under the circumstances, the sentences imposed do not

constitute an abuse of discretion.

The record failing to sustain either of the assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

GEORGE B. SCHEPERS, APPELLANT, V. JOYCE SCHEPERS, NOW KNOWN AS JOYCE SHERMAN, APPELLEE.

461 N.W.2d 413

Filed October 19, 1990. No. 89-1152.

Modification of Decree: Final Orders: Appeal and Error. When an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal.

Appeal from the District Court for Merrick County: JOHN M. BROWER, Judge. Appeal dismissed.

Philip M. Martin, Jr., of Paine, Huston, Higgins & Martin, for appellant.

No appearance for appellee.

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

FAHRNBRUCH, J.

George B. Schepers appeals an order of the district court for Merrick County changing the custody of the parties' minor child from him to the child's mother. We dismiss the appeal because it was filed prematurely.

George Schepers and Joyce Schepers, now known as Joyce Sherman, were married in Hall County, Nebraska, in January 1982. To this union, Jennifer Lee Schepers was born on September 20, 1982. On October 23, 1985, George filed a petition for dissolution of the marriage of the parties and

sought custody of Jennifer. After trial on June 12, 1986, the district court for Merrick County entered a decree dissolving the parties' marriage and awarding the permanent custody of Jennifer to George. Joyce was granted liberal visitation rights with Jennifer.

On July 18, 1989, Joyce filed an application in the district court for Merrick County to modify the dissolution decree in two respects. First, Joyce sought to have Jennifer's custody transferred from George to her. Second, Joyce asked the court to require George to pay child support for Jennifer in a reasonable amount.

A hearing on Joyce's application for modification was held on August 7, 1989. On August 11, 1989, the court entered an order changing Jennifer's custody from George to Joyce. At the August 7 hearing, no evidence was adduced on Joyce's request for child support. The court, in its August 11 order, scheduled a hearing for September 18 to receive evidence concerning the child support issue. On September 7, George filed a notice of appeal in regard to the trial court's August 11 order. We find that George's appeal of the August 11 order was premature. When an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal. *Huffman v. Huffman, ante* p. 101, 459 N.W.2d 215 (1990).

Joyce's application to modify the marriage dissolution decree raised two issues, child custody and child support. The trial court determined the issue of child custody and set a later hearing date to decide the amount of child support. The order changing child custody was not a final order for purposes of an appeal. This court accordingly lacks jurisdiction to review the district court's action in changing the custody of Jennifer.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. LAVELL FLY, APPELLANT.

461 N.W.2d 421

Filed October 19, 1990. No. 89-1293.

1. **Convictions: Appeal and Error.** When deciding whether a criminal conviction is supported by sufficient evidence, 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, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Criminal Law: Verdicts: Appeal and Error.** After a fact finder has considered all of the evidence and returned a verdict or finding of guilty, that verdict or finding may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt.
3. **Police Officers and Sheriffs: Words and Phrases.** For purposes of Neb. Rev. Stat. § 28-931 (Reissue 1989), a police officer is a peace officer.

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

Dean S. Forney, Box Butte County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Delores Coe-Barbee for appellee.

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

CAPORALE, J.

Pursuant to verdict, defendant-appellant, Lavell Fly, was adjudged guilty of third degree assault on an officer, in violation of Neb. Rev. Stat. § 28-931 (Reissue 1989), and thereafter sentenced to imprisonment for a period of not less than 20 months nor more than 5 years. Fly claims the trial court erred in (1) finding there was sufficient evidence to support the verdict and (2) imposing an excessive sentence. We affirm.

At approximately 4 p.m. on April 1, 1989, Officer Joseph Digmann of the Alliance Police Department was dispatched to a business establishment in Alliance, Box Butte County, Nebraska, to interview Fly with reference to a disturbance. The two men met at the front door of the establishment.

Digmann testified that Fly was upset and said his brother had been assaulted and hurt. Fly then got into the police vehicle to

show the officer where his brother was. As they were driving away from the establishment, they met an "older brown Plymouth" automobile. Fly said his brother was in that automobile and told the officer to stop the Plymouth. Fly next jumped out of the police vehicle, which had slowed down, and ran after the Plymouth, the driver of which pulled into the parking lot across the street from the establishment at which Fly and Digmann had met. Digmann followed Fly in his vehicle and also drove into the parking lot.

Digmann testified that he was then met at the door of his vehicle by Fly and four other men. Digmann exited his vehicle and asked Fly who had been hurt and what was going on.

By Digmann's account, the men then formed a half circle around him and forced him to back up against his vehicle. Fly stood directly in front of Digmann, and the group used loud, profane, and abusive language toward the officer. Digmann stated that he tried to settle down the group but that Fly kept pointing his finger within about 4 inches of Digmann's face. Digmann told Fly to settle down, back up, and take his hand out of the officer's face, but Fly instead moved his hand closer and continued to yell profanities at him. Digmann then took hold of Fly's hand, lowered it, and told Fly he was under arrest.

According to Digmann, Fly thereupon tried to struggle and get away, but Digmann kept hold of him. Digmann testified that Fly then struck him on the right cheek, below the eye, with his left fist, knocking off Digmann's glasses. Digmann kept hold of Fly's right hand throughout the struggle, and Fly hit the officer twice more, on the forehead and on the jaw. The two men then wrestled and fell to the ground, whereupon Digmann's gun fell out of its holster onto the ground. Digmann let go of Fly to retrieve the gun while both men were on the ground, and Fly got up and left the scene.

Digmann received a black eye and had pain as a result of the incident but did not receive medical attention or miss any work.

The State also produced the testimony of four other witnesses. While the individual accounts of these witnesses varied somewhat, all witnessed an altercation between a man and a police officer in the subject parking lot on April 1, 1989. None of these witnesses were close enough to identify Fly as the

person involved in the altercation with the police officer. All admitted that their respective views of the incident were blocked at times or that they were not watching the entire time. All heard either loud voices or profane language from the scene of the altercation, and some heard both.

Fly's account of the incident was markedly different from Digmann's. Fly admitted calling the police department, claiming that he was being chased. He also admitted getting into the police vehicle with Digmann and jumping out of it to chase an oncoming automobile that he recognized, which automobile then pulled into the subject lot. Fly also admitted that several people got out of this automobile and approached the police vehicle.

However, by Fly's version, Digmann started talking hysterically to him and the others. According to Fly, Digmann touched Fly on his chest violently with his index finger, forcing Fly to back up. Digmann then grabbed Fly's jacket, pulled it over his head, and started punching him. Fly asserted that he struggled and tried to get away. He panicked during his struggling, Digmann's gun fell from its holster, and both men fell to the ground due to Digmann's pulling on him. Fly speculated that Digmann must have hit his own head during the altercation. Fly confessed that he left the scene when Digmann let go of him in order to retrieve the gun.

Fly specifically denied striking Digmann with his left hand, citing an injury he suffered to that hand earlier in the day as proof that he could not have done so. He also claimed to have told Digmann of this injury before getting in the police vehicle. Digmann specifically denied this claim, and Fly admitted he did not have his hand medically treated.

Fly's stepbrother or half brother, Leo Boerschig, testified that Digmann initiated the scuffle by poking Fly in the chest. According to Boerschig, Digmann then grabbed Fly's jacket and, in the ensuing scuffle, the two men's heads collided. Boerschig did not see Fly hit Digmann.

Section 28-931 reads in pertinent part: "A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer . . . while such officer . . . is engaged in the

performance of his or her official duties."

When deciding whether a criminal conviction is supported by sufficient evidence,

> it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. [Citation omitted.] "[A]fter a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt." *State v. Wilkening*, 222 Neb. 107, 110, 382 N.W.2d 340, 342 (1986).

State v. Broussard, 235 Neb. 809, 813, 457 N.W.2d 457, 460-61 (1990). Accord, *State v. Bradley, ante* p. 371, 461 N.W.2d 524 (1990); *State v. Sullivan, ante* p. 344, 461 N.W.2d 84 (1990).

The evidence was such that the jury could reasonably conclude that Fly intentionally struck Digmann in the face three times and that these blows left Digmann with a black eye, other marks, and pain. The evidence also shows that Digmann was in uniform, performing his duties as a police officer at the time of the altercation. For purposes of § 28-931, "[a] police officer is a peace officer." *State v. Washington*, 232 Neb. 838, 839, 442 N.W.2d 395, 396 (1989). The verdict is therefore supported by the evidence. See, *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990); *State v. Washington, supra.*

Fly's entire excessive sentence argument is as follows: "Reason and logic demand that, after a fair reading of the Bill of Exceptions and the presentence report, this court hold that the sentence was excessive." Brief for appellant at 3. The only answer such an argument warrants is that no abuse of discretion having been shown and the sentence being within the statutory limits, it is not excessive. *State v. Glover, ante* p. 402, 461 N.W.2d 410 (1990); *State v. Broussard, supra;* § 28-931(2); Neb. Rev. Stat. § 28-105 (Reissue 1985).

There being no merit to either of Fly's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

ROBERT LEE ROSENBAUM, APPELLANT, V. JUDITH DERENNE ROSENBAUM, APPELLEE.

461 N.W.2d 414

Filed October 19, 1990. No. 89-1325.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Clay B. Statmore for appellant.

Debra K. Lyford for appellee.

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

PER CURIAM.

In an appeal from an order modifying a decree of dissolution, the father alleges that the district court abused its discretion. He argues that the district court erred in finding a material change of circumstances with respect to child custody, that the court erred in finding that it is in the best interests of the child to be in the custody of the mother, and that the court erred in holding that its "best interests" finding is a material change in circumstances.

> "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, ante p. 101, 104, 459 N.W.2d 215, 219 (1990), quoting *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

From our review de novo of the record in these proceedings, we find no abuse of discretion by the district court. We affirm.

AFFIRMED.

IN RE INTEREST OF D.S. AND T.S., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.S., APPELLANT.

461 N.W.2d 415

Filed October 19, 1990. No. 89-1379.

1. **Parental Rights: Rules of Evidence: Due Process.** While the Nebraska Evidence Rules do not apply in parental rights termination cases, due process requires that fundamentally fair procedures be employed.
2. **Trial: Evidence: Expert Witnesses.** Psychological evidence must be based on reasonable psychological certainty, and psychiatric evidence must be based on reasonable psychiatric certainty.
3. **Parental Rights: Due Process: Hearsay: Witnesses.** Hearsay evidence is not admissible in proceedings to terminate parental rights because the admission of such evidence would violate the parent's due process right to cross-examine adverse witnesses.
4. **Parental Rights: Trial: Evidence: Appeal and Error.** The improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made.
5. _____: _____: _____: _____. As long as an appellant properly objects at trial, the Supreme Court, in parental rights termination cases, will not consider improperly admitted evidence in its de novo review of the record.
6. **Parental Rights: Attorney and Client: Guardians Ad Litem.** While Canon 7 of the Code of Professional Responsibility requires a parent's attorney to zealously represent the wishes of the parent in a proceeding to terminate parental rights, a guardian ad litem is to determine the best interests of the parent without reference to the parent's wishes.
7. **Parental Rights: Guardians Ad Litem.** A guardian ad litem appointed for a parent pursuant to Neb. Rev. Stat. § 43-292(5) (Reissue 1988) is entitled to participate fully in the proceeding to terminate parental rights.
8. **Parental Rights: Appeal and Error.** In a proceeding to terminate parental rights, it is the obligation of the Supreme Court to try the factual questions de novo on the record, and it is thus required to reach a conclusion independent of the findings of the trial court; however, where the evidence is in conflict, it 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.
9. **Parental Rights: Proof.** An order terminating parental rights must be based on clear and convincing evidence.

Appeal from the County Court for Platte County: GERALD E. ROUSE, Judge. Affirmed.

Gerald M. Stilmock, guardian ad litem for mother, of Tessendorf, Milbourn, Fehringer, Stilmock & Peetz, P.C., and James C. Stecker, of Robak & Stecker, for appellant.

Stan A. Emerson, guardian ad litem for children, of Luckey, Sipple, Hansen, Emerson & Schumacher, and William H. Kurtenbach, Platte County Attorney, for appellee.

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

CAPORALE, J.

Finding that D.S. was unable to discharge her parental responsibilities by reason of her mental condition and by virtue of her failure to comply with ordered plans of rehabilitation, the county court, sitting as a juvenile court, terminated her parental rights in and to her minor son, T.S., and minor daughter, D.S., finding such action to be in the best interests of each of the children. The father's parental rights in and to the children were also terminated, but he has not appealed. The mother, however, assigns 11 errors to the court below, which, in summary, claim that it erred in (1) admitting certain evidence, (2) limiting the participation of her guardian ad litem, and (3) finding the evidence sufficient to support its conclusions. We affirm.

In connection with the first summarized assignment of error, the mother argues that the court below admitted into evidence certain psychological and psychiatric opinions without proper and sufficient foundation and further received in evidence several hearsay exhibits.

While the Nebraska Evidence Rules do not apply in parental rights termination cases, due process requires that fundamentally fair procedures be employed. *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989). Therefore, this court requires that psychological evidence be based on reasonable psychological certainty and that psychiatric evidence be based on reasonable psychiatric certainty. See *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988). Hearsay evidence is not admissible in such proceedings because the admission of such evidence would violate the parent's due process right to cross-examine adverse witnesses. *In re Interest of P.D., supra.*

The improper admission of evidence by the trial court in a parental rights termination proceeding does not, however, in

and of itself, constitute reversible error, for, as long as the appellant properly objected at trial, this court will not consider any such evidence in its de novo review of the record. *In re Interest of P.D., supra*; *In re Interest of D.L.S., supra*.

The second summarized assignment of error arises from the restrictions the court below placed on the guardian ad litem's participation in the case. The record reflects that the guardian was not allowed to raise objections directly but, instead, had to pose them through the mother's attorney. Nor was the guardian permitted to ask questions at the deposition of a psychologist. In addition, he was limited in his questioning at trial.

It is clear that an attorney acting as an advocate fulfills a different role than does one acting as a guardian ad litem. While Canon 7 of the Code of Professional Responsibility requires a parent's attorney to zealously represent the wishes of the parent, a guardian ad litem is to determine the best interests of the parent without reference to the parent's wishes. *In re Interest of M.M., C.M., and D.M.*, 230 Neb. 388, 431 N.W.2d 611 (1988). Thus, a guardian ad litem might well seek the admission or exclusion of different evidence than would the advocate for a parent.

This court recently held that a guardian ad litem appointed to represent a juvenile affected in a Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) hearing is entitled to participate fully in adjudication and disposition hearings. *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990). Accord *In re Interest of R.W., post* p. 420, 461 N.W.2d 545 (1990). There is no reason this rule should not apply as well to guardians ad litem appointed for a parent pursuant to Neb. Rev. Stat. § 43-292(5) (Reissue 1988). Therefore, it was error for the court below to have prevented the guardian from fully participating in these proceedings.

However, the mother has made no showing that she was prejudiced by this error. No showing has been made as to what would have been admitted or kept out of evidence had the guardian ad litem been allowed to examine the psychologist who testified by deposition, or had he been permitted to fully examine at trial and directly pose objections.

The foregoing determinations compel us to consider the

third assignment of error, which challenges the sufficiency of the evidence to support the court's conclusions. In making that analysis, it is our obligation to try the factual questions de novo on the record, and we are thus required to reach a conclusion independent of the findings of the trial court; however, where the evidence is in conflict, we consider and may give weight to the trial court's observation of the witnesses and acceptance of one version of the facts rather than another. *In re Interest of R.W., supra; In re Interest of A.B. et al., ante* p. 220, 460 N.W.2d 114 (1990); *In re Interest of L.K.Y. and A.L.Y.,* 235 Neb. 545, 455 N.W.2d 828 (1990); *In re Interest of M.R., J.R., and N.R.*, 228 Neb. 47, 420 N.W.2d 924 (1988). Moreover, an order terminating parental rights must be based on clear and convincing evidence. *In re Interest of L.K.Y. and A.L.Y., supra.*

With that review of the law, we turn our attention to the lower court's finding that the mother should be deprived of her parental rights because of her mental condition. The statutory provisions relevant to this issue are found at § 43-292:

> The court may terminate all parental rights between the parents . . . and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that . . .
>
> . . . .
>
> (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period.

As we turn our attention to the evidence, we, of course, apply the evidential principles discussed in connection with the first summarized assignment of error. In this regard the mother specifically complains that some of the psychological evidence was based on a reasonable degree of *professional* certainty rather than on a reasonable degree of *psychological* certainty. While it would certainly have been better to have used more precise language in relating the questioned opinion to the witness' specific profession, when read in context, it becomes clear that the questioned evidence was indeed based on a reasonable degree of psychological certainty.

The record establishes that the mother is a drug abuser, has a long history of depression and suicide attempts, and has been hospitalized frequently. There is competent psychological evidence that her mental illness, whether it be called a personality disorder or something else, renders her incapable of discharging even part-time parental responsibility, and it is doubtful she could be successfully treated before the children reach majority. While there is evidence that both of the children would be served by maintaining some contact with their mother, there is also evidence that they need to be in a permanent, healthy family situation.

Suffice it to say that our de novo review of the evidence clearly and convincingly persuades us that the mother unfortunately suffers from some mental disorder which renders her incapable of discharging her parental responsibility to her 7-year-old son and 6-year-old daughter, that such condition will continue for a prolonged indeterminate period, and that it is in the best interests of both children that their mother's parental rights in and to them be terminated.

Having come to that conclusion, it is not necessary that we determine as well whether the evidence also establishes that the mother failed to comply with the various ordered plans of rehabilitation or reunification. Indeed, it seems inhumane, inconsistent, and inefficient for the State to insist that one's parental rights be terminated because of a mental inability to parent and at the same time demand that the terms of a plan designed to reunify the parent and child be fulfilled. If the parent is mentally incapable of discharging parental responsibilities, any plan of reunification is predestined to fail and can only serve to disconcert the child, frustrate the parent, and squander the State's resources.

Nonetheless, since the record fails to support the summarized assignments of error, the judgment of the court below must be, and hereby is, affirmed.

AFFIRMED.

JONI APPLEGATE, APPELLANT, V. BRADLEY APPLEGATE, APPELLEE.

461 N.W.2d 419

Filed October 19, 1990. No. 89-1444.

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

Rae Ann Schmitz, of Western Nebraska Legal Services, for appellant.

Paul W. Snyder, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

H. Joan Pennington and Laurie Woods for amicus curiae National Center on Women and Family Law.

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

PER CURIAM.

This is an appeal from the decree of the district court dated November 3, 1989, which awarded custody of the three minor children of the parties to the appellee father.

Appellant mother argues for a rule which would always award the children to the primary caretaker and complains that the trial court failed to recognize child and wife abuse and that the decree of the trial court was affected by gender bias.

At the outset we reject adoption of the primary caretaker rule as a per se rule. This factor is simply one of several considerations outlined in Neb. Rev. Stat. § 42-364 (Reissue 1988), i.e., "The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing."

By the appellant's own testimony we find no evidence of wife abuse. As to child abuse, both parents sometimes overreacted physically to the frustrating behavior of two of their three children who are affected with attention deficit disorder. It is a matter that both parents must be and are working on through support groups, self-education, or both.

Finally, although some of the witnesses who testified might have evidenced traces of gender bias, the important

consideration is whether any gender bias manifested itself in the conduct and decision of the trial court. It did not.

When the custody of minor children is involved in a dissolution proceeding, the custody is determined by the fitness of each parent and the best interests of the children. *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990). We review the judgment of the trial court de novo on the record and, finding no abuse of discretion, the judgment is affirmed. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

No attorney fees are awarded.

AFFIRMED.

SUSAN SCHILLINGER, APPELLANT, V. TERRY SCHILLINGER, APPELLEE.

461 N.W.2d 421

Filed October 19, 1990. No. 89-1504.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Roberta S. Stick, of Legal Services of Southeast Nebraska, for appellant.

Sandra Hernandez Frantz for appellee.

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

PER CURIAM.

In this action Susan Schillinger appeals an order of the district court for Lancaster County, Nebraska, modifying the parties' divorce decree so as to change custody of the parties' two children from herself to appellee, the children's father. The trial court found that there had been a material change in circumstances such that it was in the best interests of the children that their custody be changed to their father.

In this court's review of a case 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. The court also considers and may give weight to the fact that the trial court saw and heard the witnesses. *Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989).

Our de novo review of the extensive record, including audiotapes of phone conversations and in camera testimony of the children, reveals that the evidence supports the order of the trial court. There was no abuse of discretion. Accordingly, the order of the trial court is affirmed.

AFFIRMED.

IN RE INTEREST OF R.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.W. AND L.W., APPELLANTS.

461 N.W.2d 545

Filed October 19, 1990. No. 90-130.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, this court reviews factual questions de novo on the record and reaches a conclusion independent of the trial court's finding.
2. **Trial: Evidence: Appeal and Error.** Where the evidence is conflicting, the Supreme Court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Parental Rights: Pleadings.** When a petition alleges a juvenile to be within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), the court shall inform the parents or custodians of their rights. Neb. Rev. Stat. § 43-279.01(1) (Reissue 1988).
4. **Parental Rights: Guardians Ad Litem.** A guardian ad litem is not appointed to prosecute or defend the parents, Neb. Rev. Stat. § 43-272.01(2)(b) (Reissue 1988), but the guardian may present evidence and witnesses and cross-examine witnesses at all evidentiary hearings, § 43-272.01(2)(e).
5. **Parental Rights.** A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the County Court for Scotts Bluff County: G. GLENN CAMERER, Judge. Affirmed.

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

Sara J. Olsen, Deputy Scotts Bluff County Attorney, for appellee.

G. Kirk Meade, guardian ad litem, of Nichols, Douglas, Kelly and Arfmann, P.C.

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

WHITE, J.

The parents of R.W. appeal the order of the Scotts Bluff County Court, sitting as a juvenile court, which terminated their parental rights to R.W. The lower court found that the State had shown by clear and convincing evidence that the parents had neglected R.W. The parents assign as error the trial court's alleged denial of their due process rights and its finding that the State had proved by clear and convincing evidence that parental rights should be terminated. We affirm.

In an appeal from a judgment terminating parental rights, this court reviews factual questions de novo on the record, and we are required to reach a conclusion independent of the trial court's findings. Where the evidence is conflicting, the Supreme Court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of A.B. et al., ante* p. 220, 460 N.W.2d 114 (1990); *In re Interest of V.M.,* 235 Neb. 724, 457 N.W.2d 288 (1990).

The record shows that a juvenile court petition was filed on April 13, 1989, alleging that R.W., born October 31, 1984, is a person within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) and that R.W.'s parents "neglect or refuse to provide proper or necessary subsistence or other care necessary for [his] health or well-being." At the hearing on April 20, 1989, the public defender was appointed to represent the parents and an adjudication hearing was set for May 16. The court ordered that R.W. remain in foster care in the custody of the Nebraska Department of Social Services and withheld ruling on visitation pending a separate hearing.

On July 14, 1989, the court found the allegations in the petition to be true, ordered a home study and case plan, and set a hearing on temporary custody and visitation for August 28.

The Department of Social Services retained custody, and on September 15 the court ordered supervised weekly visitation and ordered a report be made on the success in bonding between the parents and R.W.

A motion to terminate parental rights was filed by the State on October 10, alleging that the parents had substantially and continuously or repeatedly neglected R.W.

Following a hearing, the court suspended visitation while the parents were incarcerated in the Scotts Bluff County Jail. On January 4, 1990, the court terminated parental rights, finding that the State had shown by clear and convincing evidence that the parents had neglected and refused to give R.W. necessary parental care and protection. The parents offered little explanation for their actions, but the court found that R.W. had been struck by the parents and that food was withheld at times as some type of family discipline. Both parents were subsequently convicted of felonies as a result of a criminal child abuse prosecution.

The child verbalized fears of his parents and indicated a desire not to return home. Expert testimony at the termination hearing on December 12 and 14, 1989, also showed that there was little or no bonding between the parents and the child. The court held that because "a court-imposed family reunification against the child's will would be contrary to the law and certainly not in this child's best interests," the "only reasonable alternative is to terminate parental rights and place the child in a permanent home so that he may establish new family ties."

The parents' first assigned error asserts that the county court deprived them of due process in several respects: by denying visitation pending the adjudication hearing, by requiring psychological evaluations of the natural parents but not of the foster parents, by failing to enforce the separation of the juvenile court proceedings and the criminal proceedings, by proceeding against the parents without ascertaining whether they understood the proceedings, by allowing the guardian ad litem to prosecute the parents, and by openly favoring the

contentions of a hostile guardian ad litem. Their second assigned error contends that the county court erred in terminating parental rights when the evidence was less than clear and convincing.

We find no deprivation of due process in the proceedings against the parents. The record shows that the parents were informed, both at the initial appearance in the criminal case and at the initial appearance in the juvenile court proceedings, of their rights to remain silent, to an attorney, and to testify and present evidence. The parents were also informed of their rights to a speedy adjudication and to a preliminary hearing and speedy trial. They were informed of the possible penalty for the criminal charge, and the court explained that the prosecutor must prove the allegations in the juvenile petition by clear and convincing evidence. The parents were informed that the court could require them to attempt rehabilitation and that if they failed, their parental rights could be terminated. The public defender was appointed to represent them in both cases. Under state law, when a petition alleges a juvenile to be within the provisions of § 43-247(3)(a), the court shall inform the parents or custodians of their rights. Neb. Rev. Stat. § 43-279.01(1) (Reissue 1988). No indication was given that the parents did not understand their rights or the possibility of the termination of parental rights.

Visitation was initially denied only until the court could obtain expert testimony on the effect of such visitations upon the child. At a July 14, 1989, hearing, the social worker testified that R.W. had been insistent in stating that he did not want to visit his parents. The court scheduled an evidentiary hearing and placed the burden on the State to demonstrate, through evaluations or other expert evidence, that the parents should not have visitation.

Michael Slosnerick, a psychologist with Panhandle Mental Health, testified at the August 28 visitation hearing that he had met with the parents and had no difficulty communicating with L.W., the mother, who is from Korea and speaks English fairly well but with an accent. Slosnerick testified that, based on his personal observations and the interpretation of previous psychological testing, T.W., the father, showed no major

psychosis or evidence of a thought disorder. No previous tests were available for L.W., but he said she showed no indication of problems with hallucinations, thought processes, or depersonalization. The psychologist testified that the parents repeatedly stated that they had done nothing wrong and believed they were being treated unfairly. T.W. and L.W. said they would not alter their actions if they had them to do over again, Slosnerick said.

The psychologist also observed the parents and R.W. in a controlled situation. Slosnerick reported that when R.W.'s parents first entered the room, R.W. was nonresponsive and did not go to them until they showed him some toys. Slosnerick said R.W. interspersed statements about the toys, such as "Here's my car," or "Are these mine?" with statements directed to his parents, such as "I don't like you." R.W. also stated that he did not want to visit with his parents again.

Slosnerick recommended that the court act cautiously on visitation because there appeared to be no bonding between the child and the parents.

We find no error on the part of the trial court in denying visitation pending the separate hearing or in denying it based on the testimony at the evidentiary hearing.

The parents also object because the criminal case was heard by the court immediately after the initial hearing on the juvenile matter. We see no irregularity here, because both proceedings were initial appearances. The judge made it clear that he would not be able to conduct both proceedings, but that another judge would handle the criminal case.

Nor did a due process violation occur at the initial interview with the police or at any later hearing. When the parents were interviewed by an officer of the Scottsbluff Police Department on the evening their son was removed from the home, they were informed of their rights and signed rights advisory forms. Both agreed to speak with the police without an attorney. They were represented by counsel at subsequent court proceedings.

The parents also argue that the court erred by allowing the guardian ad litem to act as a prosecutor and that the court openly favored the contentions of a hostile guardian ad litem. At the December 12, 1989, hearing, the parents' counsel

objected to questioning by the guardian ad litem, suggesting that the guardian was acting as a prosecutor of the parents. The trial court overruled the objection, noting that the guardian is entitled to ask questions. We find no error in the trial court's holding. While state law dictates that a guardian ad litem is not appointed to prosecute or defend the parents, Neb. Rev. Stat. § 43-272.01(2)(b) (Reissue 1988), the guardian "may present evidence and witnesses and cross-examine witnesses at all evidentiary hearings," § 43-272.01(2)(e). R.W.'s guardian ad litem had been cross-examining earlier witnesses. The objection was made when the guardian was cross-examining L.W., who had been called as a witness by the parents' counsel, thus opening the door for the county attorney and the guardian ad litem to cross-examine her. We find no error in allowing this questioning. No due process violations occurred in this case.

We also find no error in the trial court's termination of parental rights based on clear and convincing evidence. The record is replete with examples and testimony of the neglect and abuse to which R.W. was exposed by his parents.

On April 11, 1989, Officer Nancy Paetow of the Scottsbluff Police Department received a phone call from R.W.'s grandmother expressing concern about his well-being. Paetow and another officer visited the home the next day, explaining to the mother that they wished to check on R.W.'s condition. The mother was initially evasive, but allowed Paetow to examine the child. Paetow said she noticed that R.W.'s ribs were obvious, that his stomach was bloated and extended, that he had injuries to his buttocks and a bruise on his cheek, and that he was lethargic. She said that R.W.'s feet were swollen and purplish, with scabs and wounds, and that the large toenails were twisted and deformed. The mother explained that R.W. was losing weight, but that she did not know why; that the wounds on his back were carpet burns; and that his feet were frostbitten because he wets the bed and his feet get cold.

Paetow told L.W. that she wished to take R.W. with her to the hospital, and the mother said she would get him ready. When she heard a clinking noise, Paetow went to check and found L.W. in the kitchen rapidly spooning baby food into R.W.'s mouth. At the hospital, R.W. told Paetow that he was

hungry. He ate a sandwich, salad, milk, and ice cream, and Paetow said she became concerned about his becoming ill from having consumed too much food too quickly.

Patricia Pester, a Child Protective Services worker for the State who met Paetow and R.W. at the hospital, described R.W. as being very small for his age, about the size of a 2½-year-old; being extremely thin with an extended stomach; and having numerous injuries over his entire body. His feet were swollen and purple, and his emotional state was abnormal in that he was extremely quiet and compliant for a 4½-year-old child who had been removed from his home.

Dr. Valerie Bailie, a pediatrician, examined R.W. at the emergency room on April 12. She also described R.W.'s general appearance as that of a 4-year-old who was the size of a 2-year-old, "very thin in appearance." He "was pitifully thin with very skinny arms and legs and . . . a very swollen protruding abdomen, typical protein malnutrition." He weighed about 22 pounds upon admission. Elizabeth Ann Kenyon, director of the Women, Infants, and Children (WIC) feeding program, testified that when R.W. first qualified for WIC on November 4, 1987, he weighed 25½ pounds. In January 1988, his weight was 25 pounds. In June 1988, R.W. weighed 23 pounds 10 ounces.

When Dr. Bailie first saw R.W., she said he was eating voraciously, was "very fixated on the food," and had little facial expression. Her examination showed that R.W. had a small cephalhematoma, or blood collection, under the skin on his right forehead; multiple small circular black bruises on his back; bruises on his lower lumbar region and upper buttocks; fresh abrasions and contusions on his buttocks; cigarette burns on his right elbow, on his right thigh and knee, and between the fourth and fifth left toes; old burns on both hands; purplish discoloration, swelling, and open sores on both feet; and an enlarged liver and spleen.

The parents had asserted that some of the injuries were caused by black fly bites and that others resulted from his bed-wetting. Dr. Bailie testified that the injury between the fourth and fifth toes could not have been caused by an insect bite. Dr. Ronald Blevins, a pathologist, testified that he

believed R.W.'s scars were not consistent with fly bites, but with cigarette burns. Dr. Bailie testified that prolonged exposure to urine or ammonia could cause the contusion appearance between the buttocks, but could not explain the other bruises on R.W.'s body. The condition of R.W.'s feet was typical of a frostbite injury, Dr. Bailie said, which could result from prolonged exposure to low, but not freezing, temperatures. Her examination results upon R.W.'s admission to the hospital were suggestive of child abuse, she said.

Dr. Bailie also examined R.W. the next morning and found that he had become very outgoing. He had not stopped eating since he came to the emergency room, Dr. Bailie said, and food was withheld because otherwise he would eat constantly.

Paetow interviewed the father at about 9:10 p.m. on April 12, 1989, at the Scottsbluff Police Department. T.W. told the police that the child no longer had a bed but slept on the floor because his bed had been ruined from bed-wetting. The room where R.W. sleeps is an unheated addition on the back of a trailer, so R.W. gets cold and that causes the frostbite, the father said. Paetow said the father explained that R.W.'s burns were carpet burns, not cigarette burns, and that the other injuries were black fly bites that R.W. had received in June 1988 which had not healed.

T.W. stated that their problems with the child stem from the involvement of T.W.'s parents in R.W.'s life. After the child has contact with them, T.W. said, R.W. whines and becomes a behavioral problem and has to be disciplined. T.W. stated that they have to spoonfeed R.W. because he refuses to hold his eating utensils in the way in which the parents prefer.

The father explained that R.W. does not chew his food adequately and swallows his food in chunks and that they believed that might be the reason for his weight loss. T.W. said they had been feeding the child chunky baby food in order to help him gain weight.

T.W. admitted that he may have struck R.W. in the mouth at some time, causing an injury to the tissue which attaches the upper lip to the gum, and that he had slapped R.W. in the face. The Child Protective Services worker also testified that T.W. had told her they had problems with R.W.'s behavior and with

R.W.'s wetting his pants.

Paetow interviewed the mother on April 12, 1989, at the police department. L.W. said the burns on the child's hands were received when the family lived in an apartment with floor-type radiators, which R.W. would hold when he was learning to walk. His foot injuries resulted from being cold and wet from his bed-wetting. The injuries which appeared to be cigarette burns were explained as either carpet burns or black fly bites from a visit to Maine. L.W. indicated that because R.W. does not chew his food properly, he receives two jars of baby food each day and also eats additional food with the family. The mother also stated that their problems with R.W. stem from the interference of the grandparents, who pay too much attention to R.W.

Kathleen Brozovich, R.W.'s foster mother, testified that R.W. was very quiet when she and her husband first picked him up from the hospital and that he was weak and had to be carried up and down the stairs in their home. R.W. was initially obsessed with food, but by the time of the hearing, Brozovich said he had changed and would eat normally.

After his visit with his parents at the evaluation with Slosnerick, R.W. told Brozovich that he wanted to live with her, and not with his "mommy and daddy." She also testified to an accidental meeting with T.W., in which neither R.W. nor T.W. acknowledged the other.

The record does not clearly explain why only one child in the family was treated in this manner. The mother testified that she was trying to help R.W. to have confidence "because he's my firstest son. Korean people for me . . . firstest son is a very important thing. . . . I kinda wait for a son, my firstest son, a copy of my husband, you know. Korean people, it very, very important." Both parents indicated that they believed the grandparents were interfering in their raising of R.W., and the mother seemed to feel slighted by the attention paid to the child. However, nothing adequately explains why parents would neglect and abuse one of their four children, yet the record is clear that this is the case. None of the witnesses testified that the parents at any time admitted any wrongdoing or indicated that their parental behavior would change if R.W. were returned to

the home. The evidence is clear and convincing that it is in R.W.'s best interests to terminate the parental rights of T.W. and L.W. because they are unwilling to alter their conduct which has led to the neglect and abuse of an innocent child. R.W. "cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 410, 451 N.W.2d 275, 278 (1990); *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989).

The judgment is affirmed.

AFFIRMED.

JAMES R. MARKS, APPELLANT, V. JUDICIAL NOMINATING COMMISSION FOR JUDGE OF THE COUNTY COURT, 20TH JUDICIAL DISTRICT, ET AL., APPELLEES.

461 N.W.2d 551

Filed October 26, 1990. No. 88-679.

1. **Statutes.** Specific statutory provisions relating to a particular subject control over general provisions.
2. **Statutes: Public Meetings.** Neb. Rev. Stat. §§ 24-801 to 24-812.01 (Reissue 1989) constitute a special act relating to judicial nominating commissions and control over the more general provisions of the Nebraska public meetings law.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed.

Bernard J. Glaser, Jr., for appellant.

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

Steven L. Willborn for amicus curiae Nebraska Civil Liberties Union.

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

BOSLAUGH, J.

This is a suit for a declaratory judgment under the Nebraska

public meetings law, Neb. Rev. Stat. §§ 84-1408 to 84-1414 (Reissue 1987). The plaintiff, James R. Marks, a resident and citizen of Valley County, Nebraska, sought a judgment declaring that the action of the Judicial Nominating Commission for Judge of the County Court, 20th Judicial District, at its meeting held on March 27, 1987, was void and that the defendants be enjoined from violating the Nebraska public meetings law. The defendants are the nominating commission and the members of the commission.

The plaintiff and the defendants filed motions for summary judgment, which were heard upon the pleadings, affidavits, and a stipulation of the parties. The trial court sustained the defendants' motion and dismissed the petition. The plaintiff has appealed.

The plaintiff's theory of the case is that the Nebraska public meetings law, §§ 84-1408 to 84-1414, applies to judicial nominating commissions and any action by such a commission must conform to the requirements of the public meetings law.

The meeting of the commission involved in this case took place on March 27, 1987. The commission members met at Broken Bow, Nebraska, to select nominees for judge of the county court, 20th Judicial District.

After the voting members of the commission in attendance took the oath prescribed by law, the commission held a public hearing. At and during the public hearing, the commission received comments and documents in addition to that information which it had previously received concerning the qualifications of lawyers who had signified in writing their willingness to serve as a judge if appointed.

Following the public hearing, the commission met privately and confidentially in closed session, during which it interviewed the various candidates. After the interviewing process, the commission considered and deliberated upon the qualifications of each of the candidates.

Following the interviews, consideration, and deliberation, and while still in closed session, the chairman of the commission conducted, and recorded in writing, an oral rollcall vote of each voting member of the commission who was present. After the votes were counted and the voting members

were satisfied that an accurate count had been made, a letter certifying the results was signed by each member and sent to the Governor of Nebraska.

In granting the defendants' motion for summary judgment, the trial court found that the commission's selection of nominees in a closed session was authorized by Neb. Rev. Stat. § 24-810(3) (Reissue 1989). The court ruled that Neb. Rev. Stat. §§ 24-801 to 24-812.01 (Reissue 1989) specifically relate to judicial nominating commissions and thus govern over the public meetings statutes, §§ 84-1408 to 84-1414, which are general statutes relating to public meetings.

There can be no question that §§ 24-801 to 24-812.01 constitute a special, independent legislative act, complete in itself, which is intended to cover the entire subject of the selection of nominees by judicial nominating commissions. It contains broad provisions concerning procedural methods to be used by nominating commissions in selecting judicial nominees.

Section 24-809, in accordance with article V, § 21(5), of the Nebraska Constitution, provides in part: "In selecting or rejecting judicial nominees, said commission shall vote by oral roll call vote." It is of some significance that neither the Constitution nor the statute provides that the vote shall be public or be taken at a public hearing. Furthermore, § 24-812 specifically provides that all communications between members of judicial nominating commissions shall be confidential.

Section 24-810(2) provides for a public hearing which any member of the public shall be entitled to attend and, at the hearing, to express, either orally or in writing, his or her views concerning candidates for appointment to judicial vacancies.

Section 24-810(3) provides in pertinent part: "After the public hearing the nominating commission shall hold such *additional private or confidential meetings* as it determines to be necessary. Additional information may be submitted in writing to the judicial nominating commission, at any time prior to its selection of qualified candidates to fill the vacancy." (Emphasis supplied.)

When read as a whole, the language appearing in §§ 24-801

to 24-812.01 is plain, direct, and unambiguous. It provides that a judicial nominating commission may select or reject judicial nominees, after the public hearing, in a private or confidential meeting, provided the vote is taken by an oral rollcall.

In his petition, Marks prayed that the court find that the March 27, 1987, nominations made by the judicial nominating commission were void because of its failure to comply with the provisions of the Nebraska public meetings law, §§ 84-1408 to 84-1414. In particular, Marks argues that the public meetings law prohibits the selection of nominees in closed session.

Marks' contention in this regard fails for at least two reasons. It is clear that §§ 24-801 to 24-812.01 are special statutes concerning the selection of judges by judicial nominating commissions, while §§ 84-1408 to 84-1414, the Nebraska public meetings law, are general statutes relating to public meetings. That is to say, §§ 24-801 to 24-812.01 are special statutes, while §§ 84-1408 to 84-1414 are general statutes. That difference is controlling.

It is a general principle of statutory construction that specific statutory provisions relating to a particular subject control over general provisions. *Lentz v. Saunders*, 199 Neb. 3, 255 N.W.2d 853 (1977); *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981). Sections 24-801 to 24-812.01 constitute a special act relating to judicial nominating commissions which controls over the more general provisions found in the Nebraska public meetings law.

Further, the Nebraska public meetings law was enacted to ensure that public policy is formulated at open meetings of the bodies to which the law is applicable. The declaration of the intent of the public meetings law is found in § 84-1408:

> It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.
>
> Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies....

Section 84-1408 makes it clear that the main purpose of the public meetings law is to ensure that *public policy* is formulated

at open meetings.

It may be said with certainty that the selection of nominees for judicial vacancies does not involve the formation of *public policy*. Therefore, the act of selecting nominees to fill judicial vacancies was not intended to fall within the provisions of the Nebraska public meetings law.

Marks' claim that the action of the Judicial Nominating Commission, 20th Judicial District, on March 27, 1987, was void under the Nebraska public meetings law, see § 84-1414, is without merit in view of the inapplicability of the Nebraska public meetings law to judicial nominating commissions.

The district court correctly granted summary judgment to the defendants because there was no genuine issue as to any material fact before the court and the defendants were entitled to a judgment as a matter of law. See, Neb. Rev. Stat. § 25-1332 (Reissue 1989) (summary judgment); *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990).

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JAMES OLDFIELD, APPELLANT.

461 N.W.2d 554

Filed October 26, 1990. No. 89-842.

1. **Constitutional Law: Speedy Trial.** The constitutional right to a speedy trial is distinct from the provision for a speedy trial prescribed by the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1989).
2. **Trial: Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as a trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
3. **Constitutional Law: Appeal and Error.** Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.
4. **Speedy Trial: Proof.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1989), the State, by a preponderance of evidence, must prove existence of a period of time which is

authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) to be excluded in computing the time for commencement of the defendant's trial.

5. **Speedy Trial.** Under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1989), a defendant must accept reasonable delay as a consequence of the defendant's pretrial motion.
6. _____. Excludable time under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1989) is calculated by adding the excluded days to the last day of the 6-month period initially determined for § 29-1207(2).
7. _____. An excludable period under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1989) commences on the day immediately after the filing of a defendant's pretrial motion.
8. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
9. **Criminal Law: Appeal and Error.** In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
10. **Convictions: Circumstantial Evidence: Proof.** 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.

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

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

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

SHANAHAN, J.

In the district court for Seward County, as the result of a bench trial after waiver of a jury, James Oldfield was convicted of three felonies charged in the information, namely, count I, possession of cocaine, see Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988); count II, carrying a concealed weapon, see Neb. Rev. Stat. § 28-1202 (Reissue 1989); and count III, possession with intent to distribute, deliver, or dispense

methamphetamine, a controlled substance, see § 28-416(1)(a). The district court sentenced Oldfield to concurrent terms of imprisonment for the convictions.

Oldfield has appealed and claims that the trial court erred in (1) failing to dismiss the charges against Oldfield, since his "constitutional and statutory right to a speedy trial" was violated, and (2) finding the evidence sufficient to convict Oldfield on count III, possession of methamphetamine with intent to distribute, deliver, or dispense that controlled substance.

We affirm the district court's judgment.

Based on information supplied to a dispatcher for the Nebraska State Patrol, Trooper Robert Roberts was directed on February 8, 1988, to an area on U.S. Highway 6 near Milford, Nebraska, to locate a dark-colored automobile which had a broken windshield and bore Kansas vehicle plates. Sources had reported that the vehicle in question was being driven erratically and was weaving from shoulder to shoulder on the highway. When Roberts saw a vehicle which matched the description from the dispatcher and which was parked on the shoulder of Highway 6, he stopped his patrol car, got out, approached the other car, and eventually requested and obtained the occupant's license to operate a motor vehicle. From the information on the license, Roberts learned that the driver's name was James Oldfield, and returned to his patrol car to radio for any additional information on Oldfield.

Investigator Raymond Smee, an undercover Nebraska State Patrol drug investigator for 5 years, was monitoring the radio transmission from Roberts' patrol car and recognized Oldfield's name. By radio, Smee informed Roberts that Oldfield was a known drug user. When he returned to Oldfield's car and the left front or driver's door was opened, Roberts immediately observed a hypodermic syringe on the car's floor between the front seat and the driver's door.

About that time, Smee arrived at the scene and informed Roberts that he knew Oldfield as a result of undercover investigations, and knew that Oldfield was a drug user who administered amphetamines and cocaine with syringes. Roberts and Smee then removed Oldfield from his vehicle as two other

officers arrived at the scene. One of these officers observed an expended .45-caliber shell on the front floorboard at the passenger's side of Oldfield's car and also saw several bullet holes in the car's windshield. On account of these observations, Roberts "patted down" Oldfield to determine if he was armed and found that Oldfield was wearing an empty shoulder holster. Roberts then searched the driver's side of Oldfield's car for the presence of weapons and found a loaded .45-caliber semiautomatic pistol wedged behind the vehicle's center console. Oldfield was arrested for carrying a concealed weapon.

Oldfield's vehicle was towed to and impounded at the Seward County Jail, where Roberts and Smee later undertook an inventory of the car's contents. During the inventory the officers found three more hypodermic syringes; a pair of hemostats; two pipes which, according to Roberts' later testimony, were commonly used for smoking marijuana; a spoon; a gun case which held a bottle of clear liquid, razor blades, and Q-tips; and a locked plastic box. The spoon and two of the syringes contained cocaine residue, according to a laboratory analysis performed after the inventory.

On February 9, 1988, pursuant to a search warrant, the officers opened the locked box found in Oldfield's car and discovered a grinding kit consisting of a small scale, a grinder, screens, a funnel, two vials, metal scoops, and two plastic bags containing a white-yellow powder. Through a chemical analysis of the two bags of powder, the bags' contents were identified as 22.46 grams of methamphetamine.

On April 18, 1988, the State filed its information and charged Oldfield with the three felonies heretofore mentioned. A jury trial was set for August 22. Oldfield filed a motion on August 8 to suppress the physical evidence obtained from his automobile. After Oldfield's suppression motion had been scheduled for hearing on August 26, the State requested, and received, a postponement until October 11 because Smee, the undercover officer, was unavailable for the suppression hearing. At the October 11 hearing on the suppression motion, the State presented evidence reflecting the events recounted above concerning Roberts' contact with Oldfield and his

automobile. At the conclusion of evidence in the suppression hearing, the court took Oldfield's motion under advisement until January 10, 1989, when the court overruled the suppression motion and scheduled Oldfield's case for a jury trial to commence on March 13. On March 2, however, pursuant to Oldfield's waiver of a jury trial, the court notified counsel that the bench trial in Oldfield's case would commence on March 22.

On March 20, the State filed a motion to endorse its information with the name of Trooper Larry Wollenburg, who was instrumental in obtaining the search warrant for Oldfield's automobile. In his objection filed on March 22, the date set for trial, Oldfield resisted the endorsement of Wollenburg's name on the information and, through his lawyer, requested that "this matter be continued." Also on March 22, Oldfield filed his separate "Motion to Dismiss," claiming that he was entitled to an "Order dismissing this matter, for the reason that the Defendant is entitled to a total discharge of the offense charged in accordance with Neb. Rev. Stat. 29-1208 for the reason that the Defendant has not been brought to trial within six months from the filing of the information." That same day, March 22, the court overruled Oldfield's objection to the State's endorsement of Wollenburg's name on the information and continued the proceedings until March 28, the date for Oldfield's bench trial. When Oldfield appeared with his lawyer for the trial on March 28, a pretrial discussion involved the possibility of Oldfield's waiving his motion for dismissal if he proceeded to trial without the court's ruling on the motion. However, after the court concluded and ruled that there was "no waiver on behalf of the defendant of his statutory right to a six-month trial," the bench trial commenced. At the conclusion of evidence in Oldfield's trial, the court took the matter under advisement pending disposition of Oldfield's dismissal motion based on deprivation of the statutory right to a speedy trial. The court held a hearing on April 17 concerning the speedy trial motion, which was then taken under advisement. On May 12, the court overruled Oldfield's speedy trial motion, convicted Oldfield of the three felonies charged, and later, on July 17, sentenced Oldfield to concurrent terms of imprisonment for the

convictions.

Oldfield's first assignment of error refers in part to a defendant's right to a speedy trial, guaranteed by both U.S. Const. amends. VI and XIV, see *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and Neb. Const. art. I, § 11, see, *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985), and *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983). In *State v. Vrtiska*, 225 Neb. 454, 458-59, 406 N.W.2d 114, 119 (1987), we stated:

> As we recently noted in *State v. Lafler, ante* p. 362, 405 N.W.2d 576 (1987), the constitutional right to a speedy trial, guaranteed by Neb. Const. art. I, § 11, and U.S. Const. amends. VI and XIV, is distinct from the provision for a speedy trial prescribed by the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985). As pointed out in *Lafler*, protection in the form of a statutory right may not necessarily be coextensive with the protection afforded under a constitution, state or federal, notwithstanding that such statutory and constitutional provisions may, generally, relate to the same subject.

Oldfield claimed entitlement to dismissal on the ground that he had not been brought to trial within the 6-month period prescribed by Neb. Rev. Stat. §§ 29-1207 et seq. (Reissue 1989). In his dismissal motion, Oldfield did not allege that he had been denied the constitutional right to a speedy trial; hence, the constitutional question concerning a speedy trial was not raised in the trial court.

In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as a trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. See *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985) (failure to raise, at the trial level, a question concerning an allegedly unreasonable search preserved no question for appellate review regarding the search). Cf. *State v. Vrtiska, supra* (a defendant's failure at the trial level to raise a question about a statutory notice requirement for execution of a search warrant precluded consideration of the statutory aspects of the search warrant, although constitutional requirements for a

search warrant, raised as issues in the trial court, were proper subjects for appellate review). Generally, a constitutional question not properly raised in the trial court will not be considered on appeal. *State v. Fleming*, 223 Neb. 169, 388 N.W.2d 497 (1986); *State v. Mercer*, 217 Neb. 164, 347 N.W.2d 868 (1984).

Since Oldfield, in the district court, did not raise the question of his constitutional right to a speedy trial, we will not consider a constitutional speedy trial question in this appeal.

However, Oldfield contends that his statutory right to a speedy trial, that is, a trial within 6 months from the date the information is filed, has been violated. Section 29-1207 provides in relevant part:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed. . . .
>
> . . . .
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence . . .
>
> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. . . .
>
> (c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:
>
> (i) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date . . . .

Further, § 29-1208 states that "[i]f a defendant is not brought to

trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense."

To ascertain whether the State has complied with the 6-month requirement prescribed by §§ 29-1207 et seq. concerning commencement of a criminal defendant's trial, the method to determine the last day for trial in the absence of excludable time was set forth in *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). Section 29-1207 (Reissue 1989) is the same as § 29-1207 (Reissue 1979) construed in *State v. Jones, supra*. First, in *Jones* the court rejected a computation based on a 30-day month whereby the last day for trial is determined by use of six 30-day months, or 180 days. Next, the *Jones* court expressed the method to determine a "month" for the purpose of the "6-month" requirement for a speedy trial pursuant to § 29-1207:

> [U]nless the context shows otherwise, the word "month" has been legislatively defined to mean calendar month. [Citations omitted.] . . . [W]e have construed "calendar month" as being a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one. *Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965).

208 Neb. at 644, 305 N.W.2d at 358.

Since the information in *Jones* was filed on July 3, 1979, the last day for commencement of Jones' trial was January 3, 1980. However, as the result of excluding 20 days of delay attributable to Jones, that is, 16 days pertaining to disposition of suppression motions and 4 days for a continuance granted at Jones' request, 20 days were added to the date of January 3, 1980, so that the final day for commencement of Jones' trial was extended to January 23, 1980. Because Jones' trial commenced on January 21, 1980, he was brought to trial within the 6-month period specified in the Nebraska speedy trial act. See *Jones, supra*.

In several decisions after *Jones*, this court has reaffirmed the *Jones* method for determining the 6-month period and excludable time under Nebraska's speedy trial act. See, *State v.*

Williams, 211 Neb. 650, 319 N.W.2d 748 (1982); *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983); *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983); *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987); *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988).

Because the information against Oldfield was filed on April 18, 1988, by excluding the filing date of the information and using the "move forward 6 months, but then back up 1 day" rule expressed in *Jones*, the last day for commencement of Oldfield's trial was October 18, 1988, in the absence of excludable time authorized under § 29-1207(4)(a) which extends the period for commencement of a defendant's trial pursuant to Nebraska's speedy trial act. See, *Vrtiska, supra*; *Kriegler, supra*; *Fatica, supra*; *Brown, supra*; *Williams, supra*.

> "The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the Nebraska speedy trial act. [Citations omitted.] To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or '6-month rule.' [Citations omitted.]"

State v. Vrtiska, supra at 604, 418 N.W.2d at 761 (quoting from *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987)). Since Oldfield's trial started on March 28, 1989, the State must show excludable time pursuant to § 29-1207(4) to extend the permissible date for trial beyond October 18, 1988.

Oldfield did not, and does not, contest the legitimacy of the continuance granted to the State. Since the court granted a continuance at the prosecuting attorney's request on account of unavailability of evidence material to the State's case, namely, testimony of the undercover officer, Smee, regarding the suppression question raised by Oldfield, that period is not charged against the State in computing the time within which Oldfield's trial must have commenced. See § 29-1207(4)(c)(i).

Under § 29-1207(4)(a), a defendant must accept reasonable delay as a consequence of the defendant's pretrial motion. *State*

v. Craig, 219 Neb. 70, 361 N.W.2d 206 (1985); *State v. Fatica, supra*; *State v. Brown, supra*. Oldfield does not assert that the time involved in the trial court's disposition of the suppression motion was an inordinate delay. Cf. *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986) (suppression motion under advisement for more than 1 year 3 months 23 days constituted unreasonable and inordinate delay in bringing defendant to trial under the 6-month requirement of § 29-1207).

Therefore, under § 29-1207(4)(a) the entire period attributable to disposition of Oldfield's suppression motion is excluded in computing the time within which the State was required to commence Oldfield's trial pursuant to § 29-1207. That excludable period commenced on August 9, 1988, the day after Oldfield filed his suppression motion, and ended on January 10, 1989, when the court overruled the motion. The period of August 9, 1988, to January 10, 1989, inclusive, consists of 155 aggregate days excluded in determining the last day for commencement of Oldfield's trial. The 155-day exclusion is calculated by adding the excluded days to the last day of the 6-month period initially determined for § 29-1207(2) in accordance with the computational rule expressed in *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). Since October 18, 1988, was the last day of the initially determined 6-month period within which the State was required to commence Oldfield's trial, but trial was not commenced on that date, the first day of the excludable 155 days is October 18, 1988. When the remaining 154 days of the excludable period are added to October 18, 1988, the last excluded day is March 21, 1989. Because the entire period commencing on October 18, 1988, and concluding on March 21, 1989, is excluded, March 22, 1989, was the last day for commencement of Oldfield's trial pursuant to § 29-1207(2) of Nebraska's speedy trial act. On that last day for commencement of trial, namely, on March 22, 1989, Oldfield requested, and immediately received, a postponement of his trial until March 28. The 6-day delay resulting from Oldfield's requested continuance is excluded in computing the time for commencement of trial. See, § 29-1207(4)(b); *State v. Jones, supra*.

Although in some of our decisions it appears that the day on

which a defendant filed a pretrial motion is counted within the exclusionary period under § 29-1207(4)(a), for example, *State v. Lafler, supra*, and *State v. Fatica, supra*, nevertheless, as we have reaffirmed and expressed today, an excludable period under § 29-1207(4)(a) commences on the day immediately after the filing of a defendant's pretrial motion.

Consequently, in view of the excluded periods in computing the time for commencement of Oldfield's trial, Oldfield was brought to trial within the 6-month period prescribed by § 29-1207(2); hence, Oldfield's first assignment of error is without merit.

Oldfield's second assignment of error is that the evidence is insufficient to establish possession of methamphetamine with his intent to distribute, deliver, or dispense that controlled substance. Regarding this assignment of error, Oldfield states:

> Appellant does not dispute that the evidence adduced at trial is sufficient to establish, beyond a reasonable doubt, that appellant did *possess* methamphetamine on the date alleged in the information. The presence of methamphetamine and drug paraphernalia in a vehicle within the sole control of appellant was clearly sufficient to prove appellant's possession.

(Emphasis in original.) Brief for appellant at 17.

> "In determining whether evidence is sufficient to sustain a conviction in a bench trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction."

State v. Blue Bird, 232 Neb. 336, 339, 440 N.W.2d 474, 476 (1989) (quoting from *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989)). In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

The officers in the present case found, among other things, razor blades, a small scale, a grinding kit, and 22.46 grams of methamphetamine in Oldfield's automobile and, therefore, in his possession under the circumstances. Investigator Smee, trained in identifying controlled substances and their packaging and methods of distribution, had worked as an undercover officer for 5 years and made several purchases of controlled substances in conjunction with undercover operations. Smee testified that the razor blades may be used for chopping methamphetamine into smaller particles and that scales of the type found in Oldfield's car are used to weigh controlled substances. As an item not commonly found in possession of drug users, a grinding kit is used to transform a controlled substance, such as methamphetamine, into a powder. The quantity of methamphetamine found in Oldfield's possession is several times the amount normally possessed by a user, or, as Smee explained: "[A] user will normally buy smaller amounts. On methamphetamine they work mainly in quarter, half grams, maybe a gram, up to about [3.5 grams] . . . . Anything over that then they're starting to get into the redistribution of the substance." Smee estimated the value of the methamphetamine found in Oldfield's automobile at approximately $1,200 to $1,500.

The foregoing are circumstances from which intent to distribute methamphetamine may be inferred.

"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); *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990). "When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 141, 416 N.W.2d 231, 237 (1987); *State v. Blue Bird, supra*.

In *State v. Turner*, 192 Neb. 397, 399, 222 N.W.2d 105, 106

(1974), this court stated:

> Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance, the equipment and supplies found with it; the place it was found; the manner of packaging; and the testimony of witnesses experienced and knowledgeable in the field.

See, also, *State v. Eary*, 235 Neb. 254, 261, 454 N.W.2d 685, 691 (1990): " 'Possession of a quantity of a controlled substance in a form customarily used for delivery or distribution will support an inference of possession with intent to deliver or distribute' " (quoting from *State v. Salas*, 231 Neb. 471, 436 N.W.2d 547 (1989)); *State v. Britt*, 228 Neb. 201, 421 N.W.2d 791 (1988); *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987).

Based on the quantity of methamphetamine in Oldfield's possession, combined with the articles found with the methamphetamine, including the locked box in which these items were discovered, and the testimony of a witness with specialized knowledge about controlled substances and illicit transactions involving those substances, we cannot conclude the trial court was clearly erroneous in its finding that Oldfield was in possession of methamphetamine with intent to distribute the methamphetamine.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY D. EDWARDS, APPELLANT.

462 N.W.2d 93

Filed October 26, 1990. No. 89-1177.

1. **Pleas: Waiver: Indictments and Informations.** A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the information or complaint is insufficient to charge a criminal offense.
2. **Postconviction: Pleas: Trial: Appeal and Error.** After a voluntary plea of guilty entered during the progress of a trial, defendant may not obtain relief from a

later imposed sentence, where relief is sought on the basis of alleged errors at the trial.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Larry D. Edwards, pro se.

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

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

GRANT, J.

This appeal is from an order of the district court for Lincoln County denying defendant, Larry D. Edwards, a hearing and denying relief on his motion seeking postconviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). Defendant appeals, assigning six errors, which may be summarized as three. Defendant alleges that the trial court erred (1) in committing errors at defendant's trial in failing to suppress certain evidence allegedly obtained and used in violation of Neb. Rev. Stat. § 29-2262.01 (Reissue 1985), and in denying defendant his constitutional right to confrontation of a certain witness; (2) in failing to grant defendant an evidentiary hearing on his postconviction motion; and (3) in failing to determine that the defendant's trial and appellate counsel were ineffective to a degree which violated defendant's constitutional right to counsel. We affirm.

The record before us shows the following: In the underlying criminal case, an information was filed against defendant in two counts: (1) distribution of counterfeit Valium (a Class III felony), and (2) distribution of cocaine (a Class II felony). Defendant pled not guilty. After jury selection earlier, trial began on March 23, 1988. Two witnesses testified for the State, and then, after the morning recess, defendant withdrew his not guilty pleas and pled guilty to the two charges. The only plea bargain was the State's agreement that the State would have no objection to concurrent sentences and would stand mute at sentencing. The arraignment was conducted in conformity with the standards set out in *State v. Walker*, 235 Neb. 85, 453

N.W.2d 482 (1990), quoting *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The pleas were determined to be voluntary and were accepted by the court.

At sentencing, 8 weeks later, a deputy county attorney blatantly and improperly violated the agreement when he stated to the court:

> MR. MARSH: Mr. Edwards, as the presentence has reviewed, has a very extensive criminal history, although a lot of those are a long time ago. In light of his past record, and the fact that he is standing before the Court convicted of a Class 2 and a Class 3 felony, we would ask that Mr. Edwards be committed to the Nebraska Penal and Correctional Center in excess of the minimum sentence.

At the time of sentencing, no objection was made to the statement. Defendant did not move to withdraw his pleas. The conduct of the State was totally improper and may have precipitated this appeal, but, in the circumstances, no reversible error was committed. See *State v. Shepherd*, 235 Neb. 426, 455 N.W.2d 566 (1990).

Defendant was sentenced to 1 to 3 years on the counterfeit drug charge and 3 to 9 years on the cocaine charge, the sentences to run concurrently. Defendant appealed to this court and then moved to dismiss his appeal. This court sustained the motion and dismissed defendant's appeal. *State v. Edwards*, 229 Neb. xxvii (case No. 88-521, Aug. 19, 1988).

Defendant's motion to dismiss his appeal appears to have been based on a letter from a second attorney (other than defendant's trial attorney), who told defendant about the State's action in violating the plea agreement, as set out above, but told defendant that the trial judge would just resentence him to the same terms. This attorney suggested that defendant file a motion to reduce his sentence pursuant to Neb. Rev. Stat. § 29-2308.01 (Reissue 1989). Defendant dismissed his appeal and filed a motion to reduce his sentence. This motion was granted on August 29, 1988, and the trial court reduced defendant's sentence on count II to 3 to 6 years and left the sentence on count I as imposed.

On August 11, 1989, defendant filed this current motion seeking postconviction relief. With regard to the first

summarized assigned error, it is clear that the matters alleged are not the proper subjects of a postconviction motion made after pleas of guilty. In this case, the trial court held an arraignment hearing at the time of defendant's pleas. The record shows that defendant was properly advised of all his constitutional rights and that the court determined that defendant's pleas were voluntary. Once the pleas were accepted, the conduct of the trial, interrupted by the pleas, could not furnish a basis for postconviction relief. Defendant does not contend he was not advised of his *Miranda* rights or that the court did not properly advise him of his constitutional rights at the time of his pleas, but alleges he was not given effective legal advice. Defendant makes no allegation he did not commit the acts charged against him. "A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the information or complaint is insufficient to charge a criminal offense." *State v. Kitt*, 232 Neb. 237, 240, 440 N.W.2d 234, 236 (1989); *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986). After a voluntary plea of guilty entered during the progress of a trial, defendant may not obtain relief from a later imposed sentence, where relief is sought on the basis of alleged errors at the trial. Defendant's first summarized assignment of error has no merit.

With regard to defendant's second summarized assignment, that the court erred in not granting an evidentiary hearing, § 29-3001 provides in pertinent part: "Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . ." As shown hereinafter, the points raised in defendant's motion could be determined, as a matter of law, by the trial court's consideration of "the files and records of the case." The trial court did not err in denying defendant a hearing on his motion.

Defendant's third summarized assignment of error concerns defendant's allegation of ineffective assistance of counsel. Defendant has raised specific questions as to the effectiveness of his counsel at the trial level and during the initial appeal of his conviction. Most of the allegations concern the actions of defendant's counsel before and during the short trial

appearance of defendant before he entered his pleas.

Defendant contends that his pleas were not voluntary, because if his trial counsel had been effective, he would have been able to keep all evidence of defendant's guilt from the consideration of the jury.

Defendant first calls attention to § 29-2262.01 (Reissue 1985), in effect at the time of his trial, which provided:

> A person placed on probation by a court of the State of Nebraska or an inmate of any jail or correctional or penal facility who has been released on parole shall be prohibited from acting as an undercover agent or employee of any law enforcement agency of the state or any political subdivision.

Section 29-2262.01 has since been amended, as set out in the 1989 reissue of the statute, but we are here concerned with the 1985 statute.

Two Nebraska State Patrol members were called as witnesses at the trial by the State. The first patrol member testified a man was arrested and jailed in North Platte for obtaining drugs by fraud through prescriptions. The patrol member told the arrested man that he could cooperate with the patrol and that they "would arrange with the county attorney to get charges dropped against him." Defendant, in his postconviction motion, alleges that his counsel was ineffective because he did not raise § 29-2262.01 and thus keep out all evidence obtained through the action of this informant.

We have examined the trial record, as did the trial court, on this issue. The record shows that the two State witnesses did not employ "[a] person placed on probation . . . or an inmate of any jail . . . who has been released on parole . . . ." The evidence does not show that the "undercover agent" used by the State in this case was on probation or parole, and the statute referred to by defendant has no application to the facts in this case. Defendant's trial counsel, as a matter of law, was not ineffective, as alleged by defendant, in this connection.

Defendant also contends, on the issue of ineffectiveness of his trial counsel, that "the district court committed reversible error in not finding that it denied the defendant his right of confrontation under the 6th amendment to United States

Constitution by allowing hearsay testimony." This contention cannot successfully be twisted to attack trial counsel's effectiveness. Counsel objected to the testimony in question, thus discharging all duties of effective counsel. The question as to the correctness of the trial court's ruling could have been raised on appeal if the trial had gone to conclusion. As stated above, alleged errors in a trial interrupted by a plea are not examined on appeal from the sentence imposed following the plea. It should be noted that, in any event, the testimony in question was not hearsay.

The trial court did not err in denying defendant's motion for postconviction relief, and the trial court's order denying defendant a hearing and denying defendant's motion for postconviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN M. PETERSON, APPELLANT.

462 N.W.2d 423

Filed October 26, 1990. No. 89-1205.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Verdicts: Appeal and Error.** The finding of guilty by the trier of fact will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a finding of guilty.
3. **Burglary: Intent.** A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.
4. **Criminal Law: Evidence: Circumstantial Evidence: Intent: Proof.** When the sufficiency of the evidence as to criminal intent is in issue, a direct expression of intention by the defendant is not required; the intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. The

requisite state of mind is a question of fact and may be proved by circumstantial evidence.

5. **Sentences: Appeal and Error.** An order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.
6. **Sentences.** It is the minimum portion of an indeterminate sentence which measures its severity.

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

Avis R. Andrews for appellant.

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

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

FAHRNBRUCH, J.

Contending that he did not have the requisite intent to steal when he broke into and entered a Fremont, Nebraska, sporting goods store around 2:30 a.m. on June 2, 1989, John M. Peterson appeals his burglary conviction and sentence.

After his jury conviction, the defendant was sentenced to prison for not less than 4 nor more than 15 years.

On appeal, the defendant, in substance, claims (1) that there was insufficient evidence to prove that at the time he broke into the sporting goods store he had the intent to steal and (2) that his sentence is excessive. We affirm both Peterson's conviction and sentence.

In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Wright*, 235 Neb. 564, 456 N.W.2d 288 (1990).

Taking the view most favorable to the State, the evidence reflects the following: On June 2, 1989, at 2:30 a.m., police officers responded to a silent alarm at Lou's Sporting Goods

(Lou's), located in Fremont, Dodge County, Nebraska. Two officers entered the business and proceeded to search for persons in the store. In a room beneath a stairway, the officers located Peterson. The defendant was crouched under a trophy-assembly work station with his gloved hands over his head. Ten feet from Peterson the officers found a rifle belonging to the store. The officers also found the defendant's personal knapsack, containing a pair of binoculars, a holster, a scope, and three boxes of pistol shells, all of which were the property of Lou's.

Peterson told the officers that he had taken the rifle because he liked rifles, that the scope was for the rifle, that he had taken the binoculars because he wanted them, and that the holster was for his girl friend to use in an upcoming parade. He explained that he had taken the ammunition for a gun he had previously purchased from Lou's.

The defendant told the officers he had entered the building to "prove a point." When asked what he meant, Peterson declared " 'there are bars on the windows,' [but] there was nothing on the roof." The defendant said he entered the sporting goods store by climbing a drainpipe up to the roof and then removing the cover from a roof hatch, after which he climbed down into the store.

In considering Peterson's first assignment of error, that there was insufficient evidence to prove that he had the intent to steal when he broke into and entered the sporting goods store, we are guided by the following rules of law: The finding of guilty by the trier of fact will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a finding of guilty. *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989). Under Neb. Rev. Stat. § 28-507(1) (Reissue 1989), "[a] person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." When the sufficiency of the evidence as to criminal intent is in issue, a direct expression of intention by the defendant is not required; the intent with which an act is committed involves a mental

process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990). The requisite state of mind is a question of fact and may be proved by circumstantial evidence. *Id.*

In his defense, Peterson testified that on June 1, the day before the burglary, he was in court on a charge of child neglect because his child was present when the defendant attempted to commit suicide; that the suicide attempt was the result of his despondency over a divorce action instituted by his wife; that the defendant sought, but was refused, psychiatric treatment in the June 1 court action; that he was unable to sleep that night because he heard voices; that he had been hearing these voices in his head since he was 14; that he put on his knapsack and went for a walk, something he frequently did late at night; that he used his knapsack to carry rocks for weight while jogging; that he did not recall why he climbed onto Lou's roof; and that upon entering the building he had no idea what he was planning to do.

Clearly, the evidence adduced at trial was sufficient for the jury to infer and find beyond a reasonable doubt from the words and acts of Peterson and from the circumstances surrounding his entry into the sporting goods store that he entered Lou's with intent to steal. Peterson was wearing gloves in June and was carrying a knapsack, and, when questioned, the defendant had a purpose for each of the items taken. In contrast to Peterson's testimony, his own psychiatric expert testified that Peterson was competent to stand trial, was sane at the time of the burglary, knew what he was doing, and could have stopped himself. No rocks were found in Peterson's knapsack. Additionally, Peterson's grandmother testified that it was Peterson's normal practice not to leave the house at night but, rather, to lie about, watch TV, and eat all night.

It cannot be said that the evidence as to the defendant's intent to steal was so lacking in probative value as to be insufficient to support a guilty verdict. Peterson's first assignment of error is meritless.

Peterson's second assignment of error, that his sentence is excessive, is also meritless. Burglary is a Class III felony

punishable by not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985).

The defendant was sentenced to an indeterminate sentence of not less than 4 nor more than 15 years' imprisonment, with credit for time spent in jail while awaiting disposition of his case. It is well established that an order imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Garza, ante* p. 215, 459 N.W.2d 747 (1990). Peterson's sentence was well within the statutorily prescribed limits. Moreover, it is the minimum portion of an indeterminate sentence which measures its severity. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990); *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988); *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987).

As a juvenile, Peterson was placed on probation for burglary. As an adult, in 1984, he was placed on probation for 2 years because of a theft. That probation had to be continued until February 1987 because Peterson had not complied with all of the terms of his probation within the 2-year period. Also in 1984, the defendant was placed on 6 months' probation for disorderly conduct. During that probation, he failed to pay court costs, failed to report to the probation office, and failed to attend Alcoholics Anonymous meetings as ordered. Peterson, from October 1986 to April 1987, accumulated three fines for the violation of the law relating to the possession of marijuana. In December 1988, he was fined for child abuse/neglect. The defendant also paid fines for two liquor violations and seven traffic offenses. If not contempt for the law, Peterson's extensive record shows, at the least, a total disrespect for the law.

Considering the deliberate and premeditated manner in which Peterson committed the burglary at the sporting goods store in Fremont, and considering his continued disrespect for the law as shown by his numerous violations of law, any sentence less than what the trial court imposed in this case would not only depreciate the seriousness of Peterson's offense, but would also promote disrespect for the law. See Neb. Rev. Stat. § 29-2260 (Reissue 1989). Under all of the facts and

circumstances, it cannot be said that the trial court abused its discretion in sentencing the defendant to not less than 4 nor more than 15 years' imprisonment. The sentence was not overly severe.

Peterson's conviction and sentence are affirmed.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DAVID CONTRERAS, APPELLANT.

461 N.W.2d 562

Filed October 26, 1990. No. 90-009.

1. **Appeal and Error.** The Nebraska Supreme Court does not consider assignments of error not argued in an appellant's brief.
2. _____. Arguments not related to the assignments of error are meaningless and are therefore not considered.
3. **Sentences: Probation and Parole: Appeal and Error.** The denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.
4. **Drunk Driving: Licenses and Permits: Revocation: Time.** Revocation of one's operator's license for a period of 365 days will not always fulfill the requirement of Neb. Rev. Stat. § 39-669.07(b) (Reissue 1988) that revocation be for a period of 1 year.
5. **Implied Consent: Licenses and Permits: Revocation: Time.** Revocation of one's operator's license for a period of 180 days does not fulfill the requirement of Neb. Rev. Stat. § 39-669.08(4)(a) (Reissue 1988) that revocation be for a period of 6 months.
6. **Drunk Driving: Implied Consent: Licenses and Permits: Revocation.** Neb. Rev. Stat. §§ 39-669.07(b) and 39-669.08(4)(a) (Reissue 1988) require that the relevant periods of revocation of one's operator's license not run concurrently with any jail term imposed.

Appeal from the District Court for Douglas County, KEITH HOWARD, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Judgments of District Court affirmed in part and in part reversed, and causes remanded with direction.

Edward W. Hasenjager and Martin G. Cahill for appellant.

Robert M. Spire, Attorney General, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

CAPORALE, J.

Following a consolidated county court bench trial, defendant, David Contreras, was in one case adjudged guilty of second-offense driving while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988), and in the other case of refusing to submit to a breath test, in violation of Neb. Rev. Stat. § 39-669.08 (Reissue 1988). He was thereafter sentenced to pay a $500 fine and to spend 30 days in jail on the driving conviction and on the refusal conviction was sentenced to pay a $200 fine and to spend 7 days in jail, both periods of incarceration to run concurrently. In addition, Contreras' license to operate a motor vehicle was revoked for a period of 365 days on the driving conviction and 180 days on the refusal conviction, the latter period of revocation to run concurrently with the first and each to run from the date of imposition of the jail sentences, July 20, 1989.

These judgments were affirmed by the district court. In this appeal Contreras asserts the district court erred in failing to find that the county court erred on the record in (1) finding the evidence sufficient to support the driving conviction, (2) finding the evidence sufficient to support the refusal conviction, (3) failing to find he had been twice put in jeopardy, and (4) imposing excessive sentences. However, the arguments in Contreras' brief concern themselves with the alleged (1) lack of probable cause for his arrest, (2) inadequacy of the sentencing hearing, (3) error in receiving evidence, and (4) excessiveness of the sentences.

The corollary to the rule that this court does not consider assignments of error not argued in an appellant's brief, *State v. Bradley, ante* p. 371, 461 N.W.2d 524 (1990), and Neb. Ct. R. of Prac. 9D(1)d (rev. 1989), is that arguments not related to the assignments of error are meaningless and are therefore not considered. Consequently, we concern ourselves only with the one assignment of error which is actually argued in Contreras' brief, the claimed excessiveness of the sentences, and ignore the arguments not related to any assigned error.

Contreras urges that as a truckdriver and the sole support of his wife and nine children, he should have been placed on probation rather than be incarcerated. In so arguing, he focuses on Neb. Rev. Stat. § 29-2260(3)(k) (Reissue 1989), which provides that the hardship imprisonment would visit upon an offender's dependents is a factor to be considered in imposing a sentence. He also calls attention to *State v. Stastny*, 227 Neb. 748, 419 N.W.2d 873 (1988), wherein we held, in part, that a sentence of probation was not excessively lenient for one with two dependents who had been adjudged guilty of forgery and writing a "bad check." What Contreras overlooks is that § 29-2260(3)(k) is but one of many factors to be considered, including the risk that during the period of probation, the offender will engage in additional criminal conduct, § 29-2260(2)(a); that a lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for the law, § 29-2260(2)(c); and that the crime was the result of circumstances unlikely to recur, § 29-2260(3)(h). Moreover, the fact that *Stastny* found probation not to be excessively lenient does not mean that imprisonment would have been found to be excessive.

The dispositive rule is that the denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Pillard*, 235 Neb. 642, 456 N.W.2d 755 (1990).

There is nothing of record which demonstrates that the denial of probation constituted an abuse of discretion. Indeed, the record suggests that Contreras was once placed on probation for a driving while intoxicated conviction. The fact that he was arrested a second time tends to indicate that probation teaches him little or nothing. While it is undoubtedly true that incarceration works a hardship on dependents, it is equally true that one who earns his or her living by driving must be made aware, even more than others, that driving after having consumed excessive amounts of alcohol is prohibited.

The next question is whether the sentences imposed are within the applicable statutory limits. Second-offense driving while under the influence of alcohol is a Class W misdemeanor,

§ 39-669.07(b), mandatorily punishable, in the absence of probation, by incarceration for 30 days and a fine of $500. Neb. Rev. Stat. § 28-106 (Reissue 1989). One convicted of first-offense refusal is also guilty of a Class W misdemeanor, § 39-669.08(4)(a), mandatorily punishable by incarceration for not less than 7 days and a fine of not less than $200. § 28-106. Thus, the fine and period of incarceration for each conviction are within the statutory requirements. However, § 39-669.07(b) requires in addition that the operator's license of one convicted of second-offense driving while under the influence of alcohol be suspended for 1 year. Section 39-669.08(4)(a) requires that the operator's license of one convicted of first-offense refusal be revoked for a period of 6 months.

Although the period from July 21, 1989, through July 20, 1990, consists of 365 days and, thus, the period of revocation specified by the county court for the driving while under the influence conviction happened in this instance to comply with the statutory requirement, it should be noted that some years consist of more than 365 days, e.g., the periods from January 1 through December 31, 1988 and 1992. Moreover, 180 days is not 6 months by any calculation for any year; therefore, the period of revocation specified by the county court for the refusal conviction does not comply with the statutory requirement. See, *State v. Oldfield, ante* p. 433, 461 N.W.2d 554 (1990); *State v. Jones,* 208 Neb. 641, 305 N.W.2d 355 (1981).

Additionally, each of the last aforementioned statutes provides, contrary to the order of the county court, that the periods of revocation "not run concurrently with any jail term imposed."

We therefore affirm in part and in part reverse, and we remand these causes to the district court with the direction that it remand them to the county court for the imposition of proper sentences of suspension. *State v. Mentzer*, 233 Neb. 843, 448 N.W.2d 409 (1989); *State v. Ferrell*, 218 Neb. 463, 356 N.W.2d 868 (1984).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

HASTINGS, C.J., participating on briefs.